

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 infest *ab eodem auctore*, without restriction, before the pursuer. It was *replied*, The pursuer is infest 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 infestment, though express, was latent and unknown to the defender, all that is alleged cannot infer an astrictiion.

THE LORDS repelled the duply, and thought that going to other mills sometimes, 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 Kimmernane, 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-*