

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,

that the teinds in question are mortified by the King to a kirk, and that the same was found relevant, and that the said John succumbed in proving thereof, yet he offers him to prove, that before the term elapsed, he produced the mortification before the Commissary, and thereupon took instruments, which is produced.

Which the Lords found relevant.

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

No. 25.

1666. June 23.

EARL of EGLINTOUN *against* LAIRD of CUNNINGHAMHEAD.

The Earl of Eglintoun pursues the Laird of Cunninghamhead for the teinds of Peastoun; who alleged, Absolvitor for £.60 yearly, which, by decret of the Plat, he paid to the Minister of Irvine, and produces the decret. It was alleged, That where the decret bore, "out of the teinds," it was a mere error of the Clerk, and disconform to the ground of the decret, which was a tripartite contract, whereby the Earl of Eglintoun agreed for so much victual, out of his teind, beside what was to be paid by the town of Irvine and heritors; and the heritors obliged them, and their heirs and successors in these lands, to pay so much moneey; which cannot be understood out of their teind, they being obliged, as heritors, and the teind not being theirs, but the Earl of Eglintoun's, who was obliged so much out of his teinds, besides these obligations. It was answered, That this, being to lay a burden of stipend upon the stock, is most unfavourable, and the meaning thereof cannot be inferred, unless it had borne expressly, out of the stock; especially, seeing the teind was under tack, and it was *ex gratia* for them to pay any more than their tack-duty; but now when their tacks are expired, the Earl cannot crave the whole teind, and lay this burden upon the stock; 2dly, The Lords cannot alter the express tenor of the decret of Plat, which was a Commission of Parliament.

The Lords found, That the tripartite contract, as to this, did not burden the teinds; and therefore, seeing the Plat could only decern out of teinds, they found, that, by this contract, the heritors behoved to relieve the teinds of this burden out of their stock.

*Stair, v. 1. p. 380.*

No. 26.

Extent of the burden on the teinds.

1667. June 15.

Mr. HUGH GRAY *against* FORBES, Minister of Innerkeithing, and TENANTS of NEITHER HORSEBURGH.

The tenants of Neither Horseburgh having suspended these two Ministers upon double pointing, they alleged they had made payment, *bona fide*, of their rents conform to their tacks. It was answered, that they were called to Mr. Hugh Gray's decret in *anno* 1656; and charged thereupon thereafter the same

No. 27.

The *bona fides* of tenants paying their rents.