No 457.

The Lords found, That whatsoever the interruption, 40 years, or *immemoria possessione*, before the interruption, behoved to be proved, for they thought that what servitudes were introduced only by possession, by the patience and presumed will of the other party, being either proprietor, or having right of community, any interruption was sufficient to show that the other party willed not, nor consented to the right; and if by such interruptions parties got wrong, it was their own fault, who did not either declare their right, or insist in a molestation *debito tempore*, or use mutual interruptions; but here it was considered, that possession before the year 1610 would be equivalent to immemorial possession, albeit the witnesses were not positive upon 20 years possession before, in respect the years were 50 years since.

Fol. Dic. v. 2. *p.* 130. *Stair, v.* 1. *p.* 140.

No 458.
In a declarator of thirlage founded upon a title in writ, and 40 years possession, found that going to other mills sometimes was no interruption, if the defenders came ordinarily to the pursuers' mill, and paid insucken multures.

1665. *June* 29. Heritors of the Mill of Keithick *against* Feuars.

The heritors of the mill of Keithick pursue certain feuars for abstract multures, who *alleged* absolvitor, because they are infeft *ab eodem auctore*, without restriction, before the pursuer. It was *replied*, The pursuer is infeft in this mill, which is the mill of the barony, and *per expressum* in the multures of the lands in question; and offers to prove that there is a distinct in-sucken multure and out-sucken multure, and that the pursuer has been in possession of the in-sucken multure these 40 years bygone out of these lands. *Duplied*, The defender offers him to prove, that the possession has been interrupted by his going to other mills frequently, and without any challenge or sentence against them; and seeing the coming to a mill is but *voluntatis*, unless they enacted themselves so to do; and that the pursuers infeftment, though express, was latent and unknown to the defender, all that is alleged cannot infer an astriction.

The Lords repelled the duply, and thought that going to other mills some times, as is ordinary in all thirlage, was no sufficient interruption, if they came ordinarily to this mill, and paid in-sucken multure, and therefore found the reply relevant.

Fol. Dic. v. 2. *p.* 130. *Stair, v.* 1. *p.* 291.

No 459.
Prescription found interrupted by a summons of reduction at the instance of an appa-

1672. *July* 24. Edington *against* Home.

Mr George Edington having pursued improbation and reduction of the rights of certain lands against Home of Kimmergane, who hath been in possession more than 40 years; in which pursuit terms being taken to produce, with reservation of all defence in the cause, and against the interest of parties, and all the terms being now run, the pursuer craves certification *contra non pro-*

ducta. The defender *alleged* no certification, because the pursuer's title being as heir to his predecessor, the same was posterior to his summons, and so the summons is null *sine titulo.* It was *answered,* That the Lords do frequently sustain process at the instance of heirs, though they be not actually entered the time of the citation; for, having in them the foundation of a right, though not perfected by the solemnities, the same, when done, is always drawn back to the date of the summons; albeit the titles of singular successors by assignation or disposition will not be sustained, if after the summons, having no anterior ground of right. It was *replied,* That though the Lords sometimes allows the title of heirs, though posterior to the summons, yet that is when no party hath interest; but here the sustaining, or not sustaining of this summons, carries the whole right of the lands in question; for the defender being in possession more than 40 years, he is *tutus præscriptione,* unless it be interrupted by this summons. It was *duplied,* That prescription is most odious, and therefore interruption is sustained upon summonses, albeit no decree can follow upon these summonses through any defect of the titles or formalities, because the very citation is *indicatio animi,* that the party intends to interrupt the prescription; and here the citation is not only within the prescription, but the pursuer's service as heir.

No 459.
rent heir, though executed before his service.

The Lords sustained the summons both for prescription, and sustained process in the reduction and improbation. See Quod ab initio vitiosum.

Fol. Dic. v. 2. p. 130. Stair, v. 2. p. 108.

1677. *December 7.* Henderson *against* Arnot.
1678. *January 11.* Balmerino *against* Cockburn.

No 460.

Partial or clandestine abstraction not sustained as interruption, but going to other mills with the whole grist for one or more years together.

Fol. Dic. v. 2. p. 130. Stair.

*** These cases are No 126. p. 10867. and No 127. p. 10870.

1678. *January 25.* Duke of Lauderdale *against* Earl of Tweedale.

No 461.

Inhibition at a parish church door sufficient to interrupt the positive prescription of teinds.

Fol. Dic. v. 2. p. 130. Stair.

*** This case is No 374. p. 11193.