1758. *July* 11. GORDON of Earlston *against* KENNEDY of Knockgray, and OTHERS.

THE pursuer had right to the patronage of the parish kirk of Dalry, with the teinds, parsonage, and vicarage thereof.

Part of this parish of Dalry, and part of the neighbouring parish of Kells, were erected, about 100 years before the present action was raised, into a new parish, called the parish of Carsfairn.

In the year 1740, the pursuer raised and executed an inhibition of teinds against the heritors of the old parish of Dalry, comprehending that part thereof which was included in the new erection of Carsfairn, and thereupon brought his action against the heritors, and amongst the rest against the defender, Alexander Kennedy, heritor of the lands of Knockgray, which made part of the old parish of Dalry, united and erected into the new parish of Carsfairn.

Against this action the defender first pleaded, that the pursuer had produced no sufficient right to the patronage, but this defence was repelled by Lord Kilkerran, as Ordinary, who "found it not competent to the defenders to object to the pursuer's title, as they have produced no title of their own to the said right of patronage."

The defender, Mr. Kennedy, then separately pleaded, that he had an exclusive right to the teinds of his own lands, in virtue of an adjudication of the said lands, 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 the teinds of these lands, he contended that he had thereby acquired a right by the positive prescription.

On advising the representation upon which this plea was stated, along with the former, the Lord Ordinary "adheres to his former interlocutor of 22d July last, finding it not competent to the defenders, who pretend no right to the patronage, to object to the pursuer's right to the same; and repels the defence for Alexander Kennedy of Knockgray, founded on his charter of adjudication; finds no evidence that the parish is a parsonage, and repels the defence which the defenders founded on that allegeance, but finds the defenders only liable during the several years in which they were proprietors of the land."

Mr. Kennedy petitioned against this interlocutor, and the Court, *June* 19, 1756, "Remitted to the Ordinary, to inquire whether the parish of Carsfairn was erected before the purchase of the barony of Earlston from the family of Kenmuir, or thereafter. *2dly*, To hear parties upon the following fact, viz. Whether the defender's lands were, before the erection of Carsfairn, part of the parsonage of Dalry, or of the parsonage of Kells? *3dly*, To inquire at what period the adjudication of the lands and teinds of Knockgray, &c. came into the person of the heritor and possessor of these lands, and to proceed in the cause, and to determine or report."

Lord KILKERRAN made the following report to the Court:—

"After the competition between Gordon of Kenmuir, and Gordon of Earlston, for the patronage of the parish of St. John's kirk of Dalry, was determined in

favours of Earlstoun, Earlstoun pursued the several heritors for their bygone teinds, and these processes are all now over, except with the present defenders, whose defences are now under your Lordships' consideration.

"Their defences were first—That the pursuer had no title to their teinds, as their lands lay not in the parish of Dalry, but in the parish of Carsfairn; and that the pursuer produced no title to the teinds of the parish of Carsfairn, other than a charter on his own resignation in 1639, which could give no title to their teinds, unless he could show that he had been possessed of an anterior right.

"ANSWERED for the pursuer,—That without entering into that question, whether *esto* he had no other title than that charter, it might be competent for the defenders to object to it, yet he had no occasion to dispute that point, for that so far as concerned the defenders' teinds he had an anterior right; the fact being, that the parish of Carsfairn was erected from a part of the parish of Dalry, and a part of the parish of Kells; that the defenders' lands lie within that part which was taken off the old parish of Dalry, and as the family of Kenmuir had been undoubted patrons for centuries past of the old parish of Dalry, from whom Earlstoun derived right, and on that ground was preferred to Gordon, now of Kenmuir, however it might be competent for the defenders to call Kenmuir in a multiplepoinding, it was not competent for the defenders to object to Earlstoun's right; and upon that ground it was, and not on the general ground that I found it not competent to the defenders to object, who pretended no right themselves. I say it was upon that ground that I so found, and not on the general ground, that it was not competent for the defenders to object to the charter 1639, as giving right to the patronage of Carsfairn.

"A petition is presented against this interlocutor, and before advising it, your Lordships remitted to me to call and hear parties on two points.

"1*mo*, Whether the parish of Carsfairn was erected prior, or posterior to Earlstoun's purchase of the patronage of Dalry from Kenmuir? 2*do*, Whether the defender's lands were, before the erection of Carsfairn, part of Dalry, or part of Kells, and to report?

"With respect to the first, whether Earlstoun's right from Kenmuir was prior or posterior to the erection, I own, did not appear to me to be material, when I pronounced the interlocutors, finding it not competent to the defenders to object, as they produced no right of their own, however it might be competent to Kenmuir, who was undoubted patron, if Earlstoun was not. However, in obedience to your Lordships' commands, I have heard parties, and none of them can with any certainty say at what time this erection was.

"But says the pursuer, let that erection have been when it will, when we see the apprisings led in 1635 and 1644, to which Earlstoun acquired right, the defender's lands of Knockgray are mentioned in these apprisings, as lying in the parish of Dalry, that must in *re tam antiqua*, where nothing is said to the contrary, be evidence that this erection had not yet been when these apprisings were led, and consequently not when Earlstoun acquired right.

"Its true this is not a demonstration, but in *re tam antiqua*, it must be held as evidence, when no contrary evidence is brought.

"And with respect to the second point, it is admitted to be the common report that the defender's lands were part of Dalry before the erection.

" There was another point also remitted to me to hear parties on: there was a particular defence for Knockgray—That he had acquired right to his teinds by prescription on his adjudication, though no infeftment had followed on it, and it was remitted to me to inquire at what period the adjudication of the lands and teinds of Knockgray came into the person of the defender's predecessor.

" But it had perhaps been more material to inquire at what period they began to possess, and I do not find any sufficient evidence that the possession had been forty years before the process."

1757. *November* 16.—" Of this date, the Lords, upon report of Lord Kilkerran, before ANSWER, allow the defenders to prove, *prout de jure*, the time of commencement of Kennedy of Knockgray, and his authors, their possession of the lands and teinds of Knockgray, and allow the pursuer a conjunct probation."

1758. *Feb.* 21.—A proof having been taken, " the Lords find it proven that Alexander Kennedy of Knockgray, the defender, has acquired a sufficient right to the teinds of his lands by the positive prescription, and therefore assoilyie and decern."

Lord Kilkerran observes,—" This determines a material point, that an adjudication or disposition to teinds, without infeftment, is a sufficient title for the positive prescription."

In a petition against this interlocutor the pursuer pleaded, 1*mo*, That the defender was bound to produce the decreet of adjudication, which was his title of possession, and that, until that was done, he could not be allowed to found upon it.

2*do*, That he was farther bound to produce the grounds of debt upon which he proceeded.

3*tio*, Supposing both the adjudication, and the grounds thereof, were produced, it was no sufficient title for the positive prescription, unless the defender instructed a right to the teinds in the person of the debtor, against whom the adjudication was led. A decreet of adjudication, not clothed with infeftment, nor supported by an anterior title in the person of the debtor, is not such an *heritable title* as falls under the words of the act 1617. It is true that, in practice, the statute has been extended to tacks, pensions, patronages, teinds, and other heritable rights, which do not require infeftment to their constitution or transmission; but it does not follow from this, that a decreet of adjudication, which is merely a diligence of the law, is a proper title either in the terms or from the analogy of the statute, upon which prescription can proceed. *Stair* seems not to admit the positive prescription of teinds, even upon a disposition without infeftment; (*Stair, tit. Prescriptions*, 11, 21, and 23;) and the same doctrine is supported by decisions—*Chatto* against *Moir*, 25*th June* 1745; *Minister of Roxburgh* against *Fenington*, 1738; *Nicholson* against *the Viscount of Arbuthnot*, 1730. But the pursuer need not argue the point so high, because supposing a disposition to teinds without infeftment were a sufficient title of prescription, and supposing the statute also to extend to patronages, &c. this gives no authority for extending it to a bare decreet of adjudication without infeftment or production of title of the debtor against whom the adjudication was led.

ANSWERED, 1*mo*, The pursuer has no interest to insist on production of the decreet of adjudication, having already seen it in the record, and it would merely

be putting the defender to needless expense, to compel him to produce a new extract of it.

2do, Neither is there any foundation for the pursuer's demand for production of the grounds of adjudication. It never was disputed, that after forty years it was not necessary to produce the ground of an adjudication in order to support it.

3tio, Although, from the words of the act 1617, an infeftment seems to be necessary to establish a title of prescription, yet the statute has always been explained otherwise; (*Stair, tit. Prescriptions, sec.* 23;) where it is said that the act extends to patronages or offices which are heritable rights, although not always constituted by infeftment, also to long tacks. Accordingly it has always been held that where infeftment is necessary to transmit the right, if derived *a vero domino,* so infeftment must likewise be necessary, as a title to acquire the right by prescription, when it flows *a non domino.* But when infeftment is not necessary to the constitution or transmission of any right, neither is infeftment necessary as a title to acquire such a right by prescription; and therefore, as the right to teinds, which have not previously been established by infeftment, can be transmitted without infeftment, by a right merely personal, it follows that infeftment is not necessary to establish a title to them by prescription. In this case, there is real evidence that the right of the teinds in question never was established by infeftment, as they are parsonage teinds, and are claimed by the pursuer, as patron, under the acts 1690 and 1693. If therefore a bare disposition, without infeftment, would be a sufficient title of prescription, there can be no doubt that a simple decreet of adjudication is also a sufficient title; and as to what is said by the pursuer, that such a decree is no title of prescription unless the party founding on it can instruct a right to the teinds in the person of the debtor against whom the adjudication was led, the answer is, that the only use of the positive prescription is just to supply the want of right in the party from whom the title is derived.

1758. *July* 11.—The Lords adhered to their interlocutor. Lord Kilkerran says,—"It was a parsonage on which no infeftment could pass till the year 1690, *ergo* an adjudication before the 1690, which this is, is a good title for prescription. On this reasoning the Lords adhered; and would not the argument have been the same in the case of an adjudication of any lands on whose teinds no infeftment had ever followed?"

This case is reported in *Fac. Coll. (Mor.* 10,825.)

1758. *July* 11. BURNS *against* PICKENS.

THIS case is reported by *Kames, (Sel. Dec.* No. 149, *Mor.* 5275,) and in *Fac. Coll. (Mor.* 5273.) Lord KILKERRAN'S note is as follows:—

"The act 1695 may be eluded many ways.

"1*st,* Where he serves to his predecessor last infeft, he at the same time serves *cum beneficio* to the person who was three years in possession.

"2*dly,* If in place of serving he pursues a sale.

"3*dly,* He may elude the act this way, by really borrowing money to the