" The Lords Commissioners found, That Mr Straton had no sufficient heritable right to the teinds of Lauriston." No 101.

Act. *A. Wedderburn* et *Fergusson.* Alt. *Sir Dav. Dalrymple.* Reporter *Shewalton.*
D. *Fac. Col. No* 190. *p.* 283.

1758. *July* 11.

THOMAS GORDON of Earlston *against* ALEXANDER KENNNDY of Knockgray.

No 102.
An adjudication, without infeftment, is a good title of prescription as to teinds.

THOMAS GORDON of Earlston having right to the patronage of the parishes of Dalry and Carsfearn, with the teinds parsonage and vicarage thereof, brought an action before the court in the year 1740, against the heritors of these parishes, for payment of their bygone teinds. Alexender Kennedy of Knockgray, one of the defenders, insisted upon a title in his own person, to the teinds of his lands, *viz.* an adjudication of the lands of Knockgray, with the teinds and pertinents thereof, led at the instance of John Whiteford, against Alexander Gordon, then of Knockgray, in the year 1691. To this adjudication the defender had right by progress; and having brought a proof of forty years possession of of the teinds of these lands, he *contended*, That he had thereby acquired a right by the positive prescription.

Pleaded for the pursuer, 1*mo*, Neither the adjudication upon which the defender founds his right, nor the grounds upon which it proceeds are produced. The defender acknowledges, that he has lost the adjudication, and refers to the records; but that is not sufficient in a competition of heritable rights, in which a preference is to be sustained to one of the parties. A title is as necessary as possession, in order to establish a right by prescription; and where the sole title upon which prescription is pleaded is only a decreet of adjudication without infeftment, it is the more necessary to produce the grounds of debt upon which it proceeded. Such decreet of adjudication passes of course *periculo petentis*, and could not be the foundation of an incumbrance upon any part of the lands, even after forty years possession, without production of the grounds of debt; and therefore cannot be sustained as a title of prescription of the property of the teinds, without such production. 2*do*, Supposing the adjudication, and grounds thereof, were produced, it is no sufficient title upon which the defender can justly plead the benefit of the positive prescription, unless he can instruct a right to the teinds in the person of the debtor against whom the adjudication was led. A decreet of adjudication, neither clothed with infeftment, nor supported by an anterior title in the person of the debtor, is not such an heritable title as can fall under the words or spirit of the statute 1617. It is truly a right of the adjudger's own creating; because it proceeds upon the sole assertion of his libel, that certain lands, teinds, or other subjects, belonged to his debtor. The validity of this right must depend upon the right which was in

No 102. the debtor to the subjects adjudged, so long as the adjudger rests upon his decreet of adjudication; and if he omits to complete his adjudication by charter and infeftment, he cannot plead the benefit of the statute of prescription; because he cannot instruct an heritable title to the subjects adjudged, proceeding from any superior or author, in terms of that statute. *3tio*, There is not the least colour for supposing that Gordon of Knockgray, against whom this adjudication was led, had any right whatsoever to the teinds of his lands. This was so generally known in the 1691, when the estate was adjudged by various creditors, that none of them adjudged the teinds, excepting the said John Whiteford, who adjudges the lands, with the pertinents and teinds thereof; which words have plainly been thrown in at random. And several circumstances occur in this case, which tend clearly to show, that Gordon of Knockgray, and the persons afterwards deriving right from him by progress, with whom the defender connects, did none of them imagine that he had any right to these teinds. So that the defender's whole plea in this case rests solely upon the slender foundation of his uncompleted adjudication, which, when looked into in the record, appears also to be full of many gross blunders and contradictions in very material articles, which occasion a total uncertainty as to the extent of the sum truly due: and therefore, upon this last separate ground, it ought not to be sustained as an heritable title of property sufficient to found the positive prescription

Answered for the defender to the *first*; The pursuer cannot show the smallest interest he has to demand that the decreet of adjudication itself should be produced. Indeed it cannot now be recovered, as it was lost by an accident in the year 1739. The pursuer has seen it in the record, and there can be no use for extracting it of new. And with regard to the grounds of the adjudication, the production of these is equally unnecessary after 40 years possession has followed; and the adjudication has become an absolute right of property, which cannot now be challenged upon any ground whatever.

To the *second*, If the adjudger could instruct a right to the teinds in the person of him against whom the adjudication was led, there would be no necessity for prescription, nor could it make the right either better or worse; the adjudication itself would, without the help of the positive prescription, transmit the right from the debtor to the adjudger: and as the only use of the positive prescription is, to supply the want of right in the person against whom the adjudication is led, after 40 years possession, it supersedes the necessity of any farther inquiry into the right of the author, which the law presumes *præsumptione juris et de jure*. The statute 1617, although it seems, by the strict words, to require an infeftment in order to establish a proper title of prescription, yet it has always been more largely explained both by our lawyers, and the decisions of the Court, and has been extended to rights not established by infeftment; Stair, B. 2. T. 12. § 23. Teinds may be constituted and trans-

mitted by infeftment, yet still they are a personal subject of such a nature as to pass by a right merely personal. In general, the rule is, That where they have been once vested by infeftment, an infeftment will likewise be necessary to denude the former proprietor; but where the right of the teinds has not been established by infeftment, such teinds can be transmitted without infeftment, and completely carried by a personal right: and, in the present case, there is real evidence, that the teinds in question never were established by any infeftment. An adjudication, if led against a person having a full right to the teinds, immediately, without any infeftment, transfers the full right to the adjudger, subject only to the legal reversion: and, on the other hand, an adjudication, when clothed with 40 years possession, will give a complete right to the adjudger by the positive prescription, even although the adjudication was led against a person having no earthly right to the teinds. No 102.

To the *third*, After the adjudication is secured by the positive prescription of 40 years, it becomes an absolute right of property; nor is the adjudger now obliged to answer any objections arising either from defect of right in the debtor, or informalities in the diligence. It is sufficient for him to say, That the teinds were adjudged to him, and he has possessed the same without interruption for the space of 40 years. Besides, the blunders and contradictions imputed by the pursuer to this adjudication, appear to be of no moment when examined, supposing it were now competent to insist upon them.

"The LORDS found, That the defender had acquired a sufficient right to the teinds of his lands by the positive prescription."

Act. *Miller.* Alt. *Macqueen.* Clerk, *Kirkpatrick.*
G. C. *Fol. Dic. v. 4., p. 96.* *Fac. Col. No 120. p. 220.*

1761. *February* 4. EARL of ABERDEEN *against* HERITORS of NEW-DEER.

No 103.
An heritable right to teinds was found constituted by a redeemable right followed by 40 years possession.

IN a process of modification and locality, at the instance of the minister of New-deer, the Earl of Aberdeen *insisted*, That he had an heritable right to the tithes of his lands of Fedderat, and ought therefore to be subjected to no part of the augmentation, while there remained any teinds in the parish to which the other heritors had not obtained heritable rights.

In support of this right to the teinds of Fedderat, the following state of his titles was set forth.

In 1620, the lands of Fedderat were given off by Irvine of Drum to his second son Robert Irvine, who was infeft upon a charter from the superior.

Robert Irvine was succeeded in the lands by Robert his son and heir, who was infeft in 1670 upon a precept of *clare constat*. Against this Robert many