

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.*