

No 2. gate ; whereas the defunct was indweller, and died in Perth ; and, consequently, he ought to have been served there, and not being done so, the same is null, as done *a non suo iudice, et incompetente*. This exception was repelled ; for the LORDS found, that the brief of tutory being directed out of the Chancery, to any Judges generally, the party might serve the same before any Judge, even as a general brief to serve one general heir to his predecessor is sustained, being done before any ordinary Judge, having jurisdiction. And it being further *alleged*, That the defunct had nominated the defender, his relict, tutrix testamentar to the bairns foresaid, so that there was no place to the pursuer to pursue as tutor lawful, from the which office she cannot be thought to have fallen by her second marriage in respect that the said defunct, her husband, in his said testament, had nominated and appointed her to be still tutrix to the said bairns, during the whole time of their pupillarity, as well after her second marriage, as during the time of her widowhood ; and it being *replied*, That that provision ought not to be sustained, as being against the law, which provides, that no woman can remain tutrix after she has clothed herself with a second husband, whereby she becomes under her husband's government, and so cannot manage the office of governing another ; and this being the inviolable custom and practise of the realm, it cannot be inverted by any private appointment, set down in a testament against law and practise ; in respect of which reply, which the LORDS sustained, the LORDS repelled the said exception ; and, notwithstanding of the provision foresaid of the testament, found the relict had tint her office by her second marriage.—*See TUTOR AND PUPIL.*

*Fol. Dic. v. 2. p. 24. Durie, p. 801.*

1743. July 7.

THOMAS FULLARTON of Gallery, &c. Heritors of the Fishings on the Water of Northesk, Pursuers, *against* HERCULES SCOT of Brotherton, Possessor of the Cruive-Fishing on the said Water, Defender.

No 3.

A paction betwixt private parties, to dispense with the statutory regulations of cruives, is invalid, though acquiesced in for upwards of 40 years.

THESE pursuers brought an action against the defender, for keeping his cruives on the said water, in every article contrary to law, not only with regard to the wideness of the hecks, neglect of the Saturday's slop, and of taking salmon in forbidden time, but also by raising the cruive-dykes to such a height above the water, that the fish could neither get up nor down.

*Pleaded* for the defender, That the pursuers were barred, *personali objectione*, from insisting in this action, their predecessors, or authors, having entered into contracts with his authors, whereby they consented, in consideration of an annual payment to be made by the heritors of the cruives, to allow them to

keep their cruives in the manner then and since accustomed; and, for verifying the defence, produced two different contracts, dated in the 1685 and 1687.

By which it likewise appeared, that the pursuers authors, or predecessors, had specially bound themselves not to pursue any action against the defender's predecessor, for regulating the cruives as to the wideness of the hecks, Saturday's slop, &c.; and that the pursuers, &c. had ever since acquiesced in their agreements, and homologated the same, by receiving the annual payments.

*Answered,* The contracts were void and null, the purpose of them being none other than to authorise and encourage what the law has declared to be a transgression, and highly punishable, as appears from Parliament 1424, cap. 11. 1477, cap. 73. 1489, cap. 15. 1535, cap. 17. 1581, cap. 111. All which statutes not only enact very severe punishments for this delict, but require all Magistrates to see the same put to due execution. And the reason of so anxious an attention of the law to check such delinquencies is the same, viz. that they are not only prejudicial to the private interest of heritors, who have the right of salmon-fishing upon rivers; but also, that they are highly detrimental to the public, and plainly tend to destroy the very species of salmon, by hindering them to get up the water to spawn, and so preventing their multiplying in the ordinary way; *2dly,* If such contracts could be supposed to have any effect against the parties who entered into them, they surely could have none against singular successors, which was the case of some of the pursuers.

*Replied,* Though the maxim *pactis privatorum, &c.* holds true in some instances, yet there are many more examples of the contrary, agreeable to the rule, *licet unicuique juri, &c.*; but in order to give both these rules their full effect, it is necessary to distinguish betwixt such regulations as the law introduced, that are truly necessary for preserving the fishing in general, and such as are no otherwise necessary than to limit the use of cruives in favour of superior heritors. The defender acknowledges, that regulations of the former sort cannot be renounced by paction, but such as are of the latter sort, and are only useful to maintain the private interest of the superior heritors, must be binding.

Now, to apply this distinction to the case in hand: The defender admits, all the laws relating to the time of fishing are perpetual and indispensable; and, in fact, his cruives are always taken down in forbidden time. The old statute, with respect to the mid-stream, was found to be in desuetude; 26th January 1665, Heritors of Don, *vocce* SALMON FISHING. Neither is the Saturday's slop essential to the subsistence of the fishing, as experience has proved. The acts that require three or five inches plainly mistake, as two inches are found sufficient to permit the fry to go up and down the water freely. In a word, the unnecessary wideness of the hecks, and Saturday's slop, or the mid-stream, are quite unnecessary for the fishing in general, and can have no other use than to restrain the exercise of the cruives, in favour, or for the private

No 3. advantage of the superior heritors, which they could dispense with; and which, if they were strictly put in execution, would, in a great measure, destroy that valuable branch of our commerce.

*Duplied*, The regulation of cruives are *publici juris*, and cannot be dispensed with; the transgression of the statutes are declared to be crimes, and severely punishable; consequently, pactions dispensing therewith cannot bind the consentor, much less his heirs or singular successors; neither can such transgression operate a prescriptive right in favour of the transgressor.

The pursuers can discover no foundation for averring, that any of these regulations have gone into disuse; on the contrary, the Legislature, while we continued a separate kingdom, enjoined the vigorous execution thereof from time to time; neither has any of our Lawyers insinuated that they could go into disuse. See statute of Robert I. cap. 12. act 74th; James III. act 68th, Parliament 9th; Q. Mary, act 8th, Parliament 1617, art. 9th, act 38th, Parliament 1661; and a case in the 1737, between the Duke of Gordon and Lord Braco. See SALMON FISHING.

THE LORDS repelled the defence founded on the contracts produced, and sustained the pursuer's title to insist in this action.

*Fol. Dic. v. 4. p. 37. C. Home, No 244. p. 394.*

See APPENDIX.