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 aquaehaustus, aquaeductus, 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 granter 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 advocation 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 redeposited 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 t he mutual rights of the parties remained unaffected by any legal separation; and therefore (3)

that any property held nominally by Jean Tawse in her own name formed really part of the goods in communion of which the pursuer, as husband, was entitled to claim possession under his right of administration: Therefore decerns against the defender for payment of the said sum of £60, with the bank interest due thereon from the 24th June 1864 to this date, and with legal interest thereafter till paid: Finds the pursuer entitled to expenses; of which allows an account to be given in, and when lodged, remits the same to the auditor of Court to tax and to report.

"J. Dove Wilson.

"*Note.*—The circumstances of this case are unusual, and although the principles of law applicable seem sufficiently clear, hesitation may naturally be experienced in applying them, from a feeling that the result may not be such as one might altogether desire to produce.

"The pursuer and Jean Tawse lived together for only a few years after their marriage. Of the causes which led to their separation—whether they would have justified a legal separation, and which was the aggrieved party—little is now known, and it can serve no purpose to inquire. There are hints in the pursuer's proof that it was owing to the bad temper of the wife; and there are suggestions, apparently better supported, in the defender's proof, that it was owing to the violence and dissolute habits of the husband. But into these facts no inquiry can usefully be set on foot. It is too late now to think of bringing about the effect of a legal separation. For twenty years and more the husband and wife survived the occurrences which occasioned their parting, and neither of them took any of the legal steps necessary to cancel or suspend the rights created by the contract of marriage; and they having neglected those steps, there is no other party that can take them. It must be assumed that they had good reason for following the course they took. It is true they did not live together afterwards at bed and board. They did not even live in the same house, and the husband contributed nothing, or next to nothing, to the support of his wife and family. But mere neglect of the matrimonial duties on the part of a husband or of a wife, or of both, does not end the marriage-contract. The contract is the most solemn known to the law, and once entered into, the law alone—and that, too, only when declared by its properly instituted courts—can release from it. There is no such thing as mutually retiring from it—as the parties seem to have intended to do in this case—as if it were an ordinary contract of partnership. In some cases the law will recognise a voluntary separation when the terms of it are reduced to writing, and then appear to be of such a character, and to have proceeded upon such grounds, as the Court itself would have sanctioned or proceeded upon. But there is no case, so far as the Sheriff-Substitute is aware, where the law has recognised a separation of a nature purely voluntary on the part of both parties, however long may have been its subsistence. The Sheriff-Substitute therefore feels himself compelled to hold that the rights of both parties under the marriage-contract remained unimpaired till its dissolution. When they separated they left the contract of marriage in full force, capable of being at once appealed to again, whenever it became the interest of either party to act upon it.

"The sum in dispute in this action is a sum which was lodged by the deceased wife in bank in her own name. The pursuer and the defender differ as to the way in which she came to have possession of that money. The pursuer says that it is money which she earned while living separate. The defender says that the money belonged to the wife's father, and that she held it in trust for him. It may have been competent for Jean Tawse to have held that money in trust, but that she did so is not proved in any competent manner—that is, either by her writ or oath, or by the writ or oath of any one representing her. She must therefore be taken to have held the money, so far as she could so hold it, in her own right, and this view seems also most in accordance with what light the evidence throws upon the matter.

"Taking the contract of marriage to have subsisted till the wife's death, the money in question must have formed part of the goods in communion, and it follows that when the pursuer claimed that money (which was before the marriage was dissolved), he was claiming a sum to which he was entitled. It seems clear, therefore, that he was then entitled to have it transferred to him, and if that be so, what should have been done then must be done now."

"J. D. W."

The Sheriff (Shand), on appeal, pronounced the following interlocutor:—

"*Edinburgh, 31st October* 1866.—Having considered the cause, and proof led, recalls the interlocutor complained of: Finds in point of fact that the pursuer and the late Jean Tawse were married about thirty years ago, but that three or four years after marriage they separated, and continued thereafter to live separately till the death of Jean Tawse, which occurred in March 1865: Finds that throughout the whole period of this separation the pursuer failed to supply his wife with the means of aliment, and that, with his assent and approval, she supported herself, and also two sons of the marriage, so long as they were in childhood, by her own labour and industry as a washerwoman: Finds that the money for which the pursuer now sues is part of the earnings of the said Jean Tawse during the period of her separation from the pursuer, which she was able by careful frugality to retain, and which she possessed until shortly before her death, when she made over the right thereto to her son, the defender: Finds, in these circumstances, that in point of law the pursuer has no legal right to the sum sued for: Therefore assoilzies the defender from the conclusions of the action, and finds the pursuer liable in expenses, of which allows an account to be given in; and remits the same to the auditor for taxation, and decerns.

"Alex. Burns Shand.

"*Note.*—The preceding interlocutor sufficiently explains the view which the Sheriff takes of the facts of this case. Throughout a period of upwards of twenty-five years the pursuer's wife was left by him to maintain herself, and the children of the marriage, as she best might. She was able, by her own hard work as a washerwoman, not only to provide the necessary subsistence for herself and her two sons, but, by strict economy, to retain a sum of £60, or at the rate of little more than £2, 10s. a year, which she laid up and put in bank, it may be presumed, to provide the means of maintenance when she should no longer be able to work. She died in March 1865, and shortly before her death she made over her right to the money to her son, that he might use it in supporting her father, who is in need of assistance, and in so far as not required for this purpose for himself.

"The pursuer claims the money by virtue of his *jus mariti*. The Sheriff is of opinion that the pur-

suer cannot successfully maintain that right to the effect pleaded.

"Although the parties lived separately for almost the whole period of their married life, the pursuer was nevertheless bound to aliment his wife, and he was apparently quite able to do so. He was vested with the *jus mariti* and right of administration, under which he could enforce his right to the whole goods in communion, including, it may be assumed, in ordinary circumstances, the fruits of his wife's industry; but, on the other hand, he was under an obligation to provide the means of aliment to his wife. The pursuer did not fulfil this obligation, but by his conduct assented to the arrangement that his wife should retain for her own aliment and use what she could earn. He became aware that she had a small fund accumulated, and indeed states in his evidence that he used to get loans from his wife, out of this separate fund, of sums which he always paid back, thus recognising the fund as her property, and subject to her disposal. It appears to the Sheriff, that as the pursuer failed in his legal obligation of aliment towards his wife, he thereby deprived himself of his right to enforce his *jus mariti*, to the effect of acquiring to his own use the earnings of his wife's labour. And farther, that the conduct of the parties implies a tacit agreement, that during the separation, while the pursuer's wife should, on the one hand, by her industry maintain herself, the pursuer, on the other hand, should relinquish his *jus mariti* over such funds as she might in this way acquire.

"Had the claim been made by the pursuer against his wife and the bank as the holder of the money while it was deposited in her name during the subsistence of the marriage, the Sheriff thinks there would have been little difficulty in repelling it. (Jamieson *v.* Houston, 1770, M. 5898.) He does not think that the pursuer's right is now different because of his wife's death, or that the law will avail the pursuer in seeking now to appropriate the money to himself, and to prevent its being disposed of as his wife desired.

"If the pursuer, living separately from his wife, had provided her with a small alimentary allowance, out of which she had been able, by careful living, to save £2 a-year, he could not, in the opinion of the Sheriff, prevent his wife from disposing of these savings in the way she thought fit. In the actual state of the facts here, her earnings were just the alimentary fund or allowance she had; and it cannot strengthen the pursuer's claim to his wife's savings out of this fund, that he failed in his obligation to provide it, and left his wife to do so by her own labour.

"A. B. S."

The pursuer advocated.

YOUNG and BURNET for him, argued—A husband is entitled to his wife's earnings even although he has not alimented her. In this case the wife never asked aliment, and though she had done so it would not have been allowed her, because she was earning more than was necessary to support her, and the surplus was claimable by her husband. (Henderson *v.* M'Callum, 1794, Hume's Dec., p. 202.) The case cited by the Sheriff is not applicable, because in it the small fund in dispute was all necessary for the aliment of the wife who survived her husband; and even in that case there was great difficulty and difference of opinion. See the Judges' opinions, Hailes, p. 367. There is no evidence here of any agreement whereby the husband relinquished his *jus mariti*.

FRASER and GEBBIE for the respondent—A husband who fails in his duty to aliment his wife is not entitled to her earnings. But here there is evidence that the husband agreed with his wife that her earnings should be at her own disposal. He himself says in his evidence that he got loans from his wife which he always paid back. They cited Stair I., 4, 9; Bell's Husband and Wife, p. 469; Slanning *v.* Styles, 3 Peere Williams' Rep., 337; 2 Equity Cases, Abridgement, 156.

At advising,

LORD JUSTICE-CLERK—In this case I am prepared to adhere to the interlocutor of the Sheriff, and I rest my judgment upon one of the grounds on which it is placed by him, but on one of these grounds only. I am of opinion that we are justified in holding it to be proved that the pursuer agreed that the earnings of his wife should form an alimentary provision out of which she should support herself and her two children, and that the present demand cannot be made in the face of such an agreement. The pursuer, some years after the marriage, left his wife and children, and went to reside with her father and brother. That is his own statement, and it amounts to this that he voluntarily deserted the society of his wife. No justification for the adoption of this step is alleged. All that he himself says is that he preferred to live elsewhere. But in ceasing to live with his wife and children he made no provision for any payment by himself of any aliment for their support. The separation continued for twenty-five years at least, and the result of the proof is that the entire burden of the support of herself and the children, while children, was thrown upon Mrs Davidson. I think it proved that the pursuer did not contribute in money or in any other way to any appreciable extent to that support, and that the source of the fund out of which they were supported was the earning of wages by Mrs Davidson as a washerwoman. The fund, I think, must be dealt with as the savings of the wife out of wages so earned. Now, under ordinary circumstances, and independent of agreement or the operation of the recent statute, earnings of the wife, whether made during the cohabitation or during the separation of spouses, belong to the husband, and pass *jure mariti* to him. It may be in many cases very hard that it should be so, but such is the undoubted rule of law; the question here is, whether a special case has been made out by which the operation of the general principle of law has been excluded. It does not admit of doubt that a regular written contract, whereby the husband provides a competent and moderate aliment to a wife, from whom he chose to separate himself, and on whom the burden of supporting two children was thrown, would be good in a question with the husband or with the husband's creditors. If so, it cannot be doubted that an arrangement in writing, whereby the husband, contributing nothing, agreed to leave his wife in possession of her earnings, these earnings constituting a moderate aliment, would be valid. But writing is not necessary as a solemnity in such a contract. It might, I think, be proved by parole, and may be made out from facts and circumstances. In the case of Jamieson, quoted by the Sheriff, such an agreement was inferred in reference to the rents of a small property of the wife, of which she had the undisturbed enjoyment for twenty years, having no other alimentary provision. I think the facts proved in this case supply evidence of such an understanding and agreement. The absence of contribution by the husband—the application of the earnings of the wife in his know-

ledge—his perfect acquaintance, as deponed to by himself, with the fact of the deposit of the small excess of these earnings in the bank in her own name, and of her operation on it—his acquiescence in her purchase of a small property in her own name out of it—his dealing with her on the footing of her having the full right in the fund—and in particular, the fact of his repeated borrowing from his wife, and repayment to her from time to time, seem to me to justify the inference of an agreement on his part that these earnings should not be claimed by him, but should form an alimentary fund, which the wife alone should have. If so, and if the fund now in dispute consists, as it is in my opinion proved to do, of savings out of the earnings, there is an end of the question; for savings by a wife out of a proper alimentary fund are her own property, not claimable by the husband who created the fund as one to be peculiarly the wife's, and forming, in fact, part of her own proper estate. A husband who has agreed to a moderate aliment cannot, I think, seize upon any savings out of that alimentary fund which may be in the hands of the wife simply because they have not been all expended. He has, in agreeing to make it alimentary, parted with all prospective interest in it. Holding the facts to establish such an agreement here, I hold the small excess of the fund to have been at her disposal, and so to have competently passed to the defender by her act of transfer of the fund.

Lord COWAN—I am of the same opinion. The ground of action is not that this was a donation which the husband had a right to revoke. The pursuer says twice over in his evidence that he was aware of the existence of the fund, and he borrows from it and repays the loans, thus recognising it as his wife's property.

Lord BENHOLME—This is a very delicate case. I should be sorry to disturb the general rule, and I can support the Sheriff's judgment only on the ground that it is here proved that there was a special agreement that the wife's earnings should be her own. A husband may become his wife's debtor. The English case cited was a very strong one to that effect. It seems to me that this case stands very much on the same footing. The husband allows his wife for thirty years to keep her earnings and deal with them as her own property, and he borrows from her to some extent and several times, and he was always careful to repay. I think, therefore, that there was here an implied contract of thirty years' standing that the wife should have the uncontrolled enjoyment of this fund.

Lord NEAVES—I concur. I think this is an important case, for so far as I know this is the first time that this view has been taken. I can't say I am satisfied with the Sheriff's interlocutor, far less with his note. He says that "as the pursuer failed in his legal obligation of aliment towards his wife, he thereby deprived himself of his right to enforce his *jus mariti*." I cannot adopt that view, but I think there was here an agreement between the parties, a *consensus in idem placitum* that the wife's earnings were to be left at her disposal as an alimentary fund, and that that was a reasonable arrangement in the circumstances. If that is once made out, there is no difficulty, for we are all agreed that the savings of a wife out of an alimentary fund belong to herself. I think, therefore, our judgment should proceed expressly on the footing that there was an agreement; and I am not sure that it was a tacit agreement.

The following interlocutor was pronounced:—

"*Edinburgh, 28th March* 1867.—The Lords having heard counsel on the record, proof, and whole cause, advocate the cause: Find, in point of fact, that the advocator was married to the deceased Jean Tawse or Davidson in or about the year 1835: Find that for some years after the marriage the spouses cohabited and had two children: Find that thereafter the advocator left his wife and children, and went to reside elsewhere, making no provision for contributing to their support and maintenance: Find that the separation continued down to the death of the said Jean Tawse or Davidson, and that during that period the advocator did not make any payment for the support and maintenance of his wife, but that she was maintained from her own earnings: Find that out of the said earnings the sum in dispute was deposited in the bank by the said Jean Tawse or Davidson in her own name, with the knowledge and consent of her husband, the pursuer: Find that it was understood and agreed between the pursuer and his said spouse, that the earnings of the wife should be an alimentary fund out of which she should be supported and maintained during the separation, and that the said earnings were so dealt with during the marriage: Find that the provision so made for the wife's maintenance was reasonable and moderate: Therefore, find in point of law that the said deceased Jean Tawse or Davidson had power to dispose of the said fund, and that the same has been effectually transferred to the respondent, assoilzie the defender from the conclusions of the action, and find the pursuer liable in the expenses incurred, both in the inferior court, and this Court, and remit to the auditor to tax the same and to report." "GEORGE PATTON, *I.P.D.*"

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

Agents for Respondent—Macgregor & Barclay, S.S.C.

ABERDEIN *v.* STRATTON'S TRUSTEES, ETC.

Sale — Auction — Articles of Roup — Relevancy.

Averments which held not relevant to support an action of reduction and declarator, concluding that the pursuer was entitled to a conveyance of certain heritable subjects sold by auction, on payment of the upset price or of the highest offer.

Certain house property in Montrose, belonging to Stratton's Trustees, was exposed for sale by public roup on 28th October 1864, at the upset price of £460. The pursuer's agent attended the sale, and offered the upset price. A competition ensued between the pursuer's agent and John Fairweather, one of the defenders. Fairweather offered up to £650; the pursuer's agent offered £655, and was declared the purchaser. The pursuer now averred that his agent, after making that offer, discovered that John Fairweather was not a *bona fide* offerer, but was acting in the interest of the exposers of the property. After the sale a minute of offer was written out, bearing that the pursuer's offer of £655 being the last offer, had been accepted. This minute, however, was not signed either by the pursuer or his agent, the minute bearing that the agent declined to subscribe. The pursuer afterwards formally protested his right to the property at the upset price. In November following the trustees conveyed the property to John Fairweather. The pursuer now sought reduction of this conveyance, and declarator that he had right to the property at the upset