bond on that defect, because they referred the verity of his subscription to his own oath; whereupon there is a commission directed to Cockston, to take his deposition at home, in respect of his indisposition and age; and when he comes to depone, he denied that he ever signed any bond to Newark in 1667; whereupon they finding it was only a mistake in the extractor, the bond being truly dated in 1661, and he had made the figure like to a 7, allowed him a new commission to depone, if he did not truly sign that bond in 1661; which commission was neglected to be extracted, and so the term is circumduced for not reporting it. Calder applies by a new bill, representing, 1*mo*, That they ought to have furnished him with the act. 2*do*, They had disguised the date to preclude him of an obvious defence of prescription arising from the bond dated in 1661, and no pursuit for it till 1702, being 40 years thereafter. *Answered* to the *first*, The law does not oblige the pursuer to furnish the act in this case; and as to the *second*, it was a mere error in writing one figure for another. THE LORDS granted a new commission, on Sir Hugh's own charges, to be reported betwixt and a certain day, but declared they did not loose nor take off the circumduction; but if he should happen to die before the time of his deponing, the decreet should go out against him; but allowed him to be heard on the separate defence of prescription; against which, it was *alleged* by Kilmahew, that *esto* it were prescribed, yet that did not so take away the debt, but I may still prove it to be resting owing by his oath. *Answered*, Prescription being founded on so long a taciturnity and silence, it is reputed equivalent to a discharge, and passing from the debt, and a total extinction thereof; so that the debtor's confession that it was never paid, can neither revive it, nor make it convalesce. THE LORDS found, after 40 years prescription, the party was not obliged to give his oath, whether it was yet resting owing; and though he should confess it, yet he was not *in foro humano* liable for the debt, whatever he might be *in foro poli et conscientiæ*. Then Kilmahew *replied* on interruptions, by processes within the 40 years, and his own minority; which the LORDS found relevant, and admitted to his probation.

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by the defender's oath. Found the defender was not obliged to give his oath; and if he should confess, he was not bound *in foro humano* to pay.

Fol. Dic. v. 2. p. 97. Fountainhall, v. 2. p.

1710. *June* 7. The LADY CARDROSS *against* GRAHAM of Buchlivie.

No 3.
An heritor obtained a decree of sale of his teinds, by which he was empowered to intromit with his own teinds, paying the annualrent of the price to

THE heritor of the lands of Buchlivie obtained a valuation of his teinds in the year 1633, and a decreet of sale in February 1634, against the proprietors of the Lordship of Cardross, titulars of these teinds, decerning and ordaining them to denude themselves thereof in his favours at Whitsunday thereafter, to the crop of which year he was to enter, and pay the price to them, upon their performance. But in case of their failing to deliver to him a valid right to his teinds, it was declared lawful for him to consign the money at the term

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the titular, until he should get an heritable right. He continued in possession for forty years. In a process at the instance of the titular for bygone teind-duties, the decree was found not prescribed *non utendo*, because the heritor had taken benefit of it by intromitting.

aforesaid, and so to intromit with his own teinds, and dispose thereof at his pleasure; or, if he, the heritor, chose rather to detain than consign the price, to pay the annualrent thereof to the titulars till he got from them an heritable right to his teinds, without prejudice to the heritor to require the titulars to denude in his favours at the said term of Whitsunday, or any time thereafter. The Lady Cardross, as factrix for the Creditors of Cardross, pursued James Graham of Buchlivie, for certain bygone teind duties, who defended himself with the decreet of sale aforesaid.

Alleged for the Pursuer, The said decreet is prescribed *non utendo* for the space of forty years after the date.

Answered for the Defender, The heritor having his option either to consign the price, or to retain it for his further security, upon paying annualrent, is in the same case as if he had consigned; and his right by the decreet to require the titular to denude at any term, being *res meræ facultatis*, can never prescribe. Especially considering, that he possessed both stock and teind of his own lands; and the decreet of sale did furnish a perpetual exception to him against the titular, according to the rule, *Quæ sunt temporalia ad agendum, sunt perpetua ad excipiendum.* Besides, it stated the defender in the same case as if he had got a disposition from the titular, which could not have prescribed: And there is no difference, as to the point of prescription, betwixt a judicial and voluntary sale of teinds to the heritor of the lands, since by either, the teinds are consolidated with the stock in his person; and *in omnibus causis, pro facto accipitur, id quo per alium mora fit quo minus fiat, L.* 29. *D. De Regalis Juris.* Again, a long tack, which in our law is esteemed as an heritable right, was found not to prescribe *in toto quoad* the obligation, but only as to bygone duties preceeding forty years, 19th January 1669, Earl of Athol against Robertson of Strowan, No 34. p. 7804.

Replied for the Pursuer; True, a positive right doth not prescribe *negative non utendo*, so as to annul the right, but only hath no effect *retro* beyond forty years; but any ground of action competent to the defender against the titular to denude of his teinds, (which is the present case) is clearly liable to the negative prescription; and the prestations *hinc inde*, betwixt the titular and heritor, of denuding and paying the price, are mere grounds of action. So, 24th February 1669, Earl of Kincardine *contra* Laird of Rothsay, *voce* Teinds, a decreet of sale not adjudging *de præsenti* the teinds to the heritor, but decerning the titular to sell them to him, upon payment of the price, was found to transfer no right to the teinds till the price was paid. 2*do*, The decreet of sale ordaining the titular to denude, and the heritor to pay the price, is exactly like a minute of sale, which certainly prescribes *non utendo*; and the heritor not having required the titular to denude, his possession of the teinds must be ascribed, not to the decreet of sale, but to the decreet of valuation. 3*tio*, An obligation to transmit is only equivalent to an actual intromission, where the right is transmissible by simple consent; whereas here, the heritor could never

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have right without the titular's actual denuding himself. Besides, in this case, the obligation to denude is prescribed, and so can have no effect. 4*to*, As the heritor could exclude the titular from seeking the price, by alleging that the decreet of sale is prescribed, the titular cannot be denied the same liberty to object the negative prescription to him, when required to denude. An obligement or ground of action prescribes by the negative prescription to all intents and purposes of exception as well as action. V. G. One pursued by me upon his bond could not defend himself with the exception of compensation upon my bond that is prescribed; for no exception that is not incorporated as a reversion *in gremio* of the right pursued on, is privileged from prescription. Nor was the heritor's consigning and offering the price, any more *res meræ facultatis*, than pursuing any obligement is, which yet is excluded by forty years neglect.

Duplied for the Defender; It being incumbent upon the titular to denude conform to the decreet, against a certain day, before any performance upon the heritor's part, *Dies interpellavit pro homine*; and it was needless for him to use diligence, when the price remained in his own hands, and he was in possession of the teinds. The decreet cannot be compared to a minute, or obligement to perform; for it was not only a title of action to the heritor, to pursue for a conveyance, or disposition of the teinds, but also a right to him to enter and possess, which he could never lose *non utendo*, unless the pursuer had acquired a contrary right by the positive prescription. The decision betwixt the Earl of Kincardine and Rothsay, though singular enough, doth not meet the case. For it appears not, that there any certain day was appointed for the Earl's denuding, and the heritor's entering to possess, the characteristick difference in this case; where the elapsing of the term completed the sale, without any necessity upon the heritor to require performance from the titular, whose failing to dispone could only prejudice himself, *L.* 155. *D. De Regulis Juris*, and, in the construction of law, *pro facto habetur*.

THE LORDS found, That the prescription *non utendo* doth take no place in this case; and therefore sustained the decreet of sale.

Fol. Dic. v. 2. *p.* 97. *Forbes, p.* 406.

*** Fountainhall reports this case:

THE teinds of Buchlivie belonging to the monks of the Abbacy of Dryburgh, whereof Cardross was Lord of Erection, the creditors pursue him for 24 bolls, as his valued yearly teind; his defence was, that Graham of Fintry, his author, obtained a decreet of sale of these teinds *in anno* 1634, wherein the titular was decerned to dispone, on payment of 2700 merks, as the price put upon them, which he was willing to perform, and during the years he possessed to pay the annualrent of that sum. *Alleged*, No respect to that decreet; for being pronounced in 1634, now past fourscore years ago, and nothing done thereup-

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on, it is prescribed by the negative prescription *non utendo*, no document being taken thereupon during all that space; and though the act 1474 speaks only of obligations, yet the Lords, by their decisions, have extended it to decreets *in foro contradictorio*, as was found 26th July 1637, Laird of Lawers against Dunbar, *infra*, *h. t.* *Answered*, The decreet is opponed, empowering him to possess his teinds for the crop 1634, and in time coming, upon his consigning the price, or retaining it ay till he get a disposition, and paying the annualrent *medio tempore*, which is equivalent to an actual sale, and a consolidation of the stock and teind; so he needed take no other document, but only to possess his own teind, till they should interpel him by offering a disposition, which they never did; see 19th January 1669, Earl of Athol *contra* Strowan, No 34. p. 7804. *Replied*, The decreet at most could amount to no more but like a minute of sale, which could be no title of possession till he had performed his part, which he was so far from doing, that for several years he paid the valued teind duty without ever noticing the decreet of sale, which on all hands was a deserted derelinquished writ. *Duplied*, Whatever payments were made were in his own minority, and so can operate nothing; and whatever might be pretended if he were pursuing on this decreet, that it was prescribed, yet this can never be obtruded against him when he only makes use of it by way of exception, reply, and defence; *nam quæ sunt temporalia quoad agendum eadem sunt perpetua quoad excipiendum*; and exceptions never prescribe. Besides, this decreet bearing mutual prestations, the titular's part of disponing and denuding was *ordine naturæ* first, and he being *primus in obligatione* should have first offered to implement, which he never did, and so the heritor possessing his own teinds hindered the decreet from prescribing. The Lords sustained Buchlivie's defence founded on the decreet of sale, and found it was not lost nor prescribed *non utendo*.

Fountainhall, v. 2. p. 575.

1725. *June* 16.

The Earl of Kelly *against* —— Duncan and her Husband.

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A subject, by original rights, had been granted to heirs male; whom failing, to the eldest heirs female without division. Subfeus were granted to heirs whatsoever. Both kinds of rights came

In the year 1555, the Commendator of the Priory of St Andrews, by a feu-charter, disponed some acres of land to certain persons and their heirs male; which failing, to their eldest heirs female without division, and assignees.

Some of these acres were afterwards purchased from the original feuars, and the conveyances were made to the purchasers and their heirs whatsomever, upon which base infeftment followed.

These rights came at length in the person of Mr Duncan, who dying without heirs of the body, there arose a question amongst his sisters, Whether his succession should be determined by the original feu-charter, or by the after-conveyances?