

an, and her husband, Fea of Clestrain; which having been sisted in respect of a process then depending for payment of the annualrents in this bond, was not further insisted in, only that it was kept from sleeping by enrolments every year till the year 1752, when it fell asleep.

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The pursuers, as having right to this bond, wakened the foresaid process of pointing the ground, and mails and duties, which was originally brought by their father; they also libelled and insisted in new conclusions for declaring any incumbrances on this estate in the defenders persons satisfied by their intrusions therewith, and for obliging them to account therefor as incumbrancers.

In defence it was *contended, 1mo*, That the adjudication, in consequence of which their predecessors and authors had got possession of these lands, were now become absolute titles of property, and secured from challenge by the positive prescription; *2do*, That the original heritable bond due to Commissary M'Kenzie, which was the foundation of the pursuer's title, was cut off by the negative prescription; and, *3tio*, Objections were made to the pursuer's title to that heritable bond, supposing it still to be a subsisting debt.

The question turned on this point, Whether this was a subsisting incumbrance on this estate, although the property thereof was vested in the defenders, by the positive prescription, which the Court thought were nowise inconsistent; and the following judgment was given:

' THE LORDS repel the defence of prescription, and find the debt is still a subsisting incumbrance on the lands.'

Act. M^cQueen,Alt. H^lay Campbell.

Clerk, Kirkpatrick.

Fol. Dic. v. 4. p. 94. Fac. Col. No 192. p. 124.

SECT. II.

What Subjects may be carried by the Positive Prescription.

1671. February 1.

ALEXANDER FERGUSON *against* PARISHIONERS OF KINGARTH.

ALEXANDER FERGUSON being one of the prebends of the chapel-royal by his Majesty's presentation and collation, pursues the heritors of the parish of Kingarth for the teinds, as being annexed to the chapel-royal, as appears by the books of assumption, and three presentations from the King produced. Appearance is made for the minister of Rothsay, who *alleged* that he had presentation to the kirk of Kingarth from the King, and collation thereupon, and so

No 72.

The teinds of a parish found not acquirable by prescription, in opposition to the King's right.

No 72.

had best right to the teinds of his parish, because *de jure communi decima debentur parochis*; and as for the pursuer, he shows no right by any mortification of these teinds to the chapel-royal; neither can he make it appear, that ever he, or any other prebender, were in possession civil or natural thereof; 2dly, Albeit the prebenders had a right, the same is now taken off by prescription; because it is offered to be proved, that the minister hath been 40 years in peaceable possession before the pursuer's citation, which not only takes away the bygoners, but the whole right, and establishes the same in the minister's person.

THE LORDS found the books of assumption, and the three presentations from the King, sufficient to instruct the pursuer's title, and found the defence of prescription relevant as to the bygoners before the citation; but not to establish the right in the minister, or to take it from the chapel-royal as to years after the citation, and in time coming, in respect of the act of Parliament, providing that the King's interest shall not be prejudged by the neglect of his officers.

Fol. Dic. v. 2. p. 102. Stair, v. 1. p. 713.

1686. February.

HIS MAJESTY'S ADVOCATE *against* The HERITORS near to Dunfermline Muir.

No 73.

FOUND, That neighbouring heritors to Dunfermline muir, which belongs to the King, being infeft with the general clause of common pasturage, and parts and pertinents, they might prescribe the right of a common pasturage in the said muir, and also might prescribe the properties of some parts of the muir, by 40 years peaceable possession of the same, as part and pertinent of their properties, although there was no special mention of the said muir in their rights.

Fol. Dic. v. 2. p. 102. Harcarse, (SERVITUDES.) No 852. p. 243.

* * * Fountainhall reports this case :

THE King's reduction against Murray of Livingston, the Lord Torphichen, Mr John Elies, and other heritors adjacent to Dunfermline muir, was reported by Pitmedden; and the LORDS find not only those heritors, whose charters bear the muir of Dunfermline *per expressum*, but even those which only carry the common clause, *cum communi pastura*, have a right of servitude on it, if they can prove prescription by 40 years possession; though it was alleged to be imprescriptible, as a part of the King's patrimony, though unannexed.

Fountainhall, v. 1. p. 405.