

APPENDIX.

PART I.

POSSESSION.

1777. February 7.

GEORGE CARNEGIE of Pittarrow, *against* the MAGISTRATES and TOWN-COUNCIL of Montrose.

IN 1663, John Fullarton of Kinnaber let to the Provost, Bailies, and Town-Council of Montrose, "all and hail the salmon-fishings upon the sands
"and the sea-shore and coast from the entry in and mouth of the water
"of Southesk, northward from that, while it came just opposite over and
"against an march-stone set in the links of the said borough," &c. ; and
that for nineteen years from Candlemas then last, for payment of 2 s. Scots,
if required, with warrandice from Kinnaber's own fact and deed. Ever
since the period of this tack, the Town of Montrose have possessed these
fishings, using various acts of property, such as exposing them to lease by
public roup ; and it does not appear, that during their possession they ever
paid any tack-duty for them. Mr Carnegie of Pittarrow having acquired
right to these fishings from the successor of Kinnaber, and being
infert therein, brought an action of removing against the Town of Mon-
trose and their subtenants.

The Town of Montrose defended themselves upon their ancient titles
and immemorial possession as proprietors, instructed, since the date of Kin-
naber's lease, by various written tacks of these fishings. In virtue of their
ancient rights, it was contended, That David II., King of Scotland, by
charter, dated May 1. in the 40th year of his reign, conferred upon the
Town and burgesses of Montrose, "piscaria *infra* aquas de Northesk et
"Southesk, in crois, yaris, et rethibus, antiquitus consueta, et pertinentia

NO. 1:

*Nemo sibi
potest mutare
causam posses-
sionis.*
See No. 29.
p. 10611.

NO. 1. “ ad dictum burgum, cum molendinis,” &c. And this charter was ratified, approved, and confirmed by another of Robert, King of Scotland, February 2., in the 13th year of his reign. There is every reason to suppose, that the Town of Montrose was in possession of these fishings from the date of their ancient rights; for the word *infra*, which properly signifies below or beneath, expressly applies to the fishings in question, which are situated below or beneath the rivers of North and South Esk, in that arm of the sea which is called the Mouth of the Southesk, and lies along the common links of the burgh of Montrose. As, therefore, the Town of Montrose must have been supposed to have possessed these fishings in consequence of their ancient right, it is impossible to account for their accepting a tack from Kinnaber on any other ground than with the view of assisting his right in a dispute which at that time depended between him and Scott of Logie, with regard to the sea-fishings in that neighbourhood. But in so doing, the Town of Montrose could never have intended to give up their own right upon their ancient titles, which in fact they had no power to do. It must therefore be held, that the Town never possessed upon this lease, which, as it seemed merely calculated to serve a job, remained latent and concealed for a century past, both from Kinnaber’s successors, and from the citizens, who have always considered themselves as proprietors of the fishings in question; therefore, the immemorial use of this right of absolute property in the Town must, *præsumptione juris et de jure*, operate *retro* to the date of their ancient rights, and the Town must be presumed to have possessed as proprietors from their original constitution as a burgh. This, then, entirely cuts down the maxim, that *Nemo sibi potest mutare causam possessionis*, which proceeds in this case entirely upon a *petitio principii*, as it is averred, that the cause of the Town’s possession did not originate with the tack 1663, but with the ancient rights of the burgh.

It was urged by Mr Carnegie, in support of the removing, that his author Kinnaber stood infeft in this fishing *per expressum*, under charters from the Crown, so far back as 1592 and 1628, and that he himself now stands infeft in the same by a regular progress from the obtainers of those charters. But even supposing that this right was defective, the Town of Montrose cannot dispute it, as it is proved that they had accepted of, and entered to the possession of the fishing, in virtue of the tack 1663; and to which tack their possession ever since must unquestionably be ascribed. The Town, therefore, cannot be allowed to object to the title of that party, or his cedent, from whom their own possession is derived; but must at any rate be obliged to restore the possession to the hand from whence they received it; for there is no principle better founded in law than this, *Nemo potest sibi mutare causam possessionis*, in prejudice of the party in whose right he en-

tered to the possession. Every person must, in the first place, complete his own contract, by restoring the possession agreeable thereto, and then he may *age*, as accords, for rendering his right of property effectual; and so the law is laid down by Stair, B. 2. Tit. 1. § 27.; and by Mr Erskine, B. 2. Tit. 1. § 30. And this principle is also established in the case of Sir John Douglas, in which case the tack founded on by Sir John had been granted in the last century, had been dormant or unnoticed for above forty years together, and was expired a good many years before the removing was brought; notwithstanding of all which circumstances, the Court held, that no person could be suffered to fet up any plea or claim to the property of the lands, as a defence against a removing brought by the representative of the granter of the tack, who stood infett in the lands; and which cause was afterwards appealed, when the judgment of the Court of Session was affirmed, with costs. (See APPENDIX, PART II.)

The Lord Kennet, Ordinary, assoilzied the defenders; but upon advising a reclaiming petition, with answers, the Court considered, that the Town of Montrose could not be entitled to plead against a tack to which they were signing parties, and therefore altered the interlocutor of the Lord Ordinary, and decerned in the removing.

Lord Ordinary, *Kennet.*

Act. *D. Rae.*

Alt. *A. Murray.*

D. C.

NO. I.