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satisfied and paid of the sums in his comprising by his intromission, and what after counting shall be found wanting, he is willing to pay it. *Answered*, That old privilege indulged to superiors is much in disuetude, and few or no instances of it; but though it were in force, it can by no law nor form come in here. If Gilhaigie were seeking to enter, the Earl might reply on his power to redeem; or, if he, as superior, were pursuing a declarator of non-entry, and Gilhaigie, to stop it, offered a year's rent, to be received as a singular successor, the Earl might exclude him by his privilege; but the process here is a reduction as proprietor, and not as superior. *2do*, In that case, he must pay the debt as it stands, and not by a sham count and reckoning, putting nothing in his purse. *3tio*, The offer is no ways receivable now, when the apprising is so long ago expired, but must be made within the legal, especially you having owned me as vassal, by accepting the feu duties of several years, and the project has no other design but by a tedious process to shuffle the poor man out of his right. The LORDS found the Earl could not redeem here, but prejudice to his raising and insisting in a new process for that effect *speciatim*.

Fountainhall, v. 2. p. 715. and 731.

No 48.

1714. February 10. CRAWFORD against CRAWFORDS.

THE LORDS found the action of exhibition *ad deliberandum* competent to all kinds of heirs male and of tailzie, as well as heirs of line; but found it relevant to stop process at an apparent heir's instance, that it was offered to be instructed that there was a nearer heir male.

Fol. Dic. v. 1. p. 520. Forbes, MS.

. This case is No 9. p. 3986., *voce* EXHIBITION *ad deliberandum*.

1724. February 12.

JAMES, Duke of Hamilton, and Others, against NEIL MACALLUM and others.
In-dwellers in Glasgow.

No 49.

Heritors infest in fishings prosecuted parties for fishing in a certain river. Pleaded, the defenders fished in a part of the river not belonging to the pursuers. The pursuers found to have

THE Duke of Hamilton and other heritors who were infest in the salmon-fishing upon the river Clyde, pursued Macallum and others, who came from Glasgow, and fished salmon in the said river.

It was *pleaded* in defence, That the pursuers had no right to that part of the water in which the defenders had fished, the same belonging to the town of Glasgow, who had a right of fishing, and the defenders had at least their tacit allowance.

Answered for the pursuers, That since the defenders could pretend no right to the fishing themselves, any person who had an express right to the salmon

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.

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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.