

and has never been so accepted; nor is it, in its nature, its objects, its mode of enjoyment, or indeed any of its peculiar characteristics, similar or analogous to a praedial servitude. It is not like a right of way—or like aquaeductus, aqueductus, pasturage, or fuel. I think it is settled that such a right or privilege as that of angling cannot be acquired by prescriptive use. Now, in a question of servitude, that is of great importance. There has been no prescriptive use here, for the defender's earliest title is in 1829. But though there had, that would not create the trout-fishing a proper praedial servitude. The cases of Eyemouth and of Musselburgh were not decided on the footing that the rights claimed were servitudes, but one on the footing of a corporation trust, and the other on the footing of a superior's obligation. All proper servitudes arise from express or implied grant. By the terms of the disposition the privilege may be well conferred as between the grantor and grantee. But that will not create a servitude in a question with a singular successor. The prescriptive use or possession is the evidence on which the law implies the grant. The disposition contains the terms in which the law reads the expressed grant. But, whether implied or expressed, the grant is the foundation of the claim; and the thing granted must be, in its own nature, a proper right of servitude, either one of the known servitudes of law, or at least an innominate servitude of a proper praedial character. If, because of its nature as a mere privilege, not a proper servitude, it cannot be created by prescriptive use and possession, then I am inclined to think that it cannot be created by the express words of the disposition, to the effect of fixing it as a permanent real burden upon a singular successor.

I very much agree with the observation of your Lordship in the chair, that when a privilege of angling or trout-fishing is not a right of property, and not an incident of property, on the margin of the water, but is claimed by one whose land is removed from the water, then it must be regarded as a mere personal franchise or privilege of the same character, though of different endurance, as a permission to fish for a season or for a day, and similar to the personal privilege of shooting over the estate of another, and that it is not effectual in a question with a singular successor. I have only to add that I read the exception in Mr Patrick's title of 1864 as introduced only to clear the description. There is no question here in regard to Mr Napier's claim against the representatives of General Campbell. That question may be presented in a curious aspect, and may be attended with no little difficulty, in consequence of the terms of the feu-contract, and in consequence of the conveyance of the superiority by the deed of 1834, to which Lord Curriehill has adverted. But with any such question, Mr Patrick, who is not Mr Napier's superior in the feu, and who does not represent General Campbell, has no concern. He is a purchaser, and, for the reasons already explained, I am of opinion that he is entitled to succeed in this action.

The interlocutor of the Lord Ordinary was therefore adhered to.

Agents for Pursuer—Adam, Kirk, & Robertson, W.S.

Agent for Defender—James Webster, S.S.C.

PATRICK v. SMITH.

This was an action of interdict against Mr Francis Smith, which depended on precisely the same

question as was involved in the preceding case. Mr Smith alleged that he had a right to angle because he had the written permission of Mr David Law, proprietor of Finnartmore, part of Mr Napier's feu from General Campbell, and that Mr Law had acquired from Mr Napier a right to angle. The case was disposed of in the same way as that against Mr Napier.

Counsel for Pursuer—Dean of Faculty and Mr Adam. Agents—Adam, Kirk, & Robertson, W.S.

Counsel for Defender—Solicitor-General and Mr Crichton. Agents—D. Crawford and J. Y. Guthrie, S.S.C.

Thursday, March 28.

SECOND DIVISION.

DAVIDSON v. DAVIDSON.

Husband and Wife—Jus Mariti—Renunciation—Wife's Earnings. Circumstances in which held that a husband had agreed with his wife that her earnings, when they were living separate, were to be at her own disposal, and not subject to his *jus mariti*; the agreement being inferred from facts and circumstances.

This is an advocacy from Kincardineshire of an action at the instance of a father against his son for payment of a sum of £60, which the pursuer's wife, who died in 1865, had saved from her earnings as a washerwoman during a period of thirty years. Shortly before her death she made a gift of the deposit-receipt for this sum to her son the defender, and the father now claims payment of it on the ground that his *jus mariti* and right of administration extended over his wife's earnings, and that she had no power to gift the money as she did without his consent.

The Sheriff-Substitute (Dove Wilson) pronounced the following interlocutor:—

“ Having considered the record and proof—I. Finds, in point of fact, (1) that the pursuer was married to the late Jean Tawse about thirty years ago; (2) that they lived together for about three or four years, and had two sons, the younger of whom is the present defender; (3) that thereafter the pursuer and Jean Tawse separated, and continued to live voluntarily separate till the dissolution of the marriage by the death of the latter; (4) that after the separation Jean Tawse obtained certain sums of money which she deposited from time to time in bank; (5) that it is not proved that she obtained or held that money as trustee for any other person; (6) that the money amounted on 24th June 1864 to £60, and was that day placed by her on deposit-receipt in the Laurencekirk branch of the Aberdeen Town and County Bank; (7) that on 28th November 1864, the late Jean Tawse, without onerous cause, endorsed this deposit-receipt and transferred it to the defender; (8) that the defender thereupon re-deposited the money (along with certain other monies) in his own and his brother's name, after which it was again retransferred to his own name on 30th June 1865; (9) that on 1st February 1865 the pursuer's agent wrote to Jean Tawse and to the defender, claiming the money as his property; (10) that Jean Tawse died on 3d March 1865; (11) that the defender still retains the money: II. Finds, in point of law, (1) that till the death of Jean Tawse the contract of marriage entered into between her and the pursuer subsisted; (2) that the mutual rights of the parties remained unaffected by any legal separation; and therefore (3)