

1678. July 24. LAIRD OF GRANT *against* M'INTOSH of Comradge.

A PURSUIT for teinds. *Alleged*, An immunity from vicarage, prescribed by not payment for forty years, which takes away *ipsum jus*, vicarage being but like a *servitus itineris*, or *actus*, which loses *non utendo*. THE LORDS found the vicarage totally prescribed *quoad* lint, hemp, milk, and generally all species except calves, lambs, and wool, which commonly paid vicarage in all places; and as to these three, found cessation of payment liberated only for all years above forty. The same had been found before, the Earl of Panmuir and the Heritors of Inveresk, (*see* APPENDIX.); as also, the Parson of Prestonhaugh and his Parishioners, No 61. p. 10761. : And as to roots, it was lately decided between Gibb in Futhesmyre in Aberdeen and Burnet, *voce* TEINDS, where roots and herbs were found not liable in vicarage, unless they had been in use of paying the teind within these forty years; and on the 30th June 1668, the Minister of Elgin against his Parishioners, pursuing for the vicarage of some yeards in Elgin, belonging to the canons of old, it was found they should not pay vicarage, because free forty years back, and past all memory, unless he would prove payment either out of these or any other of the canons' portions within that time to the church, *voce* TEINDS.

*Fol. Dic. v. 2. p. 101. Fountainhall, MS.*

1681. June 16. FRIERLAND *against* LAIRD OF ORBISTON.

ONE Frierland a minister pursues Orbiston for the teinds of certain lands, who *alleged*, Absolvitor, by prescription, he having bruiked the lands free of paying any teind immemorially. It was *answered*, That parsonage teind being established by public law, and not being local or customary by the custom of diverse places, as vicarage is, prescription cannot take away that law, unless it had been universally in desuetude; for albeit some lands be free of teinds, as minister's glebes, and the teinds which did of old belong to the Cistercian order of friars, yet there the common law is taken off by an exception introduced by the canon law, which then was in vigour when the lands were mortified to that order, and so must continue as the rule thereof. It was *answered*, That prescription by the canon law doth take place by immemorial possession; and if prescription do not liberate from the payment of teinds, it will be due for thirty-nine years past; for it being an annual prestation every year, it is taken off by a several prescription of forty years, so that not only the right of teinding should remain, but forty years bygone teinds should be due, albeit the heritor hath *bona fide* enjoyed and consumed these teinds.

THE LORDS found the prescription not to exclude the right of teinding; but found the private interest of this or private ministers to be excluded thereby

No 62.

Found, that lint, hemp, milk, &c. totally prescribe *non utendo* for forty years, also all species of animals, except calves and lambs; as to them and wool, it was found, that cessation of payment liberated only for all years above forty.

No 63.

Parsonage teinds found not to prescribe as vicarage teinds.

No 63.

*quoad præterita*, before the defender was put in *mala fide*, as being fruits consumed *bona fide* upon a colourable title of exemption.

*Fol. Dic. v. 2. p. 101. Stair, v. 2. p. 876.*

No 64.

Whether a right to teinds can be lost by the negative prescription, see No 59. p. 10760.

1749. November 3. DUKE of ROXBURGHE *against* SCOT of Gala.

THE Duke of Roxburghe, in a process against Scot of Gala, claimed right to the teinds of the parish of Lindean, and for his title produced a charter from the Crown *anno* 1607, containing these teinds. The defence was, that the family of Roxburghe never possessed these teinds, therefore, that the pursuer is cut out by the negative prescription, and the defender has acquired the subject by the act 1690, as patron of the parish. It was *answered*, That, by the said act, patrons got only right to teinds not heritably disposed; and *2do*, That a right to teinds is not lost by the negative prescription. It was *replied* to the *first*, That it is the intention of that statute to bestow upon patrons teinds not heritably disposed, that is, teinds to which no private person has an heritable and perpetual right, which is the present case; because the Lord of Erection having lost his right by the negative prescription, the teinds of this parish returned to the Crown, and came to be in the same situation as if they never had been heritably disposed. *Replied to the second*, That vicarage teinds are local, and are unquestionably *funditus* lost by the negative prescription; or, more properly speaking, are consuetudinary, and not exigible, unless so far as they have been in use to be levied. And as to parsonage teinds, that no heritor indeed can claim a total exemption, being due by the public law, which subjects all lands not particularly excepted to the burden of parsonage teinds: But with regard to titulars, that a right to parsonage teinds may be acquired by the positive prescription, and lost by the negative prescription, as well as other private rights.

In support of this argument it was observed, that there is a wide difference betwixt rights founded on private consent, and rights founded on the law of nature, or on the public law; the former sort only are lost by the negative prescription. The reason of the thing extends no further, as shall be by and by explained; and the words of the statute extend no farther, 'Ordains that actions competent of the law upon heritable bonds, reversions, contracts or others whatsoever, either already made, or to be made after the date hereof, shall be pursued within the space of forty years;' where the words 'made or to be made,' plainly limit the subject of the negative prescription to private deeds. As to rights founded upon the law of nature, or upon the public law, there is no reason these should fall by the negative prescription: They are rights known to every mortal, which every mortal must lay his account with. There can be no *bona fides* to object to such rights: For example, the heritors of every parish are liable to uphold the parish-church, and to rebuild the same where