

one to throw into the mass whatever he gets by the law, but not what is acquired by deed.

MONBODDO. Had the moveables belonged to old Scotstarvet I should have been of the Justice-Clerk's opinion; but here the question is as to the moveables of the late Scotstarvet.

ESKGROVE. Miss Scot takes as heir to the person to whom the moveables belonged, and therefore she must collate.

BRAXFIELD. If the late Scotstarvet had not been infeft, the case would have been different. Here Miss Scot takes by the act of the law. Collation has place in collateral succession; and Miss Scot cannot draw a share of the moveables without collating. As to the English funds, even supposing the case of *Brown of Braid* to have been rightly judged, the succession must be by the law of England, for Scotstarvet *resided* in England. *Locus originis* is nothing: you must go to the court of law of that country where the funds are.

ESKGROVE. I have great respect for the opinion of Lord Hardwicke; but I still adhere to the opinions of this Court in the cases of *Elcherson* and *Henderson*. Scotstarvet had a *forum* in Scotland, but his domicile was in England: so even the case of *Brown* does not contradict my opinion.

SWINTON thought that Lord Hardwicke's opinion was misunderstood.

DUNSINNAN thought that the question was, What effect should Miss Scot's taking the English funds have upon the right to the estate in Scotland?

On the 15th November 1787, "The Lords found that Miss Scott could not take the moveables in Scotland without collating, and found that the succession as to the English funds must be determined in England."

For Miss Scott,—J. M'Laurin. *Alt. R. Blair.*
Reporter, Justice-Clerk.

1787. November 16. ROBERT CARMICHAEL and Messrs. STIRLINGS *against*
Sir JAMES COLQUHOUN.

PART AND PERTINENT.

The right of trout fishing understood as conveyed under the description of part and pertinent, but may be expressly reserved from the grant, or transferred to a third party.

[*Fac. Coll. X. 10; Dict. 9645.*]

JUSTICE-CLERK. Salmon fishings require grants: trout fishings go along with a grant of the lands as part and pertinent. It has been said that trouts were *res nullius*. In one sense they may be said *cedere occupanti*; for, if I have a right to lands, it does not follow that I have a right to trouts swimming in the river; but I have a right to take and kill them. This right may be renounced, or it may be acquired by others. The Crown has no right to trout

fishings any more than it has to hunting or fowling. The clause, *aliorum piscium*, is unmeaning. It could give no right which would not have attended property although not expressed. The salmon fishing, however, must be preserved, and, together with salmon, he may catch trout. In close time Sir James Colquhoun could not catch trout; but the difficulty lies here, how to accommodate the right of the parties so as not to interfere with the salmon-fishing.

MONBODDO. I know nothing in this country which is *res nullius* excepting the air. Every man may use *that*, but few do. I cannot understand a grant *aliorum piscium* to mean nothing. The question is, whether Sir James Colquhoun has acquired a right to the fishing of trouts or lost it? or whether another has acquired it? In *burns* there may be a right, as part and pertinent: not so in rivers; there *must there* be a grant.

HENDERLAND. The Crown has an universal right in land and in water; and, in making grants, it may reserve the fishings or convey them. If Mr Stirling or his authors have possessed trout fishings, the right will be good. If Sir James Colquhoun has only fished for trout at particular times, he can go no farther: if he has exercised it at all times, he has preserved his right.

SWINTON. Fishing is *res nullius*. The right of fishing is properly by grant.

ESKGROVE. Lands and fishings are understood to be the right of the Crown originally. Grants from the Crown *cum piscationibus* carry nothing, unless explained by possession. Such a grant might imply that the Crown was not to resume it. The Crown might interrupt the fishing of salmon without grant; but a subject, having a right, cannot interrupt beyond the limits of his own grant. Heritors may fish trouts *ex adverso* of their own lands, but I doubt whether they can interrupt those who may choose to fish from a boat. Whenever a man can exclude another from a bank, he may so far exclude him from fishing. If Sir James Colquhoun has been in possession of the fishing of trouts, he may maintain his right.

PRESIDENT. In salmon-fishings the Crown may grant the privilege of drawing nets on a neighbour's banks; but I never heard of such a privilege in trout-fishings. Sir James Colquhoun has a clear right as to salmon-fishings, and to such fish as may be caught along with the salmon. The other heritors may fish *ex adverso* of their grounds, but so as not to hurt the salmon-fishings.

BRAXFIELD. The exclusive right as to salmon-fishing is in Sir James Colquhoun. As to trout-fishing, from the nature of property, the heritor *ex adverso* has that right; and no person can do any thing to interrupt it. Fishings may be separated from lands: then the Crown will have a right to *all* fishings. But if the Crown feus out, either *cum piscationibus* or with parts and pertinents, this will carry inferior fishings. A grant *aliorum piscium* may be effectual by prescription, which is good in a grant *a non domino* as well as *a vero domino*. Mr Carmichael has his right from the authors of Sir James Colquhoun: his right is to trout-fishings exclusively. As to Messrs Stirlings, the disposition to them with parts and pertinents will carry trout-fishing. Sir James Colquhoun might have acquired a right to trout-fishing by prescription; but he has not. He has been wont to catch trouts, but not to exercise a trout-fishing: he is not entitled to catch trouts with a net appropriated to that purpose.

On the 16th November 1787, "The Lords, in respect that Sir James Col-

quhoun's right to the salmon-fishings is not disputed in this cause, found that he has right to the salmon-fishing in the river Leven, where it runs through the property of the pursuers: found that the pursuers have a right to fish trouts opposite to their respective properties, with trout-rods or hand-nets, but not with net or coble, or in any other way that may be prejudicial to the salmon-fishing belonging to Sir James Colquhoun." And, 5th December 1787, they "adhered, excepting as to hand-nets," as to which they appointed the petition to be seen: so that the general point is fixed.

Act. J. Morthland, H. Erskine, Ilay Campbell. *Alt.* Wm. Baillie, G. Ferguson, R. Dundas.

Reporter, Braxfield.

1787. November 17. DAVID, &c. ARCHIBALDS *against* MARION MARSHALL.

WRIT—ACT 1579, C. 80—1681, C. 5.

A witness being designed in a deed by a familiar appellation, and subscribing in his proper one, vacates the deed.

[*Fac. Coll. X. 8; Dict. 16,907.*]

HAILES. Here we have a proof of the supine carelessness of men of business. Witnesses ought to subscribe before the testing clause is filled up. How could a writer, with his eyes open, certify that *Hilloch* subscribed as a witness while no such subscription appeared. It is in vain to say that this man had two names, *Hill* and *Hilloch*. By the same argument *Little* and *Littler*, *Smeal* and *Smeallie*, *Rosse* and *Rose*, may be the same names, because they resemble each other. It is also said that *Hill* is the name, and *Hilloch* a diminutive. But mark the consequences: a man may sign *Alexander* and be aptly designed *Sandie*: so *William* and *Willie*; *Richard* and *Dick*; *Robert*, *Rob*, and *Robin*; *Edmund*, *Nun*; *Francis*, *Frank*; *Thomas*, *Tom*, &c. Hence we shall have the following accurate designation: *Dr William Thomas*, advocate in Aberdeen; *William Thom*, witness: *George Alexander*, writer in Edinburgh; *George Sandie*, witness: *Philip Frank, Esq.*, late one of the Supreme Council at Calcutta; *Philip Francis*, witness.—Such instances are numberless.

BRAXFIELD. The Act 1681 is a wise one: since that time no condescendence has been allowed to supply nullities.

PRESIDENT. In the case, *Duke of Douglas against The Creditors of Little-gill*, the defect was found suppliable, and supplied: *that* however related to a deed executed before the Act 1681.

On the 17th November 1787, "The Lords sustained the objection;" and, 4th December, adhered.

Act. G. Wallace. *Alt.* Alex. Abercrombie.