No 25.

Answered; The defender's exclusive right to salmon-fishing is admitted. But, long before the Crown conferred that right, the pursuers authors had acquired their lands, and the trout-fishing as pertinent of these; for in no instance was the fishing of trout ever reserved by the Crown. It could not, then, bestow that right on the defender. Nor is the vague expression of 'other fishings,' sufficient to indicate such an intention.

The COURT seemed unanimous in the opinion, that the right of trout-fishing in a river, though naturally inherent in the property of the adjacent banks, so as to accompany lands as part and pertinent, might yet be reserved from the grant, or transferred to a third party, either expressly or by prescription; and that trouts were *res nullius* in this sense only, that any person standing on a high road or any public ground contiguous to the stream, might lawfully catch them.

Some of the Judges thought the clause 'other fishings' in the defender's charters sufficiently expressive of the exclusive right of fishing trout on the banks in question; which others did not admit; but all seemed agreed, that if he or his authors had that exclusive right, it had been lost by disuse.

The cause was reported upon informations; when the Lords pronounced this interlocutor:

'In respect that Sir James Colquhoun's right to the salmon-fishing is not disputed in this cause, find he has right to the salmon fishing in the river Leven, where it runs through the property of the pursuers; find the pursuers have a right to fish trouts opposite to their respective properties, with trout-rods or hand-nets, but not with net and coble, or in any other way that may be prejudicial to the salmon-fishing belonging to Sir James Colquhoun, the defender.'

Reporter, *Lord Braxfield.* Act. *Dean of Faculty et Morthland.*
Alt. *Solicitor-General et Baillie.* Clerk, *Home.*

S. *Fol. Dic. v. 4. p. 40. Fac. Col. No 5. p. 10.*

1795. *June* 2. ARCHIBALD CAMPBELL *against* COLIN CAMPBELL.

No 26.
A tenant found not entitled to cut sea-ware for the manufacture of kelp, although the lease gave him the lands, with 'parts, pendicles, and universal per-

COLIN CAMPBELL possessed on a lease, which commenced in 1759, one half of the farm of Nether Kames, on the coast of Argyleshire, with the 'houses, 'biggings, yards, orchards, mosses, muirs, meadows, grassings, sheelings, parts, 'pendicles, and universal pertinents thereof, used and wont.'

Archibald Campbell purchased this farm in 1786. He soon after complained to the Sheriff, that his tenant pretended to a right to cut sea-ware for the manufacture of kelp, and therefore he craved an interdict against his doing so in future.

No 26.
tinents thereof, used and wont;' and although a proof was offered, that he and the former tenant had been accustomed to manufacture kelp.

The Sheriff granted the interdict, in respect, that 'making the kelp, and cutting the shores, do not fall to be considered as part and pertinent of a farm.'

Two bills of advocation having been refused, the tenant presented a reclaiming petition, which was (2d December 1794) refused without answers.

In a second petition, which was appointed to be answered, the tenant offered to prove, that he and his father had been accustomed to manufacture kelp ever since the commencement of the lease; and that such likewise, though not to the same extent, had been the practice of their predecessor in the farm.

In the answers, the landlord denied the extent of the practice, which, he *alleged*, had been often interrupted.

The tenant, in point of law,

Pleaded; Wherever a farm, situated on the sea-shore, (which, in so far as it is not necessary for purposes of public utility, is *juris privati*; Stair, b. 2. t. 1. § 5.; Ersk. b. 2. t. 6. § 17.), is let to a tenant merely by the name by which it is generally known in the country, without mentioning the number of acres it contains, or specifying its boundaries, it will be held to include the landlord's right in the shores. If the sea should recede, the tenant will be entitled to cultivate and bank the ground which is left by it; and, for the same reason, he is entitled to those vegetable substances which are produced on the surface of the shore.

The tenant, in the present case, has not been opposed in cutting the sea-ware for the purpose of manuring his farm and feeding his cattle. Since, therefore, it is included in the lease for one purpose, it must be so for every other to which it can be put, *salva rei substantia*; and this holds with regard to the manufacture of kelp, as the sea-ware may be cut for that purpose every third year, and even grows the more luxuriantly for being so.

Independently of the general question, as the farm is let with the 'parts, 'pendicles, and universal pertinents, used and wont,' it must be relevant to prove, from the practice of its possessors, that the cutting of sea-ware, for the manufacture of kelp, is included under that description.

Answered; The right of a tenant extends only to the annual fruits of the surface; Ersk. b. 2. t. 6. § 22. On that account he has no right to mines or minerals, (Stair, 15th February 1668, Colquhoun, *voce* TACK) even for the purpose of manuring his farm, 10th February 1778, Bethune against Jarvis, IBIDEM; nor to the woods which grow upon it; and, for the very same reason, he has no right to sea-ware, which must be of several years growth before it is fit to be manufactured into kelp; 14th November 1781, Lord Reay against Falconer, No 33. p. 5151. And although it has not hitherto been though worth while to object to the tenant's cutting sea-ware for other purposes, his doing so is by no means admitted as a matter of right.

Even if the lease had given an express right to sea ware, it would only have extended to a right of cutting it for the proper uses of the farm, in the same

No 26. manner as it has been found in the case of an express right to cut timber; Gilmour, 16th June 1664, Touch against Ferguson, *voce* TACK.

A subject which is thus of a different nature from those usually included in a lease of land, and different also from those which are expressly conveyed, cannot be understood to come under the description of a pertinent; and the proof offered, especially in a question with the pursuer, who is a singular successor, is irrelevant; Ersk. b. 2. t. 6. § 24.

Upon advising the petition, with answers, the Court had no doubt, that, in the general case, a right of manufacturing kelp could not be enjoyed as part and pertinent of a farm; but several of the Judges thought, that the proof offered should be allowed before answer.

THE LORDS adhered;—see TACK.

Lord Ordinary, *Ankerville.* Act. *M. Ross.* Alt. *Hope.* Clerk, *Sinclair.*

D. D. *Fol. Dic. v. 4. p. 40. Fac. Col. No 171. p. 403.*

If a mill will be carried as part and pertinent; see MILL.

See TACK.