No 100. of his own lands, and for the same reason they could not be allocated to the minister.

The Lords commissioners adhered.—*See* Teinds.

Petit. *W. Grant.* Resp. *H. Home.*

D. Falconer, v. 1. *No* 126. *p.* 153.

1756. *February* 25.

John Straton of Lauriston *against* the New College of St Andrews.

No 101.
A clause *cum decimis* in a charter of adjudication, though repeated in subsequent charters, was found not to give right to the teinds by the positive prescription, in the person of him who continued to take leases of the teinds from the Crown, the former titular.

The lands of Lauriston lie in the parish of Marytoun. The teinds belonged to the bishopric of Brechin until the abolition of episcopacy in the 1690, when they became vested in the Crown. The lands belonged to the Earl of Middleton, and were apprised from him in the 1670. On this apprising Colonel Charles Straton obtained a charter in the 1695, wherein a clause *cum decimis tam rectoriis quam vicariis* is contained; which clause is repeated in all the subsequent charters. In the 1721, Colonel Straton obtained from the Crown a lease of the teinds of Lauriston; which lease was renewed in 1740, and is still current. In a process of augmentation, modification, and locality, raised by the minister of Marytoun, the question occurred, Whether the teinds of Lauriston, were to be considered as belonging heritably to Straton, or as possessed under lease.

Straton of Lauriston *pleaded*, That the teinds were heritably conveyed to his predecessor by charter from the Crown, and have been transmitted in all subsequent charters, during a space much longer than is required by the act 1617. Neither can the leases of the teinds, which have been inadvertantly taken, vacate this heritable right, or imply a dereliction thereof; the teinds therefore must be held as belonging heritably to Straton, and the augmentation localled accordingly.

Answered for the New College of St Andrews, as having right to other teinds in the parish of Marytoun: The question is not, whether an heritable right already established to the teinds of Lauriston has been vacated or delinguished? but, whether such heritable right has ever been constituted in the person of the proprietor of Lauriston? The act 1617 requires not only heritable infeftments, but also continued possession for forty years; now, Straton and his authors have not possessed the teinds as heritors, but as tenants by lease from the Crown. The consequence of the argument used by Straton would be, that if an heritor can once procure a clause *cum decimis* to be inserted in his charter and sasin, he may continue to take leases of the teinds from the crown, and after the expiry of forty years, may plead an heritable right to the teinds by positive prescription, notwithstanding his possession as tenant.

" 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