

No 107. liament of King Charles II, the least quantity of which bears, " That five foot of the middle stream must be constantly free.

It was *answered, imo*, That the old acts anent the middle stream were wholly in desuetude, and were in effect derogate by the act of King James VI. anent cruives, which ordains the Saturday's slap to be kept, but mentions not the middle stream; and, as for the late act of Parliament, it was impetrate by these same parties, and never passed in these articles or noticed by the Parliament but as an ordinary confirmation. It was *answered*, That there was no prescription of public rights against standing laws, and albeit the desuetude of such laws could be effectual, yet the late law revives and confirms them all *per expressum*, which is not a particular confirmation, bearing mention of any particular party or particular right, but as a general confirmation of general laws anent all the cruives in Scotland.

THE LORDS, considering that the middle stream has been long in desuetude, and that this late ratification was passed without notice; therefore, before answer, they ordained the parties to adduce witnesses, whether the middle stream was accustomed in any cruives in Scotland, and whether the same would be beneficial or hurtful to the salmon fishing of the kingdom in general, and whether it were destructive to the cruives in common; and likewise, they gave commission to examine the witnesses *hinc inde*, whether their new cruives were built upon challes, or they otherwise built the former cruives to the prejudice of the fishing above in the water. See SALMON FISHING.

*Fol. Dic. v. 2. p. 104. Stair, v. 1. p. 255.*

1667. February 22.

Earl of SOUTHESK *against* Lady EARLSHALL.

No 108.

A clause in the dispositive part of a charter from the Crown *cum privilegio piscendi in aqua*, does not constitute right to a salmon fishing, unless the person to whom it was granted had fished for salmon 40 years without interruption.

THE Earl of Southesk being infeft in certain lands upon the water of Eden and the salmon fishing, pursues declarator that Earlshall hath no right thereto. The pursuer produces an infeftment *in anno* 1558, in which, after the land is disposed, there follows a clause, " Una cum salmonum in piscationibus in aqua de Eden," with a *novodamus*. It was *alleged* for the defender, That he hath the like declarator against the pursuer, which he repeats by way of defence, and produces an infeftment of the same year of God, bearing, in the dispositive clause, " Una cum privilegio piscandi in aqua de Eden solito et consuet," and *alleges*, That by virtue thereof, he had good right to fish in the water, and that he had been in immemorial possession by virtue thereof. It was *answered, first*, That this clause cannot carry salmon fishing, which is *inter regalia*, and must be specially disposed. *2dly*, The defender's right, though in the same year of God, is yet some months posterior to the pursuer's; and as to the defender's immemorial possession, it cannot consist nor give prescription without a sufficient title by infeftment, and it hath been frequently interrupted by the pursuer. It was *answered* by the defender, That he and the pursuer, and the Laird

of Reiris having two-thirds of one barony all lying run-ridge, the King's granting the pursuer his third cum salmonum piscationibus, added to the lands as a pendicle thereof, it cannot be understood exclusive of the other two-third parts of the same barony, likeas Reiris hath the same clause in his infeftment; and albeit Earlshall's clause be not so express, yet it not being the common clause in the tenendas cum piscationibus, but in the dispositive clause of this special tenor, it must needs comprehend salmon fishing, or otherwise it would have no effect, verba autem interpretanda sunt cum effectu, and albeit the clause were dubious, yet it hath been in long possession, immemorial, which sufficiently instructs the accustomed fishing to have been before the same. *2dly*, As to the anteriority of the pursuer's infeftment, the defender offers to prove that his predecessor was infeft before him, with this clause that is in his own infeftment produced. *3dly*, Albeit the defender's right were posterior, yet it is sufficient to give him a joint right to the salmon fishing with the pursuer, because he offers him to prove that he hath 40 years peaceably possessed the salmon fishing as the pursuer hath, whenever they were in the river.

No 108.

THE LORDS found that the clause in the defender's infeftment, albeit it had been prior to the pursuer's, could not give right to the salmon fishing in prejudice of the pursuer's express infeftment of salmon fishing, unless the defender's infeftment had been clad with immemorial and 40 years peaceable possession, which being so alleged by the defender, the pursuer offered to prove interruption, and therefore a term was granted to either party to prove.

*Fol. Dic. v. 2. p. 104. Stair, v. 1. p. 456.*

1672. February 7.

FULLERTON against Earl of EGLINTON.

No 109.

GEORGE FULLERTON being infeft in the lands of Dreghorn, with a *novodamus* containing salmon fishing in the water of Irving, pursues a declarator of his right against the Earl of Eglinton, who *alleged* no declarator, because he stood infeft in the barony of Robertson cum piscationibus in aqua de Irving, clad with immemorial possession. The pursuer *answered*, *Non relevat*, because salmon fishing being *inter regalia*, cannot be conveyed unless it be expressed. It was *answered*, That the general denomination of fishing in the water of Irving in the *tenendas*, though it could not have been a sufficient right alone, yet it is *titulus præscriptionis*, the lands being in *baronia*, which is *nomen universitatis*, and is perfected with 40 years uninterrupted possession.

Which the LORDS found relevant, and assoilzied.

*Fol. Dic. v. 2. p. 104. Stair, v. 2. p. 64.*