

## DIVISION III.

## What Title requisite in the Positive Prescription.

## SECT. I.

## Title requisite to Purchasers of Land, and to Adjudgers.

1623. December 18. L. MONYMUSK against FORBES.

IN an action betwixt L. Monymusk *contra* Forbes of Barns, for reduction of the defender's infestment of a fishing, &c. the LORDS found, that the pursuer, by virtue of his right to his fishing, which was a distinct fishing from the defender's fishing, and different therefrom, and which right proceeded from the Abbot of Aberbrothick, and so from an ecclesiastick person, could not be heard, neither had interest to pursue the defender for production or reduction of the rights of his fishing made to him, which proceeded from the King, they being distinct fishings, and the right thereof flowing from sundry authors.— And in the same process, an exception founded upon a right clad with forty years possession, uninterrupted, was sustained to induce prescription against the pursuer, albeit the time of the beginning of that possession, when it was first apprehended, the right would not then have maintained the defender, if he had been challenged or pursued then by this pursuer or his author.

Act. Hope & Learmont.

Alt. Nicolson.

Clerk, Scot.

*Durie, p. 93.*

\* \* Haddington reports this case :

MONYMUSK pursued Forbes of Barns to hear and see it declared, that he had done wrong in raising a cairn upon a shallow part of the water of Dee, near his lands of the barony of Torry, lying upon the south side of the water of Dee, wherein he was infest, and in the salmon fishing of the barony, with the pertinents, by the Abbots of Arbroath, and sinsyne by the King, by virtue of the act of annexation, and thereafter by resignation of the Marquis Hamilton by erection, and in possession of his fishing past memory of man. He first insisted for production and reduction of Barns's infestment, which the LORDS would not sustain, because Barns his predecessors were infest in their lands and ba-

No 78.

A right which would not have been sustained at the beginning, was found to induce prescription, being followed with 40 years possession.

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, &amp;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