

No 15. implement, by his executing a settlement of the estate in terms of the obligation.

The following judgment was pronounced: "Find the onerosity of the bond of tailzie by Hapland not instructed; and therefore that it was alterable by him at pleasure, and was altered accordingly; and farther find, that no action having been brought, or other document having been taken upon the said bond or obligation within forty years of its date, the same falls under and is cut off by the negative prescription; and therefore assoilzie the defenders." A reclaiming petition was refused without answers.

Lord Ordinary, *Monbaddo*. For Boyd Porterfield, *Ilay Campbell, J. Swinton*.
For Joanna, Margaret, and Lillias Porterfields, *Lockhart*. Clerk, *Campbell*.

R. H.

Fac. Col. No 115. p. 340.

1774. July 6.

Mr JOHN M'AULAY, Minister of Inverary, *against* DAVID BLAIR,
Factor for the EARL of BUTE.

No 16.
A decree of locality is subject to prescription, and may be lost *non utendo* for 40 years.

IN the 1651 Mr Alexander Gordon, minister of the English congregation at Inverary, obtained a decree of locality out of the teinds of the Bishops of Argyle and of the Isles, before the High Commission for plantation of churches, appointed by Parliament 1649. A horning was raised upon this decree, at Mr Gordon's instance, in the 1691.

Whether Mr Gordon had attained possession, upon this decree, of the three chalders of victual thereby payable out of the island of Bute, did not appear certain; but, in July 1691, the Lords Commissioners of His Majesty's Treasury, upon consideration of a petition for Mr Gordon, with the said decree of locality, appointed the chamberlains of the rents of the bishopricks, above specified, to pay his stipend, conform to the said decree, for the years 1689 and 1690, and he obtained a renewal of this order, crops 1692 and 1693.

The synod of Argyle obtained a grant from Queen Anne, in the 1705, of the rents and revenues of the said two bishopricks, for the pious uses therein expressed.

The Earl of Bute, in the 1723, obtained a tack from the Crown of the teinds, parsonage and vicarage, payable to the Crown, as come in place of the Bishops of the Isles, furth of the whole lands within the island of Bute, for payment of ten merks Scots, and relieving the Crown of all annuities, taxations, and other public burdens, imposed or to be imposed, upon the said lands, and of the stipends payable furth thereof to the ministers within the island of Bute; and the family have obtained renewals of these tacks of teinds.

Mr M'Aulay, the present minister of Inverary, having obtained letters of horning, charged the factor of the Earl of Bute to make payment of the three chalders of victual, conform to said decree of locality in 1651, for the years

1766, 1769, and intervening years. A suspension was obtained of this charge; and, during its dependence, Mr M'Aulay raised a declarator against the Officers of State, the Duke of Argyle, the Earl of Bute, and the Synod of Argyle, to have it found and declared, "That the pursuer, and his successors in office, ministers serving the cure of the said parish of Inverary, have good and undoubted title to the modification and locality in the decree 1651, particularly the said three chalders of victual forth of the first and readiest of the teinds pertaining to the late bishoprick of the Isles, in the lands and island of Bute.

The original decree of locality 1651 was said to have been burnt, along with the other records of the teind-court; but reference was made to the hornings, and other deeds, as sufficient for proving the tenor thereof.

On the other side, it was *pleaded*; *imo*, Independently of other objections, in point of form and of law, to this decree, that the date assigned to it was a false date, as, from various circumstances, it was utterly impossible that such a decree could have been pronounced of the date assigned to it. And, at advising the cause, the pursuer gave up the point as to the date.

2do, That this decree never having taken effect by possession following upon it, the same was clearly lost *non utendo*, and the pursuer must be left to his action against the Synod of Argyle, as accords.

Observed on the Bench; Supposing the decree were every way formal, yet that decree was totally set aside by the acts after the Restoration, and more especially the act restoring Bishops, who were meant to be restored to every thing they were in possession of; consequently the Bishop of the Isles was entitled to enjoy the teinds in question, notwithstanding any previous decree of locality: That there is no evidence that the presbyterian ministers, upon the Revolution, were put back to what they enjoyed at the Restoration; and it would appear, that Bishops' teinds then went to the Bishops: That there was perhaps an equitable claim, but not a legal, to ministers in this pursuer's situation; and, accordingly, it appears, that the commissioners of teinds authorised the chamberlain to allow the minister the benefit of these three chalders; but, then, this was only till his Majesty's pleasure should be known; and it was entire to the Crown to dispose of them otherwise; although, had this decree, and the effect so long given to it by the Lords of the Treasury, been known of, it may be doubted whether a tack would have been granted, at least without burdening it with the three chalders in question.

The Court "sustained the reasons of suspension, and assoilzied from the declarator."

Act. D. Dalrymple, M^cQueen. Alt. Swinton. Clerk, Pringle.

Fol. Dic. v. 4. p. 90. Fac. Col. No 122. p. 328.