

1664. July 15. THOMAS CRAWFORD *against* PRESTON GRANGE.

Thomas Crawford, as assignee by the Earl of Traquair to a decret of the valuation of the teinds of Lethinhops, obtained decret against the Laird of Preston Grange, heritor thereof; who suspended, upon this reason, That these lands were a part of the patrimony of the abbacy of Newbottle, which abbacy was of the Cistercian Order, which Order did enjoy that privilege, that they paid no teinds for their lands, while they were in their own labourage or pasturage, of which privilege not only the Abbots, but, after them, the Lord Newbottle and the defender have been in possession; and, accordingly, Sir John Stewart of Traquair having pursued the Lord Newbottle before the Commissaries of Edinburgh, *in anno* 1587, for the teinds of the lands of Newbottle, upon the same defence he was assoilzied; which decret standing, must be sufficient to the defender, ay and while it be reduced; likeas, the defender stood infest in the said lands by the King, which express privileges *decimarum more solito*. The charger answered, *first*, That the foresaid privilege, which sometime did belong to all monasteries, was, by Pope Adrian IV. limited to the Cistercian Order, Templars, Hospitallers, and that for such lands only as they had before the Lateran Council; so that the suspender cannot enjoy that privilege, *first*, Because he cannot instruct the lands to have belonged to the abbacy before that Council; *2dly*, That being a privilege granted to churchmen, is personal, and cannot belong to their successors, being lay-men; and albeit the said decret be in favours of the said Lord Newbottle, yet he was Commendator of the abbacy, and so in the title of the Order.

The Lords found this reason relevant, and instructed by the said decret, and suspended, for such part of the lands as were in the suspender's own hand.

*Stair, v. 1. p. 215.*

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1664. December 13. BISHOP of the ISLES *against* JAMES HAMILTON.

The Bishop of the Isles pursuing Hamilton, a merchant in Edinburgh, for his teind fish taken in the Isles, which is a part of the Bishop's patrimony, the defender alleged, That he being a merchant, and not a taker of herring, cannot be liable for the teind thereof, any more than if one should buy corns in the market, or out of the barn-yard, he could be convened for the teind. It was answered for the pursuer, That it was the immemorial custom, that the first buyer from the fishers should be liable to the Bishop of the Isles for the teind of the fish bought; and, for proving thereof, produced a decret at his predecessor's instance against some merchants in Edinburgh, which decret did bear, that, in a former decret, betwixt the same parties, the Bishops had proved immemorial possession against the merchants; *2dly*, The instance holds not of buying corns in the market or barn-yard; but if any body should buy the whole crop, when it was upon the land

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No. 22.

The privilege of being teind free competent to certain orders of friars; also not only to the temporal lords of erection, but to their vassals, for lands in their own possession.

No. 23.

Proof of immemorial possession not instructed by a decret mentioning a former decret where the possession was proved.

No. 23. untaken off, being in the sheaves or stooks, he would undoubtedly be liable, as intromitter, for the teind; so, if any merchant bought not upon the place where the fishes were taken, he was not liable; but buying the fish fresh, as they were taken, in whole boatfulls, and selling them there themselves, such merchants must be liable as intromitters. The defender answered, That the immemorial custom was indeed relevant; but a decret against some few persons could not prove it against others, being *inter alios actum*; but here there was only a decret bearing, that there was a former decret in which that was proved.

The Lords sustained that member against those who bought the herring, and salted them themselves, to be proved by their oaths; and would not sustain the probation of the custom, seeing the principal decret was not produced, unless that, at least, the testimonies proving that custom were repeated and produced out of the old process, that it might appear whether there were any ground of objection against the manner of probation.

*Stair, v. 1. p. 250.*

1664. December 20.

MR. JAMES REID, Minister of North Leith, *against* WILLIAM MELVIL.

No. 24.

The Minister of Leith found to have no right to the teind of fish imported.

Mr. James Reid charges William Melvil for the teind of hard fish bought by the said William in the Lewes, and imported by him at Leith. He suspends, on this reason, that he bought the said fish from merchants in the market, and did neither take the same himself, nor bought them immediately when they were green from the taker, and so can be liable for no teind. The charger answered, That he is *decennalis et triennalis* possessor of getting 20s. of the last, of all fish imported at Newhaven; and, for instructing thereof, produces a decret, *in anno* 1634, and another *in anno* 1662, and, if need be, offers him yet to prove possession. The defender answered, That these decreets are expressly against the fishers or takers of fish, but not against merchants buying and importing the same: And as for the custom, *Non relevat*, unless it were an universal custom, established by sentences; for if some few merchants should have, to save themselves trouble, given an uncertain acknowledgment, according to their own discretion, and no fixed duty, nor any compulsory way, it imports not.

The Lords suspended the letters, except only for such fish as should be taken by the boats and fishers of Newhaven.

*Stair, v. 1. p. 243.*

1664. December 20. EARL of ATHOL *against* JOHN SCOT.

No. 25.

The Earl of Athol having obtained decret against John Scot, before the Commissary of Dunkeld, for the teinds of the said John's lands, he suspends, and raises reduction, on this reason, That albeit the decret bear a defence proponed,