

tatives, whereby to oblige him to purge the tailzied estate of debts, as was just said of a tailzie, with irritant clauses not duly recorded.— On the original appeal affirmed, on the point, of the want of a sufficient resolute clause to irritate the right of Mr. Hepburn's debtor; and dismiss the cross appeal, with a declaration, that it was unnecessary to determine, in the present cause, the points thereby brought in question."

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ALEXANDER LITTLEJOHN of Woodstone, *Appellant*;  
ARTHUR STRATON - - - - - *Respondent*.

House of Lords, 1st February 1759.

**SALMON FISHING—RIGHT.**—A party's grant of fishing was described as bounded along the shore between certain points therein described; held that this does not exclude another, whose right is prior, though general in its terms, from acquiring possession of part of the fishings within the points so marked out and described.

By Crown charter granted in 1588 to James Keith, the appellant's predecessor, the lands of Halwoodstone, Hillend, and Fisherhill, part of the barony of Woodstone, situated in the county of Kincardine, was conveyed with a salmon fishery in these terms; "cum piscationibus tam piscium alborum  
"quam rubrorum super arenas vulgo vocat St. Cyrus sands  
"enter semitem vulgo vocat priestis-rod fute ab oriente, et  
"torrentem vulgo vocat the burn (rivulet) of Mauchrie, ab  
"occidenti, aut eo circa jacen in Baronia de Woodstone."\*

By regular progress of titles these lands, with the fishings as above described, came, through successive owners after Keith, to be acquired by the appellant; and, in virtue of these titles, and the above charter, he had possessed a fishing on the sands of St. Syrus, within the points above expressed, as contained in the said crown charter, as well as subsequent, charters of the same.

The respondent held his lands, which extended along the sea shore, under charter "cum piscationibus et piscariis tam  
"alborum quam rubrorum piscium cum singulis suis pertin-  
"entis, jacens infra regalitatem de Lindores et Vicecomita-  
"tem de Kincardine." Under this charter of alienation from a subject; and also, charter of alienation from Alardice to the Earl of Montrose in 1588; and charter of alienation from the Earl to the respondent in May 1630; and charter from the crown in 1631, the respondent claimed the fishings opposite

\* So written in the charter.

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to these lands of Scotstoun and Mauchrie; and also possession of fishings further east than the Burn of Mauchrie, to a green baulk or bank, which divides the lands of Mauchrie from the minister's glebe at that point,—he having, in virtue of this title, been in immemorial possession of such fishings.

The appellant, conceiving that the respondent was encroaching on his right of fishing, by extending the same farther east of the burn of Mauchrie than he had right to, raised an action of declarator to have his right of fishing declared.

Dec. 18, 1755.

The Justice Clerk, Ordinary, “ Found the writs and condescendence given in for the defender, do not exclude the pursuer's titles; and, in regard the pursuer's rights are long prior to those produced for the defender, and that the defender does not allege possession upon the titles of any part of the fishing libelled, or within the boundaries thereof, as described by the pursuer's infetment, and in the libel, so as to have acquired right thereto by prescription, find the pursuer has the sole right to the fishing libelled, exclusive of the defender, and decerned and declared in terms of the libel.”

In a representation against this interlocutor, the respondent offered to prove:—That in virtue of his titles, he and his predecessors had possessed a salmon fishery beyond Mauchrie burn, as far as the minister's glebe, which is divided by the lands of Mauchrie by a green baulk, so that his fishing came within the limits of the appellant's grant.—That in the appellant's original grant, there were added the words, “ *aut eo circa*,” which plainly shewed that this boundary was a little vague and uncertain, at the time the fishery was granted to the appellant's ancestor, though these words are omitted in the subsequent charters: The respondent's titles were more ancient than the appellant's, for he had charter of date 12th March 1543, of the lands of Scotstoun and Mauchrie, “ *cum piscationibus et piscariis* ;” another charter in 1588; and another in 1630. That these grants showed, that the Abbots of Lindores, to whom the whole lands and fishings belonged, were divested of the fishings in 1543, prior to the appellant's grant in 1588.

Dec. 23, 1757.

After proof being led, the Lords, of this date, found, “ That the pursuer has right to the fishing from Priestrodfoot, as far west as the green baulk at the west side of the minister's glebe; and found that the defender has right to the

“ fishing, as far east as the green baulk, and decerned and  
“ declared accordingly.”

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Against this interlocutor the present appeal was brought  
by the pursuer :—

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*Pleaded for the Appellant.*—The lands of the appellant lie at a distance from the sea coast, and his fishings were granted as a separate and distinct estate, unconnected with the lands, and on condition of paying a separate reddendum or feu-duty to the superior. This grant proceeds from the crown, is prior in date to that of the respondent's.—The respondent's earliest grant from the crown being dated 1631, and conceived in general terms, without any particular description of its extent, and given merely as a pertinent of the lands. No such grant, merely general in its terms, and subsequent in date, could infringe the limits, or prejudice the right of the appellant, after the crown had already divested itself to that extent. The limit and boundary of the appellant's fishings are described in the most exact manner, both in the titles and by permanent land marks on the shore.—The right of fishing given,—extending from Priestrodfoot on the east, to Mauchrie burn, gives him an exclusive right of fishing along the sands of St. Cyrus, or whole coast within those two points, or as it is described in the title :—“ Super arenas vulgo vocat St. Syrus sands inter  
“ semitem vulgo vocat Priestroadfute ab oriente et torren-  
“ tem vulgo vocat, the burn of Mauchrie, ab occidente.”—These limits being so expressly ascertained, no usage or possession of a third party can alter the limits so expressly fixed ; and no mere refraining on his part from fishing on a certain part within those boundaries, will be effectual to constitute a right of fishing in another, or make him lose his right from non-use. Possession of one part of his fishing is good for the whole ; and perfectly legitimate to stop the currency of prescriptive possession, on the part of the respondent. By the interlocutor complained of, new limits are fixed to the fisheries, entirely different from those specially described in the grants; and to that extent the appellant's grant is so far annulled.

1588.

*Pleaded for the Respondent.*—The conveyance of the lands of Scotstoun and Mauchrie, una cum piscationibus et piscariis tam alborum quam rubrorum piscium, is a proper conveyance of a salmon fishing within the bounds of those lands, and being prior in date to the appellant's grant, and followed by possession for 40 years, gives a preferable title to the fishings.

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The appellant's right of fishing, as bounded and described in Archibald Wood's charter of 1588, conveys only such a right of fishing upon these sands, as belonged to the lands granted by that charter, and therefore is not exclusive of the respondent's right to a salmon fishing, upon a very small part of these sands, opposite to the estate of Scotstoun and Mauchrie. If the charter of Archibald Wood imply a conveyance of salmon fishing over the whole sands of St. Cyrus, from Priest-rodfoot to Mauchrie burn, then it was a grant which was beyond the power of Archibald Wood to make, because the fishings opposite to Scotstoun and Mauchrie, which actually form a part of the sands of St. Cyrus, within the limits specified, were already in possession of Sir Thomas Erskine. The respondent's title, therefore, as derived from Sir Thomas Erskine, who held the lands of Mauchrie and Scotstoun from the Abbey of Lindores, prior to 1543; is a proper title to the salmon fishing, within the bounds of the lands thereby conveyed; and the Abbey then being superior of the lands, just as the king is now superior, the respondent's derivative right is as good as the appellant's—is clearly prior to his, and is besides fortified by prescriptive possession, and ought therefore to be preferred.

After hearing counsel, it was

Ordered and adjudged, that the interlocutors complained of be affirmed, with £100 of costs.

For Appellant, *Al. Forrester, Al. Wedderburn.*

For Respondent, *C. Yorke, Fred. Campbell.*

Not reported in Court of Session.

ROBERT ANDERSON, Mason, -

*Appellant;*

JAMES ANDERSON, late of Crookhill,

*Respondent.*

House of Lords, 26th Feb. 1759.

SALE—SECURITY FOR PRICE.—Circumstances in which held, where a purchaser did not find satisfactory security for payment of the price within the time specified in the minute of sale, though cautioners were offered, but rejected as insufficient, the seller was entitled to sell the property to another.

THE lands of Crookhill, belonging to the respondent, were burdened with debt to such an extent as to compel a sale