express words of the act of Parliament, which ordained interruptions to be made by lawful citation of parties. To which is was *triplied* by his Majesty's Advocate, That the statute did not derogate to the act of Parliament, but explained the same anent the manner and form of citation in causes concerning the King. The Lords found the King should be answered and obeyed of the duties, notwithstanding of the alleged prescription, in respect of the foresaid interruption. No 456.

Auchinleck, MS. p. 163.

1662. *November* 14.

Mr Thomas Nicolson *against* Lairds of Bightie and Babirnie.

No 457.
What sufficient interruption of the servitude of common pasturage.

There having been mutual molestations betwixt Mr Thomas Nicolson advocate, and the Lairds of Bightie and Babirnie, anent a common pasturage in the muir of Bighty, lying contiguous to all their lands; it was *alleged* for Babirny, That he ought to be preferred to Mr Thomas Nicolson, and the said Mr Thomas excluded from all commonty, because Babirny stands infeft in the lands of Babirny, which infeftment bears, with common pasturage in the muir of Bighty, and Mr Thomas had no express infeftment therein. It was *answered* for Mr Thomas, That the allegeance is not relevant to exclude him, because he, his predecessors and authors are, and have been infeft in his lands *cum communi pastura*, and by virtue of the said infeftments, in peaceable possession immemorial, or by the space of 40 years, which was sufficient to establish the right of community with Babirnie, notwithstanding his infeftment bears express. It was *answered* for Babirnie, That not only was his infeftment more express, but Mr Thomas's lands and his were holden of diverse superiors, viz. Babirnie's of the King, and Mr Thomas's were kirk-lands; and albeit the muir lies contiguous to Mr Thomas's lands, yet it is not of the same parish. The Lords repelled the reasons of preference for Babirnie in respect of the answer. It was further *alleged* for Babirnie, That the allegeance and answers for Mr Thomas Nicolson ought to be repelled; because he offers him to prove, that Nicolson was interrupted since the year 1610, and condescended, by yearly turning his cattle off the ground, and stoping him from casting peats; and therefore he must say 40 years possession, by virtue of an infeftment preceding that interruption. It was *answered* for Nicolson, *non relevat*, unless either a legal interruption by lawburrows or summons, or at least a complete and full *interruptio facti*, by debarring him one whole year from any deed of community; but for turning off his goods, which were presently put on again, and he enjoying all his profit, such were attempts, and incomplete interruptions, whereof he needed take no notice, seeing he continued in possession; otherways there would be great inconveniences by such interruptions, which would be noticed by the lieges, and yet would cut off the probation of the old possession before the same.

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-*