

No 78.

rony of Rutherston, and lying on the north side of the water of Dee, and salmon fishing thereof, holden of the King before the pursuer's author. Thereafter it was *alleged*, That Forbes of Barns did no wrong to heighten and raise the said cairn for hauling and drawing his nets thereto, because it was necessary and convenient for his fishing. It was *answered*, That the shallow being much nearer Monymusk's side, Barns could not erect *opere manufacto* any thing that might prejudice the pursuer's fishing; and that the raising of the cairn with stones and gravel made the south side of the water shallow, and the north side deep, which drew all the commodity of the fishing to come to the defender. Barns *replied*, That his peaceable possession forty years inferred prescription. THE LORDS reasoning the matter, inclined, that he who was infeft by the King in salmon fishing, having no land, might draw his nets, and dry them, on either side of the water; and where one was infeft in lands lying on the one side of the water, with the salmon fishing, and another on the other side of the water, every one of them might haul and draw their nets to their own side, but not to his neighbour's. And that in salmon fishings of that nature, where the infeftments were general, they were to be ruled by their immemorial possession. And in this present cause, the LORDS found, That the defender's peaceable possession, by the space of forty years, inferred right by prescription; and as to the cairn, that every one of the parties might draw and haul his nets to that side thereof which was nearest to his own lands.

Haddington, MS. No 2961.

1679. January 21.

FRASER against HOGG, &c.

No 79.

A sasine without a warrant, not bearing to proceed upon a retour, or precept of *clare constat*, is no title of prescription.

THE Earl of Marischall having wadset certain lands to Monan Hogg, Sir Alexander Fraser having right to the reversion, uses an order, and pursues declarator of redemption against James Hogg, oye and apparent heir to the wadsetter. Compearance is made for the relict of Monan Hogg, son to the wadsetter, who produced her contract of marriage, providing her to the liferent of the half of the lands in question *in anno* 1633, and an infeftment thereupon from her husband; and *alleged*, that she had right to the sums consigned, as coming in place of the land redeemed. It was *answered*, That she had no right by her infeftment against this declarator, which is a petitory judgment, unless she could instruct that her husband, who was her author, was infeft, otherways her right was *a non habente potestatem*; for if the wadsetter's son died infeft, any right granted by him is effectual; but his son may pass by him, and enter heir to his goodsire, and thereby have right to the sum and wadset consigned. It was *replied* for the relict, That her infeftment having been unquarrelled for forty years, gives her a full right by prescription, being clad with possession, for the law interprets a husband's possession to be the wife's

possession. *2do*, There is produced a sasine of the son's, upon a disposition from the wadsetter, which being clad with forty years possession in the son, and his relict deriving right from him, it makes the same a complete right, whereby the oye cannot pass by the father, and go to the goodsire; and though the relict cannot produce the warrant of her husband's sasine, which hath been abstracted by her step-son, who hath transacted with Sir Alexander, and colluded to exclude his father's relict, yet this sasine, with forty year's possession, is sufficient by the act of prescription. It was *duplicated*, That the act of prescription doth never give right upon sasines without a warrant, except such sasines as proceed upon precepts of *clare constat* and retours; but in all other prescriptions, it requires a charter or precept before the years of prescription, and sasines, and possession subsequent for forty years; but this sasine of the relict's husband hath neither a charter nor precept antecedent, nor doth it proceed upon retour or precept of *clare constat*.

THE LORDS found, That this sasine neither having a warrant produced, nor proceeding upon a retour or precept of *clare constat*, is no title of prescription; and that the wife's own infestment cannot infer prescription by her husband's possession, unless she had possessed forty years after his death.

Fol. Dic. v. 2. p. 103. Stair, v. 2. p. 677.

1680. November 19.

CUMMING against IRVING.

CUMMING of Cowtter being infest in the lands of Cowtter, with the salmon-fishing of the water of Dee on both sides, adjacent to his lands, pursues improbation and reduction of all rights to the salmon-fishing in the said water, and craves certification *contra non producta*. The defender *alleged*, No certification, because he produces extracts of his father's and grandfather's sasines of the lands of Kincousie, and the salmon-fishing upon the water of Dee, which lands are opposite on the other side to Cowtter, and offers to prove forty years possession, by virtue of these infestments, with his own infestment produced.— The pursuer *answered*, That the extracts of sasines could not satisfy the production in improbations. *2do*, Even the principal sasines are no title for prescription by the act of prescription 1617, unless they had proceeded upon retours, or had a charter or precept anterior to forty years possession. The defender *replied*, That the pursuer's father having married his mother, his father being killed in the King's service when he was an infant, many of his writs were amissing, and it is likely his writs might have been abstracted by his step-father to carry this fishing, and therefore he had raised and executed a probation of the tenor, desiring therefore that no certification should be extracted, till he might conclude the tenor.

No 79.

No 80.

Found that extracts of sasines could not be a title for prescription.