

- No. 2. to the defender to prove, that in the mean time he might proceed criminally, before the Justice, and instruct the defence by the sentence of the Justice, or whether they would receive the probation themselves, they resolved to hear the parties upon it.

Stair, v. 1. p. 138.

1664. June 24. DUKE and DUCHESS of HAMILTON *against* SCOTTS.

No. 3.
Effect of a
commission
appointed by
act of Par-
liament.

The Duke and Duchess of Hamilton being charged for payment of a sum due to umquhile Sir William Scott of Clerkington, and assigned by him to his four children, alleged, that by act of Parliament commission was granted for deducting so much of his creditor's annual-rents as should be found just, not exceeding eight years, and therefore there could be no sentence against him as to that till the commission had decided. The pursuers answered, That these annual-rents were not due for the years during the time the Duke was forefault by the English, which ended *in anno* 1656, and they insist but for the annual-rents since that year. It is answered for the Duke, That albeit he had paid many of these years annual-rents by force of law, then standing, yet that could not hinder the deduction, but that he would have repetition or deduction in subsequent years. The pursuers alleged he behoved to seek the heir for repetition, and could not deduct from them.

The Lords, in respect of the commission, would not decide nor discuss the allegiance anent the year's annual-rent, but superseded to give answer till the commission had determined, even till seven years after the forefaulture, to make up these that was paid before.

In this process compareance was made for Sir Lawrence Scott, the heir and executor-dative, who alleged that there were 2,000 merks of the sum belonged to him, because his father's assignation to the children contained an express division of their shares, which was so much less than the whole sum assigned. The children answered, They opposed their assignation, which bore expressly an assignation to the whole sum and bond itself; and albeit the division was short, it was but a mistake of the defunct, and cannot prejudice the assignees.

Which the Lords found relevant.

Stair, v. 1. p. 205.

1664. July 7. JOHN MILN *against* HOME.

No. 4.
Act 1661.
Cap. 62.

John Miln, mason, having charged Sir James Home of Eccles for payment of a sum of money due by bond, he suspended, and alleged that he had the benefit of the act betwixt debtor and creditor as to personal execution, seeing he had paid a year's annual-rent, and had consigned a bond of corroboration, joining the rest of the annual-rents to the principal. The charger answered, The suspender could

not crave the benefit of the act, because he had not found caution for the principal and annual, conform to the said act ; for his naked bond of corroboration without caution, could not be interpreted security.

No. 4.

The Lords found the suspender behoved to give security either by caution or infestment.

Stair, v. 1. p. 209.

1665. February 11. EARL OF LAUDERDALE against LORD OXFORD.

The Earl of Lauderdale's goodsir, being infest in the barony of Musselburgh, which is a part of the abbacy of Dunfermline, by a gift from King James *in anno* 1584, excepted by the act of Parliament for annexation of kirk-lands *in anno* 1587, and repeated in the act of Parliament 1593 ; his father got a gift *in anno* 1641, and Oxford got another the same year from the King as heir to Queen Anne his mother, who had an heritable disposition of the whole lordship of Dunfermline from the King after Lauderdale's first right. Lauderdale obtained conformation of his first and subsequent rights in the Parliament 1661, declaring all rights formerly granted by the King since Lauderdale's first right void, which ratification bears an express provision, That it shall not be prejudged by the act *salvo jure cujuslibet*. The defender alleged absolutor *in hoc judicio possessorio*, because his father was infest by the King *in anno* 1641, and by virtue thereof in possession twenty years before this pursuit ; and as for his ratification, the defender not being called thereto, it cannot take away his right, being founded *super jure communi* until the pursuer insist in reduction, in which case the defender shall answer, but is not obliged to answer *in hoc judicio* ; and as for the exception of the act *salvo jure*, it is against the common law ; and the act *salvo jure* is posterior without repeating that exception. The pursuer opposed his ratification, excepting the act *salvo jure*, which being done upon the King and Parliament's certain knowledge, upon consideration of Lauderdale's prior right ; the Lords cannot be judges to reduce the sentence and statute of Parliament, as Durie observes to have been found in the case of the Earl of Rothes and John Stewart of Coldingham, (See Appendix.) The defender repeated his answer, and for these decisions opposed the tenor of the act *salvo jure* 1633, and repeated 1661, whereby the Lords are ordained to decide in the rights of private parties, according to law, without respect of ratification or other private statutes in favours of particular persons such as this, which being after these decisions, clears and enlarges the power of the Lords. The pursuer opposed his ratification and exception of the act *salvo jure*, which bears expressly, That it should stand as a public law, and so was no private statute mentioned in these acts *salvo jure*.

No. 5.
Effect of exceptions from acts *salvo jure*.

The Lords having considered the case, and that such exceptions from the act *salvo jure* were of dangerous consequence to the lieges, they ordained the parties before answer, to dispute the point of right as if such an exception of the act *salvo jure* had not been granted, but they thought that defence upon a possessory