

1676. November 28.

MR GEORGE SHEILL, *against* PARISHIONERS OF PRESTONHAUGH.

MR GEORGE SHEILL pursues his parishioners for their vicarage. Some of the defenders alleged use of payment of a liquidate duty for several years, which imported a verbal tack, and behaved to defend them *per tacitam relocationem*, until inhibition.

THE LORDS sustained the defence until interruption; but found the citation was sufficient.

Others of the defenders *alleged*, That vicarage was local and consuetudinary, and they had never been in use of payment of any vicarage but for lamb, wool, and tirk, whereas the pursuer insists for the vicarage of goose, gryce, lint, and hay, which was never paid by them for the space of forty years. It was *replied*, That the pursuer and his predecessors had been in use of all the vicarage libelled from some of the parishioners, and this being a benefice, interruption of a part preserved the whole.

THE LORDS sustained the defence, and repelled the reply.

1677. July 7.—THE Parson of Prestonhaugh pursues his Parishioners for vicarage teinds. The defenders *alleged*, They had tacks for years to run; which being produced, it was *objected*, That one of them set to the Laird of Waughton was null, as being set without the consent of the patron, for more than three years, after the act of Parliament; *2do*, That the tack being set *in anno* 1609, the boll was rentalled at ten shillings, which was a gross diminution of the rental; *3tio*, The other tack was set without consent of the patron. It was *answered*, That both tacks were clad with peaceable possession for forty years, and so all objections against them were excluded by prescription. It was *replied*, *1mo*, That prescription cannot run against church-men, who are but administrators, and whose express deed cannot prejudice their successors; *2do*, That which is null against a public law cannot be validated by prescription, but both these acts are acts for the public utility. It was *replied*, That prescription is of much more public interest, and is the common security of the whole nation, and there is no exception in the act of prescription, which runs as well against the church as others, and is effectual to validate any right which hath a colourable title.

THE LORDS found, that prescription did validate both the tacks, as unquarrelable during their endurance, both as to the tack-duty and the price. In this process, the LORDS found by the probation, that in this parish there was no vicarage paid, but only of lamb and wool, and in some of the lands, hay, cheese, and geese, but in none of them vicarage of kine, and sustained the same accordingly.

No 61.

Vicarage is local and consuetudinary. One heritor may be freed by disuse of payment of a particular article; tho' others continue to pay that article.

No. 61.

*** Gosford reports this case :

1676. November 28.—THE said Mr George being presented to the kirk of Prestonhaugh, and thereby having right to the parsonage and vicarage teinds, did pursue the whole heritors of the parish for payment of the vicarage teinds in time coming. It was *alleged* for the heritors, That they could only be liable for the vicarage teinds according to use and wont ; so that such heritors as never paid vicarage ought to be free, and others who did only pay some particular kinds or acknowledgments for the same cannot be decernèd for any more, seeing vicarage teinds are of their own nature local or customary, and no heritor is liable but according as he or his predecessors have been in use to pay for many years together. It was *replied*, That he being titular of the whole benefice, the negligence of his predecessor, or their voluntary acceptance of a part, cannot prejudice the pursuer, who hath right to the whole ; and as heritors of baronies, by possessing a part, will have right to the whole rents, albeit for a time he may remit to seek payment for the rest, yet that will not take away his right whensoever he shall call for the same ; so ecclesiastic benefices being of that same nature, the forbearance of any present titular cannot prejudice his successors. THE LORDS did find, That vicarage teinds by our law are local and customary, so that the heritors having possessed their lands free from vicarage by the space of forty years, or have during that time paid only particular species of vicarage, and not all teinds that fall under vicarage, that they shall be only liable accordingly, and that the payment by one heritor more than another did not oblige them ; and so admitted to the heritors' probation how far they and their predecessors had been in use of payment, either *ipsa corpora*, or otherways, for the space of forty years.

Gosford, MS. No 909.

*** Dirleton also reports this case :

THE LORDS found, that vicarage teinds are ruled by custom, and local as to the *quota* and kinds and manner of payment of such teinds as are truly vicarage : So far, that in a pursuit for vicarage teinds, the defenders *alleging*, That some of them had been in use of paying only some certain kinds by the space of twenty years ; the LORDS found the said allegiance relevant to free them of other kinds ; albeit they did reply, that the pursuer was in possession of the kinds in question within the parish ; some others of the parish having been in use to pay the same ; and that vicarage is *nomen universitatis, ut baronia*, and possession of a part interrupts prescription, and is in law possession of the whole.

Reporter, Newton.

Dirleton, No 388. p. 190.