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titles, down to 1747, all refer to the charter 1614, they are therefore just as much qualified by the contract as if it had been narrated in them. The object of the precept of *clare constat* in 1747, was merely to give the right to the heir *tantum et tale*, as it had been enjoyed by his predecessor; and it is admitted no feu-duties have been paid since its date, which both shows the understanding of parties at granting the precept, and strengthens the presumption, that no prior feu-duties had ever been exacted. In these circumstances, there can be no room either for the positive or negative prescription.

THE LORD ORDINARY, "in respect that by the original feu-contract in 1613; the yearly annualrent of 52 merks thereby stipulated, and the like sum of feu-duty, are declared to extinguish each other; and in respect there is no evidence that one farthing of the feu-duty from the date of the contract downwards, was ever paid; found, That the non-payment of feu-duty is equivalent to possession upon the annualrent-right, and therefore prescription, positive or negative, does not strike against the contract, but that it is binding on the parties and their heirs at this day: And in respect it is averred by the charger, that the suspender represents John Earl of Cassillis, the party to the contract, and that the suspender has pointed out no other title upon which he holds the estate than that of heir, found the letters orderly proceeded."

Upon advising a reclaiming petition, with answers, the LORDS, upon the grounds stated by the respondent, unanimously adhered.

Lord Ordinary, *Justice-Clerk.* For the Suspenders, *D. Cathcart.* Alt. *A. Campbell, junior.*  
Clerk, *Homs.*

D. D.

*Fac. Col. No 199. p. 477.*

## S E C T. IX.

## Teinds.

1665. November 24.

BISHOP of the ISLES *against* The FISHERS of GREENOCK.

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In a process for the teind of fish, it was found relevant, that the defenders had been in immemorial possession in the

THE Bishop of the Isles, as being presented by his Majesty to the bishoprick of the Isles, and whole teinds, rents, and emoluments thereof, and as thereby having right to the great teind of all fish taken in and about the isles of Scotland, pursues the fishers of Greenock for the teind of cod and ling taken by them about the isles of Arran, Bute, and Ilsey; but insists only for those taken between Arran and Ilsey or Bute, and not between these and the shore, and

insists against the fishers of Greenock, as fishing in that bounds. The defenders *alleged*, *1mo*, Absolvitor; because the Bishop's right bore expressly, according as his predecessors had been in possession; and it was not libelled, nor could it be proven, that ever the Bishop of the Isles was in possession of the teind of any fish taken by the inhabitants of the main-land, albeit taken in the place libelled; *2do*, Albeit that clause were not insert, yet all teinds of their own nature, and by the custom of this kingdom, are local and consuetudinary, and so can be craved out of no place, or for no particular, unless they had been accustomed to be paid of these particulars by that place; as in some places teinds are paid, not only of stirk and lamb, wool and milk, but of staigs, swine, hemp, lint, eggs, and some places of fruit, and in other places of none of these, and that within the same parishes; and therefore, unless it were libelled, that teinds had been accustomed to be paid in this place, they are not due; *3tio*, Albeit a teind here were due of fish, it could not be due to the Bishop of the Isles, because such teinds being personal, and not predial, follow the residence of the takers, and not the place where they are taken; especially being taken not in any bay or creeck of the isles, but *in mari libero*, several miles from any isle except Ilsey, which is no island, but a rock inhabited by nobody; *4to*, The defenders offer them to prove, that they and others upon that shore of the main-land have been in possession 40 years of a constant fishing of cod and ling in that place, free from all payment of teinds to the Bishop of the Isles, paying only two merks yearly to the tacksmen of the vicarage of Greenock, granted in tacks by the ministers of Greenock. The pursuer *answered*, that the clause in his charter was in his favour, and is to extend the same to all his predecessors possessed, bearing as amply, &c. and that for the possession, it was sufficient that which he had condescended, *viz.* that he offered him to prove, that through all his diocese, the small teind of fish belonged to the ministers as vicars; but the great teind of killing, ling, and herring, belonged to the Bishop, and was possessed by him and his predecessors past memory; but he needs not allege that he possessed in every several place where fish happen to swim; but possessing generally about the isles, not only as to the inhabitants of the isles being in his diocese, but also being taken by the inhabitants of the main-land throughout the kingdom: And as in a barony possession of a part will be sufficient for the whole, so it must be in this benefice; especially seeing that it is but of late there was any considerable fishing in the place in question, and there was no reason, if herring and other fish change the lochs where they are ordinarily found, that because there was never herring teinded in that loch, therefore there was none due there.

THE LORDS found the defence relevant, *viz.* That the defenders, and others upon the main-land thereabout, had been in immemorial possession in the place in question of cod and ling, free from paying any teind to the Bishops of the Isles: But the Lords would not sustain less than immemorial possession of the freedom, in respect of the time the Bishops had been out; nor did they de-

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place in question of cod and ling, free of paying any teind.

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termine the right of the ministers of Greenock, whether they had right to the hail vicarage, or that as a small duty; but reserved that to them as accords: And they found, that the defence of a constant fishing elided the condescendence that this fishing was but new.

*Fol. Dic. v. 2. p. 101. Stair, v. 1. p. 312.*

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The right of teinds suffers not the negative prescription.

1666. February 7.

EARL OF PANMUIR *against* PARISHIONERS.

THE Earl of Panmuir having right to the abbacy of Aberbrothwick, pursues for a part of the teinds thereof. It was *alleged*, Absolvitor; because they had possessed their land forty years free of teind to any body; and by the general act of prescription, all right prescribes not pursued within forty years, and so doth the right of this teind. It is *answered*, That the right of teind is founded on law, and not upon any particular or private right; and therefore, albeit in the case of competition of private parties pretending right to teinds, one right may be excluded by another, yet the teinds themselves must always be due, except where the lands are *decimis inclusis*, and did belong to privileged churchmen of old, such as the Cistercian Order or Templars, manse or glebes.

THE LORDS repelled the defence, in respect of the answer; for they thought, albeit the bygonies of the teind preceding the forty years might prescribe; yet the right of teind could not, more than the customs could prescribe, if they were neglected to be exacted for forty years, or a feu-duty.

*Fol. Dic. v. 2. p. 101. Stair, v. 1. p. 351.*

1666. June 16.

MR ROBERT BENNET, Minister of St Ninians *against* THE TENANTS OF CRAIGFORTH.

No 60.

IN a pursuit for vicarage teinds, pursued at the instance of Mr Robert Bennet, minister at St Ninians, against the Tenants of Craigforth, belonging to the Laird Elphinston; the LORDS found the defenders liable in payment of the vicarage of lamb, stirk, and wool, as being the ordinary vicarage of the country, albeit the pursuer nor his predecessor minister had never been in possession; and assoilzied from all other vicarage teinds, as *decima insolita quæ peti non debent*, unless that the minister would allege, that he and his predecessor had been in possession.

*Fol. Dic. v. 2. p. 101. Newbyth, MS. p. 63.*