

infist in his reduction, as accords: and declared, that if the defender used diligence, in the reduction, they would take it to consideration, at the conclusion of the cause.

No 5.

*Fol. Dic. v. 1. p. 1. Stair, v. 1. p. 213.*

1666. *January.*

CAMPBELL *against* STIRLING.

ARCHIBALD CAMPBELL of Ottar, by contract of marriage, and infestment following thereupon; did provide Anna Stirling, his spouse, to the lands of Kin-naltie, by charter; carrying *cum molendinis et multuris*. At this time there is no miln upon the lands; but, during the marriage, he builds one; and, after his death, the relict possesseth both lands and miln: whereupon she and her present husband, and tenants, are pursued by this Ottar; for the duties of the miln.—It was alleged, *absolutor*, because the miln was built upon the husband's lands; which she liferented; being infest, *cum molendinis*; and *edificia* built by the heritor, *cedunt solo*; and consequently to the liferenter.—It was *answered*, That milns being *inter regalia*, are not transmitted, without an exprefs disposition and infestment; and the general clause of a charter cannot do it.—*Replied*, That the general clause gives her good right, unless there had been a going miln, at the time of the infestment; in which case, it might have been questionable, unless the lands and miln had been erected into a barony; but where there was no miln; and a new miln is built; the miln accresceth to the liferenter, during the liferent; as well as if she had built it herself, after the husband's death:—which the LORDS found accordingly. Withall the LORDS declared, That if, after building the miln, her husband did thirle any other lands thereto, beside her liferent lands; that she is not to have the benefit of any such restriction.

No 6.

A miln built on an estate, during the incumbency of a liferenter, found to accresce to her.

*Gilmour, p. 130. No 180.*

1666. *February 28.*

Earl of LAUDERDALE *against* Viscount of OXFORD.

THE Earl of Lauderdale, being infest in the barony of Musselburgh; which is a part of the abbacy of Dunfermline; and was erected into a temporal lordship, in favour of the Lord Thirlston, thereafter Chancellor, the Lord Lauderdale's grandfather, in *anno 1587*; before the act of annexation, wherein the erection of Musselburgh, to the Lord Thirlston, is expressly excepted; thereafter, in *anno 1592*, the Queen was infest by the King, in liferent, in the abbacy of Dunfermline; with the consent of the Lord Thirlston, as to Musselburgh, and his resignation, to that effect. Shortly after, that same year, the King gave the Queen, an heritable, and irredeemable right, of the whole abbacy of Dunfermline; which was confirmed by a printed act of Parliament. The Queen lived till the year 1618: after which the King was served heir to his mother, in the

No 7.

The benefit of interruption of prescription, made by a donator during the usurpation, found to accresce to the true proprietor when restored.

No 7.

abbacy of Dunfermline, and infeft therein, being then Prince. The King gave an heritable and irredeemable right, to the Lord Oxenford's authors, of the teinds of Coutland, as a part of the Lordship of Muffelburgh, in anno 1641. And fhortly thereafter, his Majesty did renew the Earl of Lauderdale's infeftment, of the Lordship of Muffelburgh, with *a novodamus*; Lauderdale being forefaulted by the usurpers, Swinton got a donative of the lordship of Muffelburgh; and, among the reft, of the teinds of Coutland; and did raife inhibition and reduction of their rights. After the King's reftoration, the Earl of Lauderdale obtains his infeftment confirmed in Parliament; with an exprefs exception therein, that it fhould not be derogated by the act, *salvo jure*; raifes inhibition of the teinds; and purfues action of fpuilzie; and alfo of reduction.—It was alleged for the defender, *abfolvitor*; becaufe he ftands infeft in the teinds libelled, by infeftment, granted by the king, before the Earl of Lauderdale's infeftment purfued on; and by virtue of his infeftment, King Charles I. and Queen Anne, his authors, have been in peaceable poffeffion, uninterrupted, fince the year of God 1593: and therefore their right is accomplished, and eftablished by prefcription.—It was *answered*, for the purfuer, That the defence ought to be repelled; becaufe, fince the death of Queen Anne, who died in *anno* 1618, till the interruption made by Swinton, by inhibition and reduction, in *anno* 1656, there are not 40 year's run; and, till the Queen's death, the Earl of Lauderdale's grandfather could not purfue; becaufe he had granted refignation in her favours, for her liferent; *et contra non valentem agere non currit prefcriptio*: fo wives provifions, in their contracts of marriage, prefcribe not from their date, but from the time of their husband's death; all obligations prefcribe only from the term of payment; and infeftments, and obligations of relief, from the diftreff.—It was *answered*, for the defender, That this defence ftands ftill relevant; *ist*, Becaufe, as to any interruption made by Swinton, it cannot be profitable to the purfuer; becaufe he derives no right from Swinton: And as to the Queen's liferent infeftment, confented to by Thirlfton, the Queen never accepted of the fame; but of an heritable right from the King that fame year; by which heritable right only, fhe poffeffed, and did all deeds of property; by entering of vaffals, and granting of feus; which a liferenter could not do: Which heritable right, Thirlfton could not milken; becaufe, by a fpecial printed act of Parliament, it is confirmed in Parliament, and paffed the Great Seal, himfelf being Chancellor.—It was *answered*, for the purfuer, That the defence and duply ought to be repelled, in refpect of the reply; becaufe the confirmation of the Queen's heritable right in Parliament was, *salvo jure*; and he was fecured by the act *salvo jure*, in the fame Parliament; and that he knew thereof, at the paffing of the Great Seal, is but a weak prefumption; and fuch knowledge could not prejudge him; nor was he in any capacity to purfue upon his own right, for attaining poffeffion; feeing the Queen's liferent right, and heritable right, were both compatible; and it was evident, the Queen would exclude him, by his confent, in the liferent right; neither can the Queen's acceptance be queftioned, after fo long time; feeing the

acceptance of the liferent was to her advantage and profit, before she got the fee, and did exclude Thirlston's prior right; which would have undoubtedly reduced the Queen's right; and was excepted in the general act of annexation; and would not fall under the act *salvo jure*.—It was also severally alleged, that this Earl of Lauderdale's late right was confirmed in Parliament 1661; and all other rights declared void; and that the ratification should have the force of a public law, and not be derogated by the act *salvo jure*.—It was answered, for the defender, That, in *prescriptione longissimi temporis non requiritur tempus utile, sed continuum*; in consideration whereof, the time of the said prescription, is made so long; and, therefore, captivity, absence *reipublicæ causâ*, want of jurisdiction, or the like, are not respected; 2dly, Thirlston *valebat agere*; because he might have reduced the Queen's infestment of fee; or declared his own right of fee to be effectual after her death. And, as to the late act of Parliament, albeit it does exclude the act *salvo jure*; yet that is *parte inaudita*; and, upon the impetration of a party, *suo periculo*; but the Parliament have never assumed power to take away the private rights of subjects; except upon another or better right; otherwise no man in Scotland can call any thing his own; but a confirmation in Parliament, with such a clause surreptitiously obtained, shall take away the unquestionable right of any other.—It was answered, for the pursuer, That the Parliament had not encroached upon the just right of any other; but had only restored the pursuer to his grandfather's right; and seeing there is no question, but that right was prior and better than the Queen's, and the defender's, and was in no hazard; but, as to the point of prescription, that being a rigorous statute, the Parliament might well excuse the pursuer, for not pursuing the King and Queen; but rather patiently to abide their pleasure, till they were denuded, in favours of private parties.—It was answered, for the defender, That all our private rights, especially of property, are founded upon positive law; and there is none stronger than the right of prescription; and, therefore, if the Parliament can take that away, as to one person, and not generally, they may annul the right of any private person whatsoever.

THE LORDS were unwilling to decide in the whole points of the debate; but did, in the *first* place, consider the right of the parties, without the act of Parliament, in favours of the Queen; or the late act, in favours of the Earl: And, in the point of right, they repelled the defence of prescription; in respect of the duply of Swinton's interruption; which they found to accresce to the pursuer *cujus jure utebatur*; and found, that before the Queen's death, the prescription could not run, in respect of the Queen's infestment of liferent; consented to by Thirlston; which would exclude him from any action, for attaining possession: And they found, that he was not obliged to use declarator, or reduction, which might be competent in the cases of distress, or the rights of wives, or any other right; which yet do always exclude prescription, till action may be founded thereupon, that may attain possession. (See PRESCRIPTION.)

*Fol. Dic. v. 1. p. 1. Stair, v. 1. 370.*