

1710. January 26. MR WILLIAM MUIR, Advocate, *against* The LADY CALDWALL, and FAIRLY her Husband.

MUIR of Caldwell being married to Cunninghamhead's daughter in 1657, he infefts her in a liferent jointure, partly by way of locality, and partly an annuity. At the rising of the West-Country Presbyterians in 1666, he joining with them, and they being defeated at Pentland Hills, Caldwell is forefaulted in the Justice-Court in absence. And, because that practice was new, there is an Act of Parliament made in 1669, ratifying these forefaultures, and declaring them legal, where it is for rising in arms and perduellion. General Dalziel gets the gift of Caldwell's forfeiture, and possesses till the Revolution, at Martinmas 1688, and debars both the relict and heir. By the rescissory Act 1690, Caldwell is restored against the forefaulture, and likewise obtains a special act for repetition of the rents intromitted with by the donatar. Upon this, the heiress of Caldwell and the Laird of Fairly her husband, having insisted against Sir Thomas Dalziel of Binns for restitution of the rents, and having obtained sentence against him, upon an appeal and protest to the Parliament, he is assolied there. The Lady Dowager of Caldwell assigns her right of bygones, during her dispossession by the donatar to the forefaulture, in favours of Mr William Muir, advocate; who pursues the heiress and her husband for payment of these arrears.

ALLEGED, *1mo*,—This is a most odious and unfavourable process; the forefaulture being now declared unjust by Act of Parliament, and he restored, not *ex gratia*, but *per modum justitiæ*; and the warrandice arises from no defect in Caldwell's right, but from his joining with these people, which law now declares was no crime; and therefore she can have no recourse during the years of the dispossession. *2do*, The Acts of Parliament have freed the forefaulted persons from the annualrents during that time; and there is the same parity of reason to extend it to liferents. *3tio*, The Lady concurred with the heiress against the donatar's representative, for refunding the bygone rents; and he being assolied by a vote of Parliament, she must undergo the same fate.

ANSWERED to the *first*,—My liferent being with absolute warrandice, you must answer all supervenient hazards, unless it were by enemies' devastation or an inundation; and here it arose from his own fact and deed in joining the rebels; and likewise from his omission, that, being his wife's curator-in-law, he did not confirm her right; which would have defended against the donatar to the forfeiture. To the *second*,—These restitutions, being extraordinary, and *stricti juris*, are not to be extended *de casu in casum*. And the Act only mentions annualrents; and if it had designed to exclude relicts' liferents, it had been as easy to have named the one as the other; so *casus omissus habetur pro omissio de industria*. To the *third*,—The Lady had two actions; one against the donatar intromitter, and the other against her husband's heir; and the pursuing the one does not exhaust or renounce the other.

The Lords thought the case new; and particularly that some difference was to be made betwixt a locality and an annuity, where there was a personal obligation to pay; therefore they resolved to hear it argued in their own presence, *me referente*.