

of the debt *per se*, then to establish it by other competent proof. The identity of the debt is clear, it is a sum of £40 for value received under the first; and under the second, the same sum with interest from the same day.

The Sheriff-Substitute at Dunfermline found that the document libelled under the first conclusion of the action was not a privileged instrument; and as it was improbable, being subscribed but not written by the party said to be under the obligation, he assoilzied from that conclusion of the action and his judgment was adhered to by the Sheriff. In that state of matters the pursuer refers to the oath of the defender.

The oath being confessedly negative of the reference, the pursuer advocates the judgments in so far as they assoilzie from the first conclusion of the libel. The respondent, besides meeting the case made against the Sheriff's judgment on the first conclusion, objects that the reference excludes the challenge.

I am of opinion that the judgments of the Sheriff-Substitute and Sheriff in reference to the document sued on under the first conclusion are sound. The form of the instrument is not one known or recognised in mercantile dealing; and it is so conceived as to introduce in reference to the payee an uncertainty which is opposed to the very essence of such commercial instruments. It is made payable to one or other of two persons, not with certainty to any one. There is no definite or fixed payee. Assuming a charge to be given by the two parties separately, or an action simultaneously brought by each, the difficulty of enforcing such obligations is apparent. Considering the freedom from solemnity in such instruments, and the rapidity of execution to which, when in proper form, they are entitled, it is obviously necessary, as Mr Bell has remarked, "to require the strictest conformity to such requisites as law and mercantile custom have established in regard to their constitution." Law, as expressed by all the leading authorities upon the subject, condemns such instruments, and in mercantile dealing no such form is to be met with.

I have no hesitation, therefore, in adhering to the judgment advocated in reference to the disposal of the first conclusion of the libel, which disposes of the case; but I confess that I should have been prepared to have sustained the respondent's objection founded upon the reference to oath had it been necessary. Viewing the subject-matter of the inquiry under the second conclusion, as going to the subsistence of the very same debt sued for under the first, I should hold that the oath which is, or ought to be, an end of strife, should terminate the dispute. If the debt under the second conclusion cannot be regarded as any other debt than that sued for under the first, surely the subject-matter of the reference under the alternative conclusion must dispose of the conclusion to which it was made. For the implied condition of a reference is the abandonment of every other description of proof by which the fact referred to oath may be proved. In referring to oath there is an implied surrender of any proof by bond, bill, or written instrument. To reserve written evidence of the facts deponed to in the shape of a promissory-note or bond of the granter would be to retain a power of contradicting the testimony obtained upon an implied condition, which seems to me to exclude any other appeal to proof than the definitive appeal made on the reference. (Stair iv., 44. 2.) The advocator should, if he desired to obtain judgment upon his legal plea on the valid-

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dity of the promissory-note, have allowed judgment to go by default against him in the inferior Court, and reserved his reference until after the Court had disposed of the first conclusion.

Lord COWAN and Lord BENHOLME concurred with the Lord Justice-Clerk.

Lord NEAVES differed on the second point, and was of opinion that the conclusions were not identical, and that finding the oath to be negative of the reference in one conclusion did not exhaust the other.

Agent for Advocator—John Galletly, S.S.C.

Agent for Respondent—George Wilson, S.S.C.

Thursday, March 28.

## FIRST DIVISION.

PATRICK v. NAPIER.

*Property—Title—Angling—Servitude—Singular*

*Successor.* A proprietor of a barony conveyed a part of it in feu with a certain privilege of angling, and the feuar thereafter also acquired the superiority of the feu. Several years thereafter the barony was conveyed to a purchaser, the subjects feued being specially excepted in the disposition, but no mention being made of the privilege of angling. Held—(1) that the privilege not having been created a real burden in the purchaser's title, he was not bound to recognise it; (2) that a privilege of angling was not capable of being made a servitude in favour of a proprietor of lands discontinuous from the water in which it was to be exercised.

This is an action of declarator at the instance of Mr Patrick, the proprietor of the estate and barony of Kilmun, against Mr David Napier, of Glenshelly, which had been conjoined with a suspension and interdict betwixt the same parties. The object of the action is to have it declared that "the said David Napier has no liberty or privilege of angling or rod-fishing in the river Echaig, to the westward of the ground some time feued by John Lamont, writer in Greenock, from John Gillespie Davidson, writer to the signet, as commissioner for General Campbell of Monzie, or in Loch Eck, in virtue of a feu-contract entered into between the said James Gillespie Davidson, as commissioner foresaid, and the said defender, dated 20th and 27th June 1829, or in virtue of a disposition by the Right Hon. George Lord Abercrombie and others, trust-disponees of the said General Campbell, in favour of the said defender, dated 1834, or in virtue of any rights or titles following thereon, or in virtue of any other right or title whatever;" and also, "that the defender has no right or title to enter upon the pursuer's property of Kilmun, or to be in or to pass along the said river Echaig where it flows through or along the said property, or along the shore of the said loch where it is bounded by the pursuer's property." There are also conclusions for interdict.

The defender pleaded that the right of angling was conferred upon him by his feu-contract, dated in 1829, which contained the following clause, viz.—"With liberty and privilege to the said David Napier and his foresaids of angling or rod-fishing in the River Echaig, to the westward of the ground feued by John Lamont, writer in Greenock, from the said James Gillespie Davidson, as commissioner foresaid, and also in Loch Eck, in common with the said Alexander Campbell the

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proprietor, and his other feuars, but declaring that the said privilege shall only be exercised by the said David Napier and his foresaids at the rate of one person for every four acres of the ground hereby disposed, and no further; declaring always that the said privilege of angling or rod-fishing in the River Echaig and Loch Eck is hereby conferred alienably, in so far as the said Alexander Campbell may have right to grant the same, and that in granting feus of other ground the privilege shall be restricted in the same manner to one person for each four acres." The defender also founded upon a disposition in his favour dated in 1834, whereby General Campbell's trustees conveyed to him the superiority of the lands included in his feu-contract of 1829, under which he completed his title by charter of resignation from the Crown, and instrument of sasine following thereon, whereby, as he alleged, he stood infett in the subjects, "cum privilegio piscationis in fluvio Echaig et in Loch Eck modo et ad latitudinem specificat. in dict. feodi contractu et totis aliis privilegiis inibi specificat."

The pursuer, Mr Patrick, was a singular successor of General Campbell and his trustees. In 1854 the trustees, as they had been directed, conveyed the estates remaining unsold to the General's son, Alexander Cameron Campbell, who was infett, and in 1864 he conveyed them to the pursuer. The lands which had been conveyed to the defender in 1829 and 1834 were in the disposition to the pursuer specially excepted, but there was no mention in it of any right of angling in favour of Mr Napier, whose property was not contiguous to the river Echaig or to Loch Eck.

The Lord Ordinary (Ormidale) held that the privilege of angling claimed by the defender—however good it might be against General Campbell, the common author of the parties—was not effectual against the pursuer as a singular successor, his disposition containing no exception of the privilege, but only of the lands themselves, which had been conveyed to the defender. He therefore declared and interdicted in terms of the conclusions of the summons.

The defender reclaimed.

GIFFORD and WATSON, for him, argued:—(1) A right of angling in a river is capable of being conveyed as a separate tenement, although the grantee has no property contiguous to the river, and the defender holds such a conveyance. (2) At all events such a right may be granted as a servitude, effectual against singular successors, and such a servitude has been constituted by a grant in this case. (3) The grant is binding on the pursuer because his own title contains special reference to that of the defender.

DEAN OF FACULTY and ADAM, for the pursuer, argued:—A right of angling cannot be held as a separate estate independently of lands lying adjacent to the water in which it is to be exercised. The right belongs to the pursuer as proprietor of the *solum* or *alveus* of the water and of its banks. Nor is the right of the nature of a servitude so as to be binding on singular successors. The right claimed by the defender has not been created a real burden in the pursuer's title.

The following authorities were cited:—Craig, 1, 15, 17; Ersk., 2, 3, 36; 2, 6, 4, and 6; 2, 6, 15; 2, 9, 2, and 33; Stair, 2, 1, 28; 2, 7, 9; Bell's Prin., 747, 952, and 979; Hunter on Landlord and Tenant, p. 319; Stat. 1449, c. 18; Carmichael, M. 9645, and Hailes, 1033; Mackenzie, 26th May 1830, 8 S. 816; and 6 W. and S. 31; Ferguson v. Sheriff, 18th July 1844, 6 D. 1363; Nicholson, M. 14516;

Macdonald, 14th Dec. 1836, 15 S. 259; Somerville; 22d Dec. 1859, 22 D. 279; Duke of Sutherland v. Ross, 11th June 1836, 14 S. 960; Milne and Home v. Smith, 23d Nov. 1850, 13 D. 112; Pollok, Gilmour, & Co. v. Harvie, 5th July 1828, F.C.; Birkbeck v. Ross, 4 Macp. 272; Murray v. Magistrates of Peebles, 8th Dec. 1808, F.C.; Dyce v. Hay, 11 D. 1266, and 1 Macq. 312; Aboyne v. Innes, 22d June 1813, F.C., and 6 Paton, 444; Aboyne v. Farquharson, 16th Nov. 1814, F.C.; Garden v. Aboyne, 27th Nov. 1734, M. 14517.

At advising,

LORD PRESIDENT—The object of this action of declarator, at the instance of Mr Patrick of Kilmun, is to declare the immunity of his estate of Kilmun from a certain liberty or privilege of angling which is claimed by the defender, and the privilege which is claimed by the defender is said to be constituted and made effectual against the pursuer of the declarator by the title of the defender. Now, it appears to me that the first thing to be attended to here is the precise state of these titles, for I think a great deal, if not the whole, of this case depends upon a correct understanding of the state of the titles. In 1829, General Campbell of Monzie, who was then the proprietor of the estate and barony of Kilmun, entered into a feu-contract with Mr Napier, the present defender, by which he conveyed to him in feu 35 Scotch acres of the lands of Kilmun lying along the shore of the Holy Loch, and along with that feu he gave him this privilege, "together with liberty and privilege to the said David Napier and his foresaids of angling or rod-fishing in the river Echaig, to the westward of the ground feued by John Lamont, and also in Loch Eck, in common with the said Alexander Campbell, the proprietor, and his other feuars, but declaring that the said privilege shall only be exercised by the said David Napier and his foresaids at the rate of one person for every four acres of the ground hereby disposed." Then it will be observed further, that in the obligation to infett, the obligation is confined to infetting the feu "in the piece of ground lying, bounded, and described in manner before mentioned;" and the precept of sasine gives authority "to deliver heritable state and sasine of all and whole the foresaid piece of ground lying and described as aforesaid." So that there is no attempt in this feu-contract to give to the privilege of angling anything like a feudal or real character as in a question between the grantor and grantee of this deed. There is, no doubt, an obligation of warrandice, and that is expressed more largely, because General Campbell there binds himself "to warrant the subjects above disposed, with the disposition thereof before written," to his feu. Now, if the question had arisen upon that deed, and as between the grantor and grantee of that deed, I don't suppose any of your Lordships would have had any difficulty in holding that the grantor of the deed was under a good personal obligation to permit his feu to fish in the river Echaig and Loch Eck, within the limits and under the conditions prescribed in this deed. There is nothing unlawful in such an agreement, and it is expressed clearly and definitely as a personal contract between these two parties. Nay, even if the barony of Kilmun passed into other hands, it may be made a very serious question whether even a singular successor in that estate, standing in the position of superior in this feu, would not have been under an obligation to permit the exercise of this same privilege,

because that would have been a question between superior and vassal, arising upon the terms of a feu-contract, and a feu-contract which is binding as between the superior and the vassal for the time, even although both the one and the other may be singular successors. But that is not the state of the title as it stands before us now. It would appear that in the year 1828, after this feu of Mr Napier's had been given out, another feu had been granted in favour of one Lamont, of some 4 acres and 34 falls of Scotch measure, lying just in the same quarter as Mr Napier's feu, and there was also a third feu given out of 1 acre, Scotch measure, in favour of Mrs Mary Fletcher, wife of Mr Lamont, in liferent, and their eldest daughter, and her heirs in fee; and to all those three feus—Mr Napier's feu, and Mr Lamont's feu, and what may be called Mrs Lamont's feu—there is attached the same liberty and privilege of angling. But then, in the year 1834, Mr Napier purchased the superiority, not merely of his own feu, but of those two other feus—Lamont's feu, and Mrs Lamont's feu—and there was then executed in his favour, by General Campbell's trustees, the disposition which we have now before us, and which is a deed of very great importance in the present question. The effect of the deed is to convey that portion of the estate and barony of Kilmun, which formed the subject of the three feus, but to convey it with a double manner of holding, so as to enable Mr Napier, as disponee under that deed, to take an entry with the Crown, and so make himself superior both of his own feu and of the two other feus. The form of the disposition is quite correctly, according to feudal conveyancing, a disposition of the whole of that part of the lands and estate of Kilmun, and that part of the estate is described as consisting, in the first place, of 35 acres, which constitute Mr Napier's own feu; in the second place, of 4 acres 34 falls, which constitute Mr Lamont's feu; and in the third place, of the 1 acre which constitutes Mrs Lamont's feu; and in regard to each of these feus, as they are described in the disposition of 1834, they all end with the privilege of angling in the river Echaig, and in Loch Eck, "in manner and to the extent specified in the said feu-contract;" and then, after the description of the three feu-rights, there follows this clause, still in the dispositive clause of the deed, "and also all right, title, and interest which the Duke of Argyll had to all and sundry the teinds, parsonage and vicarage, which pertained to James Campbell of Kilmun, or his predecessors, according to their possession of the same, but in so far only as the said teinds, parsonage and vicarage, refer to the premises before disposed, together with free fish and entry to the premises, and whole parts, pendicles, and privileges and pertinents thereto belonging, and with the privilege of angling specified in the said feu-rights—to the effect of enabling the said David Napier and his foresaids to enter the vassals therein, all the said subjects lying in the united parishes of Kilmun and Dunoon." Then there is a conveyance of a certain small subject in warrandice which it is not necessary for the purposes of the present case to dwell on. The obligation to infest is in these terms—"In which lands, teinds, and others, both principal and in real warrandice, before disposed, we do hereby bind and oblige ourselves, as trustees foresaid, and the representatives of the said General Alexander Campbell, to infest and seise the said David Napier and his foresaids on their own expenses, and that by two several infestments

and manners of holding;" and there follows a procuratory of resignation, which is important, because the title of Mr Napier was made up by resignation. The procuratory gives power to resign and surrender all and whole the lands, teinds, and others, principally before disposed, and also a belt or strip of planting disposed in real warrandice. Then there is a clause of absolute warrandice by General Campbell in favour of Mr Napier, and there is a precept of sasine which is expressed in the same terms as the procuratory of resignation, so far as the subjects are concerned. Now, the intended effect, and the true effect of this deed, I think, may be very shortly stated. As soon as Mr Napier should, under this disposition, take an entry from the Crown as superior, all connection between General Campbell and this part of the estate of Kilmun came to an end. He had no longer any connection with it whatever, and Mr Napier came into the position of being the Crown vassal in that part of the estate of Kilmun, and having complete right to the whole of that portion of the estate, subject only to the effect of the feus which had been given out. But as the feus which were given out really exhausted the whole lands, what was in his person was nothing more than a superiority, with the teinds which had been expressly conveyed. Now, the right of angling was a thing not attached to this superiority, but a thing which had been originally attached to each of the feu-rights, and remained attached to each of the feu-rights; and all that was given to Mr Napier under this disposition of 1834 was the privilege of angling specified in the feu-right, to the effect of enabling him to enter the vassals therein; and that was perfectly sound and correct conveyancing, because to have given him the privilege of angling in any other way or to any other effect would have been to interfere with the rights of the feuar. It was a privilege which was to be exercised by the feuar, and not by anybody else, and therefore all that the superior could have to do with that was to enter the vassals in it, if indeed it was a subject in which a vassal could be entered at all. But the important thing to consider as regards the effect of this disposition of 1834 is that it broke off and put an end for ever to the relation of superior and vassal as between General Campbell and his successors in the remaining part of the barony and estate of Kilmun, and the feuars in the three feu-rights which I have so often mentioned. There was no longer any such relation subsisting between them, and these feuars had for their superior from that time forward Mr Napier and his successors under the right constituted by the deed of 1834. Therefore, in this question Mr Napier is his own superior, and the only superior that is over him is the Crown, and there subsists between him and Mr Patrick, as the successor of General Campbell in the remainder of the barony and estate of Kilmun, no relation of that kind, whatever. But then a good deal of argument was addressed to us upon the construction and effect of the Crown charter and infestment which followed upon this disposition of 1834, and by means of which Mr Napier took his entry with the Crown. Now, whatever may occur in that charter, or in the infestment following upon it, it must be kept in view that that is a charter by progress. It cannot confer upon Mr Napier any new right which did not belong to him under the conveyance of 1834, and it did not profess to give him by form of novodamus or otherwise, any right that was previously in the Crown. And therefore it would be quite impossible as in

a question between the two parties before us—between Mr Napier entering with the Crown by means of this resignation, and the independent proprietor of the adjoining estate (for it comes to be nothing more than that) of Kilmun—to hold that Mr Napier acquired, by means of making up his title by this resignation, a right as against the neighbouring proprietor of Kilmun, which he had not acquired by disposition previously. If, indeed, such a thing were competent or possible, there are some expressions in the sasine, which has been printed and is now before us, that might be material, because there is an obvious attempt, I think, there to give to the privilege of angling a different character from that which it had under any of the previous titles. The conveyance was correctly enough stated in this sasine, but in the precept, which is quoted from the charter, you have an authority given to give to the bearer of these presents, “*Sasinam totarum et integrarum praefat. terrarum piscationum aliorumque cum privilegiis et pertinen. supra disposit.*” that is, there is a warrant to give sasine in fishings, and accordingly sasine is given in the following terms, “*Statum et sasinam haereditariam pariterque possessionem actualem realem et corporalem praefato Davidi Napier ejusque praedict. totarum et integrarum praedict. terrarum decimarum piscationum aliorumque cum privilegiis et pertinen.*” Now, certainly, that is a thing that never was done before in regard to this right of angling. There never was any attempt to make it real—to feudalise it—and there is an attempt to do that here; but it appears to me that, as in a question between Mr Napier and Mr Patrick, it can have no effect whatever. And, therefore, I take the case as depending upon the disposition of 1834, and I now proceed to consider whether Mr Patrick, as the successor of General Campbell in the estate of Kilmun, is under any obligation to give effect to this right of angling. Confessedly the water upon which the right or privilege is to be exercised is within the estate of Mr Patrick; and the question is whether he is under any obligation to permit the exercise of that liberty or privilege within his estate. Now, he is a singular successor of General Campbell—a purchaser, and *prima facie* as a singular successor by purchase he is not to be subjected to any burdens that don't appear on the face of his titles, or are not made effectual against him in some intelligible way. But it is necessary to look to the conveyance which he received in the year 1864 from Mr Campbell of Monzie, the General's son, who had then come to be the proprietor of the estate. There is a conveyance of the whole barony of Kilmun, with a certain exception, to which I shall call attention more particularly immediately; the exception being, in truth, nothing more than that portion of the barony of Kilmun which had been previously conveyed to Mr Napier, and which comprehended the feu-rights of which I have already spoken; and there is a clause of warrandice in this conveyance in which there is an exception, for the disponent grants warrandice “under exception of the current tacks and feu-rights, without prejudice to my said disponee, to quarrel or impugn the same upon any ground, not inferring warrandice against me or my foresaids.” Now, at first it was contended that this exception in the clause of warrandice must be held to include those rights of angling, among other things, which had been granted to the feuars by General Campbell when he was proprietor of the entire estate and barony of Kilmun, but that is plainly not

tenable, because the only exception from the warrandice here is an exception of the current tacks and feu-rights of the estate conveyed. Now, the estate conveyed is that part of the estate of Kilmun within which these feu-rights do not exist, and are not comprehended. The feu-rights in question are feu-rights constituting burdens upon the portion of the estate of Kilmun that now belongs to Mr Napier under his Crown title, and are therefore not feu-rights which constitute any burden whatever upon the portion of the estate conveyed by the disposition of 1864. Therefore, the clause of warrandice, it appears to me, really gives no help whatever to the case of the defender. But it is said that there is a further exception from the conveyance, which subjects the disponee, Mr Patrick, to all the obligations which are constituted by the disposition of 1834, or by the feu-rights therein referred to; and the exception is expressed thus, after describing the barony and lands, “but excepting always from the said lands and others those parts and portions of the lands of Finnartbeg, Finnartmore, Strone, and Kilmun, sold and disposed by George Lord Abercromby and Sir George Murray, as trustees of General Alexander Campbell of Monzie, to David Napier of Glenshellish, conform to disposition thereof by them in his favour, dated the 1834.” Now, no doubt there is a reference here to the deed of 1834, and it is said that this gives Mr Patrick, the disponee, notice of what is contained in the deed of 1834, and not only gives him notice of what is therein contained, but subjects him to any obligations which are thereby constituted or transmitted in favour of the disponee of the deed of 1834. I cannot read this exception as being either intended to have, or having, according to any proper principles of conveyancing, such an effect. I think the object of the reference to the deed of 1834 is perfectly clear. It is for the purpose of defining and making more clear the description of the lands conveyed by the disposition of 1864, and as that is the sole object of the reference, the deed of 1834 cannot be read or referred to in this question for any other purpose; and above all, it cannot be read or referred to as if the reference were intended to incorporate into this deed of 1864, and make part of it the obligation or constitution of right which may appear in this deed of 1834. The sole object, and, I think, the sole effect, of the reference to the deed of 1834, under the exception of the lands therein contained, is to show that that portion of the solum of the barony of Kilmun which is embraced within the deed of 1834 is not intended to be within the description in the dispositive clause of the deed of 1864. The consequence of this is, that Mr Patrick is in the position of a singular successor, without any particular speciality in his title at all; and the question remains how far this liberty and privilege of angling can be made effectual against him. Now, one thing, I think, is quite clear, that this liberty and privilege of angling is not conveyed as a piece of property. I don't think any attempt was made to do that, if you except, indeed, some of these expressions in the sasine in the Crown charter to which I have already adverted. Then, in the next place, it appears to me to be quite clear also, that this liberty and privilege of angling has not been made a real burden upon the estate which was conveyed to Mr Patrick by the deed of 1864. In short, there is nothing real about it so far as I can see; and the only question remaining is whether it is available to Mr Napier, as the proprietor of the feu of 35

acres, as a servitude over the estate now vested in the person of Mr Patrick; and that appeared to me to be, after all, the question upon which the defender's counsel laid the greatest stress. It is necessary, in dealing with this part of the case, to consider what is the nature of this liberty of angling, and how it is exercised. Certainly, primarily, the right of angling, or the privilege of angling, or the pleasure of angling, or whatever it may be called, is a mere incident of property. That is beyond all dispute. It is a thing that naturally and necessarily belongs to the proprietor through whose grounds the stream of water flows. If the water flows through his grounds, he is the proprietor not only of the banks of the stream, but he is the proprietor of the alveus of the stream, and no one can have access to that stream without his license and permission. If, on the other hand, he is proprietor upon one side of the stream, and another gentleman is proprietor on the other side, they just divide between them that same absolute and exclusive right which in the other case belonged to the one, and they have between them the same complete power of excluding all the world from that stream in so far as it passes between their two estates. Therefore, any one not being the proprietor of the estate through which or by which the stream flows, that proposes to exercise the privilege of an angler in that stream, must do it by the license and permission of the proprietor. The moment, therefore, that it comes, in an ordinary state of things, and natural course of events, to be exercised by any party but the proprietor of the estate, it is the most purely personal franchise that anyone can imagine. It is a thing that may be conferred by leave or permission for a day, or an hour, or a week, or a month, and recalled whenever the proprietor pleases. Notwithstanding this, its natural primary character, it may be quite possible to make this liberty and privilege of angling the subject of a good personal contract. That I don't doubt, and I think it may be made a question whether it could not also be made a real burden. It is not worth while to inquire in what form that would require to be done, but I shall assume that that is quite possible. But then the question comes to be whether, if it is not made a real burden, but is merely made the subject of a personal contract between the proprietor of the estate through whose grounds the stream flows and somebody else, the contract by which the proprietor of the estate becomes bound to allow the other person to fish in his stream is not really of the nature of just a permanent license to fish there; it is the same leave and permission in its nature which he would grant for a day or a year, only it is permanent. Now, the question which we are at present to consider is not whether such a personal contract would be effectual, but whether such a personal contract creates a servitude which will be binding against a singular successor. The law of Scotland recognises no personal servitudes except one—namely, liferent, and some lawyers doubt whether that is a servitude at all. We need not enter upon that question, for if liferent be a personal servitude, it is the only personal servitude which the law of Scotland has recognised. Every other servitude known to the law, or that can be competently constituted, is a praedial servitude. Well, then, looking to this liberty of angling, such as I have endeavoured to describe it, can that be made a praedial servitude? In its natural and primary constitution, it is, as I said before, the most purely per-

sonal privilege that it is possible to imagine. But it is said that although it is personal and can be only exercised and enjoyed by persons, yet it may be attached to the praedium in such a way as to give the owner or possessor of that praedium for the time the privilege which is so constituted. Now, I think that is an entire misuse of the term praedial servitude. I think a praedial servitude must be something which constitutes a burden upon one tenement or praedium, for the purpose of creating an advantage or benefit to another praedium. It is needless, and perhaps not very safe, to go much into illustration, upon a matter of this kind, but I think that none of the servitudes known to the law of Scotland as praedial servitudes are of such a nature that it cannot be fairly and properly said that the dominant tenement, as a praedium, receives a benefit from the servient. But how can the feu which belongs to Mr Napier be said to receive any benefit as a praedium from this right of angling? The water in which the right is to be exercised is not contiguous to the dominant tenement. The right is not one that is peculiarly suitable or convenient for the dominant tenement more than for the possessor or inhabitant of any other tenement in Scotland who can obtain access to the stream. And when the owner of the dominant tenement goes to exercise his supposed right of praedial servitude upon the *fundus* of the other estate, what is it that he is entitled to do? He is not entitled to the exclusive possession of the stream; he is not entitled to the common possession of it along with a certain number of other persons defined and specified. It is not a right which is to be exercised only by the owners of so many adjoining tenements, to the exclusion of all the rest of the world. On the contrary, it is a liberty or privilege which the owner of the stream is entitled to communicate to as many persons as he pleases—to bring a perfect army of anglers there to compete with the holder of this supposed praedial servitude. Now that appears to me to be a sort of privilege or liberty, or whatever it may be called, that it is quite impossible to rear up into the position of a praedial servitude. I think it remains, notwithstanding of all that has passed here, just what it is in its origin, a personal privilege—a mere license or permission to exercise a kind of sport within the grounds of General Campbell—and as such I think no obligation whatever transmitted against Mr Patrick as a singular successor. For these reasons I am for adhering to the Lord Ordinary's interlocutor; but I need hardly say that the reasons which I have assigned for my judgment are not in all respects the same as those which influenced the Lord Ordinary in arriving at his opinion.

Lords CURRIEHILL and DEAS concurred.

Lord ARDMILLAN—In this case, which has been argued with great ability on both sides, and which, in some of its aspects, is novel as well as interesting, I have arrived at the same result as your Lordships and the Lord Ordinary. I think that Mr Patrick is entitled to a decision in his favour, both in the suspension and interdict, and in the declarator.

Mr Patrick is the proprietor of the estate of Kilmun, and also of the separate estates of Benmore and Bernice. He acquired these estates by purchase; and in particular he purchased in 1864 the lands and barony of Kilmun from Mr Cameron Campbell, of Kilmun and Inverawe, formerly of Monzie. The estates of Mr Patrick are partly on the banks of Loch Eck, the whole of one side of

Loch Eck belonging to him; and the river Echaig, flowing out of the loch, flows for a considerable distance through or along the boundary of his lands. This loch and river are private property, and the pursuer is entitled to possession unless a superior right, a common right, or a burdening right, is instructed. There is no question here between superior and vassal. The question is between the feuar of one portion of the barony of Kilmun and the proprietor by purchase of the remainder. The defender in the action of declarator, Mr Napier, feued from the trustees of General Campbell of Monzie, in 1829, a piece of ground consisting of 35 acres, "with free ish and entry to the said piece of ground, as the same is meithed and marched off from the other lands of the said Alexander Campbell." In this feu-contract of 1829, which is in process, and which is, of course, the basis of Mr Napier's right, there is no clause of parts and pertinents; but the lands are feued "together with liberty and privilege to the said David Napier and his foresaids of angling or rod-fishing in the river Echaig, to the westward of the ground feued by John Lamont, writer in Greenock, from the said James Gillespie Davidson, as commissioner foresaid, and also in Loch Eck, in common with the said Alexander Campbell, the proprietor, and his other feuars; but declaring that the said privilege shall only be exercised by the said David Napier and his foresaids at the rate of one person for every four acres of the ground disposed, and no further." It is to be observed that according to this title the defender has not a right of property in the river nor in the loch. His property is not to any extent upon the margin of the river or of the loch. It is situated at a considerable distance, its nearest point being one and a quarter miles from the river, and several miles, I think about five miles, from the loch. It is also to be observed that he has no exclusive right of angling, but only "a liberty and privilege" of angling in common with the superior of the feu and his other feuars. Now I am of opinion that this liberty and privilege is in no respect a right of property in the defender. It is not conveyed to him as a property, and no title to it as a property, or as a pertinent of property, was completed under the precept of sasine in the feu-disposition. There was, however, a privilege of angling well conferred as in a question with the granter of the feu. Then the disposition of 1834 does not, as I read it, extend the defender's right to the *dominium utile* beyond what was conveyed by the feu-contract in 1829. The import and effect of that disposition in 1834 was to convey to Mr Napier, the superiority of the subjects previously feued, both the subject feued to Mr Napier and the subjects feued to Mr and Mrs Lamont, thus terminating the relation of superior and vassal between General Campbell and Mr Napier. The Crown title expedited in 1835 was effectual to complete the previous titles; but, as there was no novodamus, it was not effectual to extend the boundaries, or to multiply the pertinents of what had been previously conveyed.

I have been unable to discover any authority for dealing with a privilege of angling for trout as anything more than an incident to riparian property. The proprietor of lands on the margin of a loch or of a stream is frequently the proprietor of the loch or of the stream. But, if his titles do not support his right to the property of the *alveus* of the stream, or the *solum* of the loch, it may be that the privilege of angling may be acquired as incident to his property on the margin. It is a

natural adjunct or accessory to property on the banks of a loch or river. Like other recognised pertinents, it has what Erskine calls "a close coherence or connection with the land." (Ersk., 2. 6. 4.) The privilege is indeed exercised from the land to which it is an accessory.

But in the present case, the defender's lands are entirely separated from both loch and river; and accordingly it cannot be as a right of property, or as a pertinent of his property, or as an accessorial incident to his property, that the liberty or privilege of angling which he now claims can be supported. Looking to the titles and to the separated position of the defender's lands, I am clearly of opinion that his pleas on this part of the case are not well founded. I agree with your Lordships that the most plausible manner, and indeed the only intelligible manner, in which Mr Napier's case can be presented, is, that his privilege has been created a right of servitude. To this part of the case I have therefore given a very careful consideration, and I have arrived at the conclusion that the privilege of trout-fishing in a loch and a stream separated by above a mile from the nearest point of the defender's land, has not been effectually created a servitude over Mr Patrick's estate. There is no prescription, and servitude is *stricti juris*, and not to be inferred by implication. It is not one of the known and recognised servitudes of our law. It is not naturally or reasonably incident to property which is remote from the water. It necessarily implies a right of access from the defender's land to the water side, for otherwise it cannot be made available. But no such right of access is conferred by the feu-disposition, for it is to be observed, that the only right of ish and entry given in the feu-contract is "free ish and entry to the said piece of ground as the same is meithed and marched from the other lands of Alexander Campbell" by a certain march dyke. This is not access to the river, which is a long way off, or to the loch, which is much further off. But it is said that, even though it were admitted that this is not one of the known servitudes of Scottish law, and though it were admitted that, as Lord Cockburn says in the case of *Ferguson v. Sheriff*, "I never heard of a servitude of fishing," still that may be a valid servitude notwithstanding, if clearly expressed. In a question with a singular successor, I do not think that this proposition can be supported to the extent stated; though for purposes of legal discrimination, the expression "personal servitude," is sometimes used by our institutional writers, yet practically, as Professor Bell correctly states, "the only servitudes in Scotland are praedial." Is this a praedial servitude? I think not. It does not satisfy the description of a praedial servitude given by Lord Stair, by Mr Erskine, and by Professor Bell. In every case of praedial servitude there must be a *praedium serviens praedio*, a dominant and servient tenement, and the burden to which the servient tenement is subjected must be of a proper praedial character, for benefit of the dominant tenement. I do not deny the possibility of the introduction of a new praedial servitude. The habits and requirements of life, varying and extending with advancing civilisation, improved agriculture, and multiplying necessities, may render the introduction of a new servitude possible and legitimate. But it must, in my opinion, be of a truly praedial character, similar in nature and quality to the praedial servitudes which the law has already recognised. This privilege of trout-fishing is not now a praedial servitude; it is not so recognised,

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)