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the right King Charles I. had to it was not *qua* King, but as heir served and retoured to Queen Anne, his mother; and so King James being nearer both to his grandmother, Queen Anne, and his father King Charles I. than King William is, he can never be heir to Queen Anne or King Charles I. so long as King James is alive, and consequently it neither being in his patrimony *jure coronæ*, nor *jure privati* he can set no valid take thereof. *Duplied*, Though Dunfermline's tack be expired, yet my Lord Tweeddale bruiks *per tacitam relocationem* till he be interrupted by some having a better right. As to King William's tack, although it be not fit to debate by what title Princes set tacks, or grant other rights to their subjects, yet it is difficult to comprehend if Queen Anne's lineal heir has abdicated the Crown, how he retains the right of his private patrimony; for then King James might still claim the emoluments of the Post Office, Admiralty, and lands he had in Ireland; but these being two nice points, Sir David can never obtrude that Queen Anne's nearest of kin stand in the property of these teinds, unless he derived right from her, or some bruiking by her right; otherwise it was *jus tertii* to him to quarrel and impugn my Lord Tweeddale's right. THE LORDS repelled Sir David's defence, unless he produced some right derived from Queen Anne, or some possessing by her right.

Fol. Dic. v. 1. p. 521. Fountainhall, v. 2. p. 38.

No 40.

In mutual declarators of the right of a salmon fishing, the one party produced a right of the subject of a very old date, but not well connected for many of the intervening years, and the other produced a charter of a much later date. Found, that the latter had no interest to object the nullity or the want of mid-couples to the former, unless he derived right from his author.

1701. December 3. FORBES of Waterton *against* UDNEY of Auchterallan.

THE mutual declarators between Forbes of Watterton and Udney of Auchterallan, anent their rights of salmon fishing upon the water of Eythan, were this day debated and advised. Waterton's right was derived from the Master of Kaithness, and Ogilvie of Deskford, the present Earl of Findlater's predecessor, about the 1474, near 230 years ago, and down by progress to Bannerman of Waterton in 1606, and so to this pursuer. Auchterallan's right was a right granted by his Majesty in 1603, to Annand, then of Auchterallan, containing expressly cruives and salmon fishing, and a connected progress ever since. And he *objected* against Waterton's right, *imo*, That there is no sort of connection of their rights from the 1474, at which they begin, till 1567, for near 100 years; and from the 1567, till 1653, there is no real right produced, which is near the space of 90 years; and then an adjudication is obtained by Forbes of Waterton against the Earl of Findlater, on a renunciation and *cognitionis causa*, for implement of Ogilvie of Deskford's obligation to denude in favour of Waterton's authors; long before which adjudication, Auchterallan had a formal complete right by charter and sasine, viz. from the year 1603, and so is preferable. *Answered* for Waterton, Whatever defects his progress laboured under, the objecting thereof was no wise competent to

Auchterallan, who could never quarrel Ogilvie's right, unless he competed on some right, legal or conventional, flowing from Ogilvie, or any of the succeeding intermediate authors intervening betwixt him and this present Laird of Waterton, which he did not pretend to. THE LORDS found Auchterallan had no interest to object this nullity and want of mid-couples to Waterton, and that it was *jus tertii* and incompetent for him to object and obtrude that defect, unless he derived right from Sir Walter Ogilvie, or any succeeding in his right. Then Auchterallan *alleged*, Ogilvie of Deskford's right was prescribed *non utendo*, before the adjudication in 1653, and so could not be of any use to Waterton. *Answered*, No prescription, because interrupted by Deskford's disposition to Bannerman in 1606, and charter and sasine thereon, and also by a gift of the non-entry duties in 1637, these fishings holding ward, and a declarator thereon in 1639. THE LORDS thought these documents were sufficient interruptions of the prescription, and that a disposition completed presumed the the party was in possession of the thing disposed, unless it were instructed, that another was then in possession; even as possession 40 years back presumes possession *retro ultra hominum memoriam*, unless the contrary be proven. 3^{tio}, Auchterallan *objected*, that Ogilvie's old rights did not mention salmon fishing, but only *cum piscariis*, which only signifies the taking of small fishes by rod or wand; and Calvin, in his Lexicon, calls *piscaria* either the place where fishes are sold, or the custom, toll, and tribute paid for them; whereas Auchterallan's rights from the King, for near 100 years back, expressly bear *cum salmonum piscationibus, et lie cruivis*. And Craig, *lib. 1. feudor. cap. ult.* shews that salmon fishing is *inter regalia*, whereunto none have right *nisi specialis fuerit eorum in concessione mentio*. *Answered* for Waterton, That of old *piscaria* carried all kinds of fishings, as Craig in the very place cited acknowledges; and Spelman, in his *Glossarium*, calls *piscaria* either the *locus*, or *privilegium piscationis*. 2^{do} His sasines pus it out of all doubt; for the symbols of tradition for the fishing bear boats, cruives, and nets, which are applicable to nothing but salmon fishing. THE LORDS repelled the objection, in respect of Waterton's answer: 4^{to}, THE LORDS entered to consider the probation led by either party anent the possession; and it was contended for Auchterallan, that he had proven 40 years possession of the fishing by angle, spear, and wand, and that it was counted a part of his tenant's livelihood. And that the river fronting for near half a mile on Auchterallan's barony was always reputed to be his, and that any deeds of possession were sufficient for the hail species and kinds thereof. *Answered*, It was notour that rod and spear were never the way of fishing salmon; and it were absurd, that this should include net, coble, and cruives; and none are hindered to fish with a wand in public rivers, which would never give them a right there-to exclusive of others. THE LORDS found this not a sufficient possession for salmon fishing, and therefore found, as Waterton had the most ancient right,

No 40. so he had the more pregnant possession, and preferred him, and assoilzied from Auchterallan's declarator. See PRESCRIPTION. SALMON FISHING.

Fol. Dic. v. 1. p. 520. Fountainhall, v. 2. p. 125.

* * * Dalrymple reports this case :

UDNEY of Auchterallen having raised a complaint before the Privy Council, against Forbes of Watertoun, for demolishing his cruives, and disturbing his possession of salmon fishing in the Water of Eithing, opposite to his own lands ; and Watertoun having raised a counter libel against Auchterallen, for pretending to set up cruives, and encroaching upon his right and possession of salmon-fishing in the said water ; both libels were remitted to be determined by the Lords of Session.

THE LORDS, before answer, having ordained either party to produce the several rights they intended to founded upon, and to prove their respective possessions ; Watertoun did produce a charter of the fishing on the said water of Eithing, from the Maucherford to the Seigieford of Fyvie, which is eight or ten miles distant, and does comprehend that part of the water bounding the lands of Udney, which is the subject of the present debate ; and this charter is granted by the Master of Caithness to Ogilvie of Desford, in the 1474, and a conveyance downward to Sir Walter Ogilvie, who was infest in the fishing, in the year 1567 ; and the said Sir Walter, his disposition thereof, in favours of Bannerman, in the year 1606, is produced, together with a decret *cognitionis causa*, and an adjudication of the said fishing, at the instance of Forbes of Watertoun, against the apparent heir of the said Sir Walter Ogilvie, in implement of the foresaid disposition, granted by him to Bannerman, in the year 1654, libelling upon the said disposition to Bannerman, and a disposition by Bannerman to Johnston of Caskieben, and by him to Tolquhon, and by Tolquhon to Watertoun the adjudger, and a conveyance downward to this Watertoun.

Auchterallen produces a charter, under the Great Seal, of the salmon fishing on the said water, opposite to his own lands, in the year 1606, with a progress downward ; and the probation of the possession does neither constitute a right by prescription, nor takes off the right of either party *non utendo* ; so that the point of right depends upon the respective production.

It was *alleged* for Watertoun ; His right was preferable, because more ancient, having produced a progress from the 1474.

It was *answered* for Auchterallen ; The progress was not connected, in so far as Sir Walter Ogilvie, who is infest in the 1567, disposes to Bannerman, and he to Johnston, who disposes to Tolquhon ; and Watertoun, as pretending right to Tolquhon, adjudges from the heirs of Sir Walter Ogilvie in implement ; but the midcuplings from Bannerman are not produced ; whereas he produces a charter under the Great Seal, with a sasine thereupon, in the year 1603, with a progress of the said fishing downward ; so that his rights being long prior to

the pretended adjudication against the heirs of Sir Walter Ogilvie, which is not supported by the grounds and conveyances of Sir Walter's right, he is preferable.

It was *replied* ; Watertoun produces sufficiently, viz. Sir Walter's right anterior to Auchterallen's, and an adjudication of the said fishing against the heirs of Sir Walter, which connects and conveys Sir Walter's right to Watertoun, an adjudication being a legal disposition, as valid as if Sir Walter had disposed to Watertoun ; and there is no need to produce the intermediate conveyances libelled upon in the decret *cognitionis*, and adjudication ; because Auchterallen hath no title or interest to call these in question, seeing he derives no right from Sir Walter. It is true, that if Sir Walter, or Bannerman, or Johnston, or Tolquhon, were Auchterallen's authors, he would have good interest to compete upon Sir Walter's right, and allege, that Sir Walter's right was conveyed to him by progress ; but that is not the case, for his right from the King cannot compete with Sir Walter's, nor can he pretend to have Sir Walter's right conveyed to him ; therefore he can have no interest to call in question the grounds of Watertoun's adjudication against Sir Walter's heirs.

“ THE LORDS found, That Auchterallen having no right from Sir Walter, had no interest to require the dispositions and grounds of the adjudication against Sir Walter's heirs, to be produced.”

It was further *alleged* for Auchterallen ; The adjudication against the heirs of Sir Walter was null, in as far as being led in the 1654, it was 48 years after Sir Walter's disposition to Bannerman, and thereby the obligation to infeft and fulfil was prescribed, and became void ; and the adjudication being null, Auchterallen's rights produced are preferable.

It was *answered* ; This allegiance is also *jus tertii* ; for, *esto* the obligation had been prescribed, and thereby a defence competent to Sir Walter's heirs, that could only make the right remain with his heirs and other assignees, but could never prefer Auchterallen, unless he could also allege, that Sir Walter had also lost and amitted his right *non utendo* within the years of prescription, whereby his right being extinguished, there might indeed be place for this competition ; but that cannot be pretended ; because there's produced a declarator of non-entry of the said fishing, founded upon Sir Walter's right, in the year 1637, assigned to Watertoun in the 1639.

“ THE LORDS found, That Auchterallen had no interest to allege prescription of Sir Walter's obligation, unless he could also allege, that Sir Walter's right was prescribed *non utendo*.”

It also occurred to the LORDS, that Watertoun having proved many years possession, anterior possessions, by virtue of Sir Walter's rights, were to be presumed, unless an exclusive possession had been condescended on, which is not alleged ; for Sir Walter's right was for several miles of the water, whereas Auchterallen's was only opposite to his own lands, within that bounds ; but they had no need to determine that point.

Dalrymple, No 26. p. 32.