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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.

1749. *November 3.* Duke of Roxburghe *against* Scot of Gala.

No 64. Whether a right to teinds can be lost by the negative prescription, see No 59. p. 10760.

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 disponed; and 2*do*, 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 disponed, 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 disponed. *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 bye explained; and the words of the statute extend no farther, 'Ordains that actions competent of the law upon heritable bonds, reversions, contracts or others whatsomever, 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

rebuilding is necessary: If there should be an example of a certain heritor who had not contributed to this work for centuries, this circumstance would not relieve him; he must contribute whenever he is called upon. In like manner, a right to teinds is established by the common law of the land, and does not depend upon private consent. Every man who purchases an estate without purchasing the teinds must lay his account to be liable for teind: He can have no *bona fides*, and therefore cannot be saved from the claim by any length of time; and this is the very language of our authors and decisions. 'A right to 'teinds (says Lord Stair, B. 2. Tit. 12. § 22.) being founded on public law, 'prescribes not, except as to bygones, before forty years. And the possessor 'cannot prescribe an absolute immunity and freedom, seeing all lands in Scot'land by law are liable in teind, except such as never paid any, being *cum de-* '*cimis inclusis*, or belonging to the Cestertian order, Templars, and Hospitallers, 'or glebes, &c.' The like reasoning is to be found in the decision observed by Stair, 7th February 1666, Earl of Panmuir *contra* Parishioners, 'The right 'to teinds is founded on law, and not a particular or private right; and there'fore, though in a competition among private parties one right to teinds may 'be excluded by another, yet the teinds themselves must always be due', No 59. p. 10760.

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It is quite consistent with this doctrine, that the rights of private parties may be regulated by prescription, both positive and negative. This is evident with regard to superiority; for, though every proprietor of land must have a superior, yet it is often determined by prescription who is the superior. In like manner, though all lands are burdened with teinds, yet prescription may determine the titular.

The defender farther insisted, that there is not such a thing in our law as bestowing a right by the positive prescription, independent of the negative prescription; and that unless the proprietor lose his right by the negative prescription, no other can acquire by the positive. To clear which point, the act 1617 was urged, which puts not the right acquired thereby upon the possession of the purchaser for 40 years without challenge, but upon acquiescence of the former proprietor. This appears from the statute itself, 'declaring, That the 'person who possesses for 40 years, without any lawful interruption, shall ne'ver be troubled, pursued, or unquieted by any person pretending right;' and more fully from the act 12th Parliament 1633, containing a commentary on the said act in the following words: 'Whereas, by act 1617, all heritable 'rights, clad with 40 years possession, are declared to be irreducible in all time 'coming, except the same be quarrelled within the space of 40 years;' therefore, &c. Hence if the person entitled to challenge be *non valens agere* the whole or any part of the time, the positive prescription does not run; as, for example, if the land be liferented by any one deriving right from the person entitled to challenge the possessor's right; see Division 13. *h. t.* *Ergo*, the positive prescription is not independent of the negative prescription, but the consequence of it. And the two following cases are remarkable in-

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stances of this; *1mo*, A registered reversion never prescribes negatively; and, therefore, the positive prescription is not good against it; *2do*, If an infeftment of annualrent be preserved from the negative prescription, by the debtor's paying interest, perhaps for 100 years, no purchaser of the estate, burdened with the annualrent, will be secure.

Now, if the negative prescription, both of land and teinds, must first take place, before there can be a positive prescription of either, the consequence is evident, that the negative prescription being antecedent to, and independent of the positive prescription, must equally take place, whether there be a positive prescription or not. If a party purchase *bona fide* lands, with the teinds thereof, this right must be available to him, to object the negative prescription against the titular claiming the teinds, just as much as if he had the positive prescription. And for the same reason, the defender, who has right to the teinds of the parish by the act 1690, is, by virtue of that right, entitled to object the negative prescription to the pursuer, just as much as if he had been in possession, by the act 1690, for 40 years.

And, in this matter, a right to teinds appears to go hand in hand with a right to land. In a declarator of the property of land, the Presbytery of Perth against the Magistrates of Perth, 24th December 1728, No 34. p. 10723. the LORDS repelled the allegeance of the negative prescription, in respect of the answer, that the defenders had produced no title to the land in controversy; and justly, because a naked possessor has no legal interest to make such objection; and it would be unreasonable to put the pursuer to the expense and trouble of proving interruptions, in competition with the defender, who is only a naked possessor. The same, no doubt, would obtain with regard to a declarator of a right to teinds. But if the Magistrates of Perth had produced a title of property, though not fortified by the positive prescription, to have founded them in a legal interest to make the objection, there appears to be little doubt, that the objection would have been sustained. In the present case, the defender hath undoubtedly a legal interest to make the objection; he has right to the teinds in question by the act 1690, supposing the pursuer's right to be lost by the negative prescription.

The reasoning was closed with an observation, that the point in dispute is of importance to the lieges in general. As the bulk of the teinds in this kingdom have been under tack, it is not in every case that a man, who has an heritable right to teinds, can support his claim by the positive prescription. Now, if no man could plead the negative prescription, who has not the positive prescription to found on, teinds would be in a very precarious state. This consideration may be carried still further: Positive prescription is a privilege granted to his Majesty's lieges only, not to his Majesty himself; therefore, according to the pursuer's doctrine, the actual possession of teinds for a century would not secure the Crown against any private party, producing some old right in his ancestor, unless it could be instructed, by what means the Crown came to acquire the right, which seldom can be done after such a distance of time.

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In answer to this reasoning, it was *insisted* on by the pursuer, That the negative prescription is only of actions, and not of rights of property. An heir apparent makes up a title to his predecessor's estate by a trust adjudication, and calls the possessors to produce their titles; if they cannot produce a good title to the property, whether by a disposition from the pursuer's ancestor, or by the positive prescription, the heir will obtain certification, and prevail in a reduction and declarator. For it was never sustained in this case as an objection, that the pursuer is excluded by the negative prescription.

"Found, That the pursuer had right to the parsonage and vicarage-teinds of the parish, and preferred him to the same."

One thing is clearly established in our practice, that possession for 40 years, upon a good title, does not transfer property by the positive prescription, unless, at the same time, the former proprietor has lost his right by the negative prescription. Upon this principle is founded an effectual objection against the positive prescription, *viz.* that the person to whom the subject belonged was *non valens agere*. But then, admitting that the positive prescription cannot run independent of the negative prescription; it does not follow, that the negative prescription of rights of property can run independent of the positive prescription; though this is Gala's plea, which, therefore, is not well supported by argument. It appears more agreeable to the act of Parliament, and to our practice, that the negative prescription of rights of property can no more run independent of the positive, than the positive can independent of the negative. If the negative prescription alone were to have the effect, why should a habile title be necessary to the possessor, in order to secure him after 40 years? The true conception of the matter appears to be, that, in order to transfer property by prescription, both the positive and negative prescription must concur.

The matter was again laid before the Court by the defender, but with the answers the Duke having produced a charter *anno* 1687, containing a *novodamus* from the Crown of the teinds in question; and it being represented, that the present process commenced in the year 1712, the Court had no occasion to resume the point of law, seeing this new production removed the objection that the Duke had lost his right by the negative prescription, as there was no time for prescription from the 1687 to the 1712.

Fol. Dic. v. 4. *p.* 93. *Rem. Dec. v.* 2. *No* 112. *p.* 223.

*** D. Falconer reports this case:

1749. *December* 8.—THE Earl of Roxburghe obtained a grant, 1607, of the abbacy of Kelso; but the patronages of the churches thereto belonging were expressly reserved to the King; and 1617, the patronage of the church of Lindean, which had belonged to the abbacy, 'with the teinds, fruits, &c. 'belonging to the said vicary,' were granted to Sir James Pringle; which right came into the person of Hugh Scot of Gala.

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The Duke of Roxburghe pursued a declarator against Gala, of his right to the teinds of the parish; wherein it was *pleaded* for the defender, That he had lost his right to them, by the negative prescription; and they, therefore, being in the same case as if no grant had been made, belonged now to the patron, in virtue of the statutes made for that purpose.

Answered, An immunity from teinds cannot be prescribed; the heritors remained liable to the Lord of Erection at the time of the statute establishing the patron's right, which, therefore, did not affect these teinds.

Replied, Although the heritors cannot prescribe an immunity from teinds, yet a titular may lose his right by the negative prescription; which will be beneficial to a competitor, whose title is not prescribed, or to the King; in this case, the titular's right was lost by prescription in 1690; the teinds, therefore, belonged to the King; and, consequently, fell under the statute.

Duplied, There was no prescription run in the 1690, nor is there now; part of the teinds were possessed by the minister, with whose provision the titular was burdened by his erection; and Gala having possessed his by tack from the abbot, there was an action brought against him in 1685, on the supposition that it was expired; which action was not prescribed when the declarator was raised: But without regarding these interruptions, the right could not be lost by the negative prescription, at the time of Gala's grant; as it cannot be pretended the King had then acquired any by the positive.

The Lords, 3d November, found that the right of the teinds of the parish of Lindean was in the person of the Duke of Roxburghe; and this day, on bill and answers, adhered

Reporter, *Murkle*. Act. *R. Craigie*. Alt. *H. Home*. Clerk, *Kirkpatrick*.

D. Falconer, *v.* 2. *No* 108. *p.* 123.

SECT. X.

Thirlage.

1632. *December* 20. Sir A. Hamilton of Innerwick *against* Hamilton.

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Parties having continually, since astriction to a mill, till within a few years of action for abstraction, carried their corns to the mill, the as-

By contract betwixt the pursuer's father and the defender's father, the pursuer's father is obliged, and his heirs, to give infeftment of the lands of , to the defender's father; likeas the defender's father obliges him and his heirs, they being infeft, to grind their corns at the pursuer's father's mill, as astricted thereto; whereupon the defender being convened for abstracting of his multures, and the excipient *alleging*, That the pursuer's self had granted to the excipient's father, and his heirs, an heritable feu-infeftment of the lands libelled, with an express clause of *molendinis et multuris*, and in the *reddendo* containing