

fishing, which was *inter regalia*, might debar them; because, by their fishing, the salmon were diminished and carried off by those who had no title to take them: That the pursuers could even hinder those who had a right to fish from using excess in fishing below them; such as building cruives too high, or otherwise hindering the salmon from coming up the river; much more could they hinder those who had no manner of title to fish; and, in this action, they had the concurrence of the procurator-fiscal for his Majesty's interest.

No 49.
no right to prevent this, although the defenders had no property in the river.

Replied for the defenders, That any person may fish and take what is *nul-lius*, and are restrained by no law, providing they can have access to the river; and since the heritors, upon whose grounds they fish, do give them allowance, no heritor, upon any other part of the water, has a right to quarrel them: That the argument from cruives, which are regulated by express acts of Parliament, could be of no weight against the defenders, who had done nothing prohibited by any law. And as to the concurrence of the procurator-fiscal, it was *answered*, that his power went no farther than with respect to the penalties in the statutes against fishing in an unlawful time or manner. THE LORDS found, that the pursuers and fiscal were not entitled to any such action against the defenders, except they had fished upon the pursuer's part of the river.

Act. Arch. Hamilton.

Alt. James Boswell.

Fol. Dic. v. 3. p. 367. Edgar, p. 30.

1729. January 7.

EARL of HOME *against* HERITORS of the Parish of Eccles.

No 50.

IN a declarator of property of teinds, the title of the process was a right labouring under many infirmities, but which was contended to be sufficient against heritors pretending no right to the teinds of their lands, and that it was *jus tertii* for them to object against it. It was yielded for the defenders, any presumptive title may do in a question of lands, because no man can pretend interest in or to lands, but in consequence of a written document, which if he has not, it is *jus tertii* to object against any presumptive title in the pursuer; but that can never happen in a question of teinds, because an heritor's right to the lands, suppose he has none to the teinds, gives him a plain interest to object any man's being declared titular of his teinds; *1mo*, Because, every heritor has a right to have his teinds declared free, rather than in the property of any man, and that because several legal interests arise to him thereby; *2do*, Every heritor has an interest that his teinds should belong to the Crown rather than to a subject, the Exchequer being in use to grant tacks to heritors of their teinds at a very easy rate, and rather to belong to the patron, from whom they can acquire at six year's purchase, than to any other

No 50. titular who can demand nine. The LORDS sustained the pursuer's title in the same way as if the action had been a reduction and improbation of land rights.

Fol. Dic. v. 1. p. 519.

No 51.

1731. December 7. LORD DUN *against* TOWN of MONTROSE.

AGAINST a declarator of the jurisdiction of constabulary, the negative prescription being objected, the LORDS found it was not *jus tertii* for the defenders to object the same; for though it is not competent to plead an exemption from the jurisdiction of the Crown, to which every one is subjected by his allegiance, it is otherwise with regard to a private jurisdiction, which is a burden upon the lieges, and the worst of servitudes. See APPENDIX.

Fol. Dic. v. 1. p. 521.

No 52.

A person objected to a service, that there was a nearer heir than the claimant, and craved a proof of the fact. Answered, the objector himself having no title to serve, it is *jus tertii* to him to found on the right of another. The Court refused to allow a proof, reserving the objections as accords.

1766. February 18. ANDREW BURNET *against* ALEXANDER BANNERMAN.

THOMSON BURNET of Kirkhill disposed those lands, and certain salmon-fishings on the river Dee, to trustees, for the behoof of Alexander Bannerman, his nephew.

Andrew Burnet writer to the signet, brother to Thomas, in the view of bringing a reduction of the settlement, so far as respected the fishings, which he considered as limited to heirs-male, took out brieves for serving heir-male in general to Thomas, before the Bailies of Edinburgh.

Alexander Bannerman objected to the service, upon the ground that there was a nearer heir-male in existence, the son of another brother, elder than Andrew; and the Bailies allowed him a proof, and granted commission.

Andrew Burnet advocated the brief; and, upon a remit to the macers, *pleaded, imo*, No more was necessary for him, but to prove that he was habit and repute nearest and lawful heir-male. That being proved, his service must proceed, and cannot be interrupted by a person who has neither taken out brieves to serve, nor so much as pretends to be heir-male. Upon the existence of a nearer heir, the claimant's service may indeed be set aside by reduction; but it is no reason to stop the service, that the objector has right to the subjects by disposition. It is still *jus tertii* for him to found upon the right of another; and, were that allowed, every service might be stopped upon allegations of the same kind.

2d^o, All objections to a service must be instantly verified, and no terms can be allowed for proving exceptions; Stair, III. 5. 33.; Bankton, III. 5. 24. and 39.