

sure, if a party were permitted to call in question the witnesses' depositions after decret obtained ; especially this suspender could not be heard to do it, because he was present when the witnesses were received and admitted, and did not quarrel them at that time, and so can never be heard to do it thereafter ; at least, he cannot do it, *hoc ordine*, but by way of reprobator, which he likewise cannot have, because he did not protest for it the time of admitting of the witnesses. The Lords, notwithstanding, granted letters to the suspender to bring over again the same witnesses, to be re-examined upon the suspender's charges, and modified presently £100 of expenses, to be paid by him to the charger, in case he failied in proving the witnesses to have been suborned, and to have deponed falsely.

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1635. December 4. JOHN KENNEDY of KERMUCKS *against* JAMES AIKENHEAD.

Mr John Abernethy disponed the lands of Glencorse to Mr Adam Bothwell, by two infeftments. That which was taken to be holden of the superior, (who was Craigivar, in place of the Lord Salton,) was never confirmed. After this, Mr Adam, being year and day at the horn, Craigivar gifts his escheat to John Kennedy of Kermucks, who, after general declarator, pursued a special : Wherein compeared Mr James Aikenhead, who had taken a gift of the same liferent of the king, and Alleged, No declarator in favours of Craigivar's donator ; because the rebel was not Craigivar's vassal, in so far as the infeftment to be holden of him was never confirmed ; and, therefore, he being nobody's vassal, (for, as to Mr John Abernethy, the infeftment which he gave to be holden of his superior, denuded him of all right of superiority that he could pretend,) in regard the infeftment was imperfect till it was confirmed ; in respect the said rebel had given a charter of the same lands of Glencorse, to be holden of Craigivar, reserving his own liferent, which charter was confirmed ; whereby he had acknowledged Craigivar to be his superior by that reservation of his liferent. Duplied, There is but two manner of ways whereby one becomes vassal to another, *viz.* either by taking an infeftment (original, or upon resignation,) from his superior, to be holden of him, or by taking infeftment of another than the superior, to be holden of his superior, which, being confirmed, makes the obtainer of the infeftment (original, or upon resignation,) from his superior, to be holden of him ; or by taking infeftment of another than the superior, to be holden of his superior ; which being confirmed, makes the obtainer of the infeftment vassal to the disponer's superior ; but, as for his reservation of his liferent in his son's charter, it cannot be equivalent to a confirmation, seeing he has no further right given him by the superior than he had before, which, if he had got, there were some reason for this. Triplid, The reservation was a sufficient acknowledgment that Craigivar was superior, to whom likewise, by virtue of this same confirmation, the rebel became debtor of the feu-duties during all his lifetime ; so that the rebel could never be heard to disclaim Craigivar for his superior, and no more the donator to his escheat. Quadruplied, Allowing that the reservation might prejudice himself, that he could not come against it, yet the king could not be defrauded by any concession of his, especially seeing he was rebel before the grant-

ing of this charter to his son ; and, *currente rebellione*, the king could not be prejudged. The Lords repelled the exception in respect of the reply.

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1636. *January 20 and 21.* WILLIAM OLIPHANT *against* WILLIAM OLIPHANT OF GASK.

*A Proposition not unfit to be motioned in Parliament.*

To reform the 49th Act of the 3d Parliament, James VI, whereby it is enacted, that possessors of benefices, or ecclesiastical rents, shall tyne and lose their liferents, being year and day at the horn.

There was a great question moved about this, 20th and 21st January 1636, betwixt Mr William Oliphant and William Oliphant of Gask : Mr William having been presented, by the Marquis of Douglass, to a prebendary of the college-kirk of Aberdeen, was denounced rebel, and remained year and day at the horn ; upon which the Marquis gifts his liferent-escheat to William, and, besides, gives a new presentation of the said prebendary to the said William, his son, as vacant in his hands by the rebellion of the said Mr William. There is raised by the tenants, owing the mails and duties of the said prebendary, a multiplepointing, where all pretending right to the same,—as also the Laird of Panmure, who had gotten from the king a gift of Mr William, his escheat and liferent,—compeared. The first dispute was betwixt them and the Marquis's donator, for the mails preceding the date of the presentation given to William his son ; to which the king's donator pretended right, as, *jure coronæ*, belonging to his Majesty, where there was no other superior to claim it. The Marquis, his donator, alleged for him this Act of Parliament ; in the end whereof it is said, That possessors of ecclesiastical rents, remaining year and day at the horn, shall lose their liferent-escheat, sicklike and in the same manner as was statute in the 30th Act of Parliament, 4th James V, that temporal men should lose their liferents : But that Act, James V, makes temporal men's liferents fall to their superior ; *ergo*, sicklike, churchmen's liferents, by the Act, must fall to their spiritual superiors, *viz.* their patrons. The king's advocate Alleged, That the similitude betwixt these two acts was only in this, that beneficed men's liferents should fall, as well as temporal men's ; but that, in this last Act, 1572, it was not determined to whom the beneficed men's liferents should fall and belong ; as was done in the former Act, 1535, anent temporal men's liferents, to which this second is relative. For this point the Lords found that it did belong to the king and his donator, notwithstanding of the said words of the act, in respect that the patron has only *nudum jus præsentandi*, but can never have any right to the fruits of the benefice. But, for the next point brought in question betwixt the king's donator and the person presented by the Marquis to the chaplainry, upon Mr William his rebellion, attour year and day ; it was thought of more difficulty ; whether a benefice did fall by the rebellion of the incumbent attour year and day, so that the patron might present another ; wherein the Lords differed in opinion, some being for the affirmative, but most part for the negative ; who alleged for them these inconveniences, that, if the liferent-escheat fall to the king, *frustra* should the patron present another, during the lifetime of the rebel ; for that were to confer *beneficium sine officio* ; and, *in*