

1666. February 15. LYON of Muiresk *against* GORDON and Others.

JOHN LYON of Muiresk having obtained decret of spuilzie of certain goods, against Gordon and others, they suspend and allege the act of indemnity, that they took these goods, being under the command of the Marquis of Huntly. It was *answered*, That the charger was in friendship with the Marquis, and on his side, and so they cannot clothe themselves with the act of indemnity, as done upon hostility. *2dly*, The act indemnifies only deeds done by command, and warrant of any pretended authority; but here no such order is alleged. It was *replied*, That orders were not given in writ, and if none get the benefit of the indemnity but those who can shew or prove orders, few or none will enjoy it; nor need the suspenders to dispute whose side the charger was on, seeing they acted by order.

THE LORDS found, That it was sufficient to allege that the charger was, the time of the intromission, actually in arms, and acted it with a party, being then in arms, but needed not prove their order, or the application of the goods to public use; but found it relevant, if it were offered to be proved by the suspender's oath, that they had no warrant, or order, or *prout de jure*, that they applied them to their own private use, not for any public use.

*Fol. Dic. v. 2. p. 160. Stair, v. 1. p. 356.*

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Found in conformity with Fairquharson against Gardiner, *supra*.

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## DIVISION XI.

### Possession, how presumed, and what presumed from it.

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#### SECT. I.

Whether the Proprietor is presumed to have uplifted the Teinds.

1684. February 6. Colonel WHITEFORD *against* Earl of KILMARNOCK.

COLONEL Whiteford, having right under the Privy Seal to some teinds and feu-duties of the subdeanry of Glasgow, from the year 1585 to the year 1629, pursued my Lord Kilmarnock for his teinds and feu-duties of these inter-

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vening years, (prescription being interrupted); and offered to prove the defender's predecessor's possession during these years, thus, viz. that his authors were infeft all the time, and have still continued heritors of the said lands, and so are presumed to have intromitted with the teinds; which ought to be sustained as probation, *in re tam antiqua*, it being now impossible to get witnesses so old as to prove the possession.

THE LORDS found, That the pursuer ought to prove the possession for the several years *in communi forma*.

*Fol. Dic. v. 2. p. 160. Harcarse, (PROBATION) No 789. p. 223.*

\* \* \* Fountainhall reports case :

1684. February 6.—COLONEL Whiteford pursuing several vassals of the bishoprick of Galloway (whereof his father was Bishop in 1630) for payment of teind-duties out of the lands now possess by them; *alleged*, Teinds are not *debita fundi*; and unless he offer to prove that they represent, by some passive title, the persons who possessed these lands during the years he claims, he cannot convene them. *Answered*, It is presumed their father possessed the teinds, unless they prove that another did draw these teinds, or had a right thereto. "THE LORDS, on Pitmedden's report, found the Colonel behoved to condescend and prove that the persons whom they represent did specifically possess these lands, and uplift the teinds, the years libelled."

*Fountainhall, v. 1. p. 267.*

\* \* \* Sir P. Home reports this case :

COLONEL Whiteford, as having right by a gift from the King, to the feu and teind-duties belonging to the subdeanry of Glasgow, from the year 1586 to the year 1629, pursues the Earl of Kilmarnock for the teind-duties of his lands. *Alleged* for the defender, That he could not be liable, unless it was offered to be proved that his predecessors intromitted with those teinds those years. *Answered*, That, *in re tam antiqua*, the pursuer was not obliged to prove the defender's predecessors actual intromission; but it was sufficient for him to prove, that the defender and his predecessors had been in possession of those teinds past memory of man; and so it must be presumed that they did intromit with the teinds before that time, unless it could be made appear that any other person intromitted with the same. THE LORDS found, That the pursuer ought to prove that the defender and his predecessors did actually intromit with the teinds the years libelled.