wherein the superior is no party contracter, hath, in satisfaction of what would fall to her by law, after her husband's decease, accepted of a liferent of certain lands in place thereof.——THE LORDS did prefer the superior to the mails and duties; and found, that an acceptation of a liferent, in full satisfaction of all terce and third, was a clear renunciation; and that she not getting the confirmation from the superior, could never return to seek a terce, as falling to her by law, to which she could never be kenned by an inquest, no more than crave the benefit of the third of moveables, in prejudice of the bairns' provisions, and portion natural; and therefore, that she had only right for relief against the heir, and that in satisfaction of all further provision, terce, third, or any other thing, could not be interpret that she accepted these lands of Birks as a part of her terce, and only renounced all further terce, which was the opinion of some of the LORDS. No 17.

Fol. Dic. v. 1. p. 517. Gosford, MS. No 359. p. 174.

*** See Stair's report of this case, No 2. p. 605. *voce* APPROBATE and REPROBATE.

1707. *February* 13. MACKAY LORD REA *against* INNES of Sandsyde.

No 18.
Found competent to an apparent heir, in an action for liquidating the avail of a marriage, to plead, that his father had died not in the fee, being denuded by an adjudger.

THE Lord Rea, as donatar to the ward and marriage of Sandsyde, pursues for having the avail of his marriage liquidated. *Alleged*, There can be no casualty of marriage, because his father did not die the Queen's vassal in the ward lands, but was denuded by an adjudication led by Thomas Crawford, who was publicly infeft, and so came in place of the vassal. *Answered*, This is *jus tertii* to the apparent heir, to found on a third party's right, unless that person did compear and defend. *Replied*, He produced the sasine to instruct his allegeance, and had sufficient interest to propone it; for the avail of a marriage was not only a *debitum fundi* affecting the ground, but also made the heir personally liable to the single or double avail, if a suitable person was offered and refused.—— THE LORDS found it was not *jus tertii*, but competent to the apparent heir to found upon it. Then it was *alleged*, No respect to the denuding, because the public instrument was not expede in the last vassal's lifetime, but since his decease, and posterior to the pursuer's gift. *Answered*, *Nullo modo relevat*, unless the infeftment had been taken after his declarator, which only put the defender *in mala fide*.—THE LORDS ordained the executions of the summons to be produced, that they might be compared with the date of the public instrument. 3*tio*, *Alleged*, No respect to your adjudication and infeftment thereon; because either paid within the legal, or led to the behoof of the apparent heir; and seeing the superior would have got the casualty of marriage by the adjudger's death, if after the legal, he cannot crave it likewise from the apparent heir; for that were to give it twice. The pursuer denying the allegeance, the

No 18. Lords thought the execution by payment within the legal did take off the casualty, but demurred as to the relevancy of the trust and behoof, if that made the infeftment accresce to the apparent heir, and allowed it to be further heard. See decision in Stair, 13th, 14th, and 28th July 1680, King's Advocate *contra* Yeaman, *voce* VASSAL, where intromission was found relevant to take off the casualty; though it was judged a stretch to find it fell by the appriser's death within the legal, till the expiration whereof, the vassal, against whom the apprising was led, continued still proprietor, and by his death only the ward and marriage opened; and the adjudication or apprising, till the ten years be run out, is no more but a *pignus prætorium*, or a security to the creditor for his debt; and the Crown has still the debtor to be its vassal during the legal, and ought not to claim the casualties by both the debtor's and the creditor's death, but must be content with one, though some have demanded both.

Fol. Dic. v. 1. *p.* 516. *Fountainhall, v.* 2. *p.* 349.

SECT. III.

Not competent to object against a Party's title, without a Legal Interest.—What underſtood to be a Legal Intereſt.

No 19.
An action of spuilzie was sustained, although, at the time of committing it, the party injured was at the horn, it being found *jus tertii* to the defenders to allege, that the action was competent only to the King and his donatar.

1554. *June* 16. KINFAUNS *against* CRAIGIE.

ANENT the spuilzie pursued by the Laird of Kinfauns against the Laird of Craigie and others, it was *alleged* by the said Laird of Craigie, and his colleagues, that the said Laird of Kinfauns had no action to pursue the said spuilzie, by reason, that the said Laird was at the King's horn the time that the said spuilzie was committed, and so the action pertained to the King or his donatar. It was *replied* by the said Laird of Kinfauns, That howbeit he was at the horn, the Laird of Craigie's exception was no ways relevant; because he alleged *jus tertii*, and the whole goods libelled were in his possession the time of the said spoliation; and howbeit the King, or his donatar, might have meddled with the gear, yet no other party having no title thereto, nor command of ———, might meddle with the said Laird's gear, it being in his possession the time of the spuilzie; but he had good action to pursue the same after he was relaxed from the horn. In respect of the said reply, the Laird of Craigie's exception was repelled.

Then it was *alleged* by the said Laird of Craigie, That he did no wrong, howbeit such spuilzie had been committed, he being on the ground, as the said