1771. *June* 22.

JOHN SINCLAIR of Freswick, *against* SIR JOHN SINCLAIR of Mey.

No 105.
An heritor's possession of his teinds, maintained upon tacks only, though for the full period of prescription, is not sufficient to constitute an heritable right.

THE enactment of the statute 1690, c. 23. whereby teinds, not heritably disponed, were granted to the patrons in lieu of the right of presentation, with the burden of the stipends, tacks, &c. was, by the statute 1693, c. 25. extended to parsonages, under the proviso, 'That where the beneficed parson, being 'a minister, having a cure, is in possession of said teinds as titular, he shall 'continue and remain in the possession thereof aye and while the patron shall 'obtain a just and reasonable stipend to be modified and settled upon him.'

Under the authority of this proviso, the parson of Cannisby, which was a parsonage kirk, continued in possession of the teinds, by receiving payment of the tack-duties from the different lessees, Sinclair of Mey, and others, from the 1574 down to the 1708.

The parish of Cannisby was almost entirely composed of the estate of Mey and barony of Freswick. In 1588, the patronage was granted by the Crown to Muat of Balquholly, from whom it was acquired by the predecessors of Freswick, and had uniformly been carried down in all the title-deeds of the estate.

In 1708, the leases of the teinds being expired, the minister of Cannisby brought a process of modification, &c.; in which Freswick appeared, produced his title to the patronage, and claimed the privilege of exeeming his own lands. Freswick's right of patronage was denied by Sinclair of Mey, and other defenders; but having brought a declarator thereof, the right, in 1711, was decided to be in his favour. Several attempts were afterwards made by Sinclair of Mey to obtain this patronage, and to have Freswick's right reduced; by the last of which, in 1748, that right was again declared to be fully vested in Freswick.

In the year 1729, Freswick, as patron, had brought an action against Sinclair of Mey, and the other heritors, for payment of their teinds, and in 1731 had obtained decreet. An action, to the same import, was raised in 1734, and decreet obtained for a certain quantity of victual. Some farther procedure thereafter took place: Sinclair of Mey brought a reduction of Freswick's right of patronage; and in the 1766, Freswick brought the present process of wakening and transference, for payment of the bygone teinds contained in the decrees 1731 and 1734, and from thence downwards.

It was stated in defence, That the defender and his predecessors had acquired, by the positive prescription, an heritable right to the teinds of their own lands; more particularly, that in 1662 Patrick Bishop of Caithness, superior of the lands of Mey, had granted a precept of *clare constat* in favour of William Sinclair, as heir to his father Sir James Sinclair, therein designed of Cannisby, predecessor of the Sinclairs of Mey, of the several subjects therein mentioned, comprehending the lands and teinds of Mey; upon which infeftment had fol-

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The Court at first found that the defender had produced no heritable right to the teinds; thereafter, on the 16th June 1769, it was found that he had a sufficient right.

In a reclaiming petition and memorial, the pursuer *pleaded*;

1*mo*, Though the precept 1662 should be considered as a proper title of prescription, yet these teinds, as belonging to a parsonage, were incapable of being acquired by prescription prior to the 1693. Before the Reformation, teinds were *extra commercium* of laicks otherwise than as tacksmen; so that possession, for any length of time, could give no right. This continued to be the law after the Reformation, so far as regarded the teinds of parsonages; which were the patrimony of the particular benefice to which they belonged; and as it was a rule *quod non est alienabile, non est præscriptibile*, the foundation of prescription, *ne dominia rerum sint incerta*, could not apply to subjects which, by the common law, could be the property of no particular person. Craig, lib. 1. Dieg. 15. § 9. Spottiswood, tit. Prescription. M'Kenzie's Observ. on statute 1587, c. 29. The power of the parson in the administration of teinds of this kind, instead of being extended, was, by the statutes after the Reformation, more limited than before, and continued so till, by the statute 1693, c. 25. the right of titulary was extended to parsonages, and teinds in general brought *infra commercium*. The point met with a decision in 1729, Lord Arbuthnot *contra* Sir William Nicolson, (See Appendix,) where, though the question was afterwards compromised, it was at first determined, "That prescription did not run against teinds which belonged to parsons before the act of Parliament 1693."

2*do*, The precept of *clare constat* in 1662 was, in other respects, a defective title of prescription to the extent maintained. As the teinds in question belonged to the parson of Cannisby, the Bishop himself could have no right; and the Sinclairs of Mey had as little any antecedent right. By a charter from the Bishop in 1622, confirmed by a charter from the Crown in 1623, though the lands therein contained were exactly the same with those in the Bishop's precept in 1662, there was no clause directing a grant of teinds, except as to the teinds of a small parcel called Pyper's Croft, therein described as *inclusæ* or *nunquam antea separatæ a stipite*, and which made no part of the parish of Cannisby. These being the titles and the *authentica instrumenta et documenta* referred to in the precept 1662; and as all precepts of *clare constat* had for their sole object the renewal of former rights in the person of the heir, and not to grant any new one, it was clear, that no other subjects were or could be intended to be contained in that precept than what were contained in the charters 1622, 1623, viz. the teinds of Pyper's Croft alone.

3*tio*, Although these teinds had been in their nature prescriptible prior to the 1693, the defender and his predecessors could not qualify such a possession as could establish a prescriptive right. In order to establish this right, it was required;

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that the possession shall have been *animo dominii*. Though therefore there had been a title which, if clothed with possession, might have established a prescriptive right, yet if *de facto* that had not been the true title of possession, and that the party had not possessed *tanquam dominus*, but in another acknowledged character, such possession would not avail to constitute a prescriptive right.

The application of the facts to this doctrine was conclusive. No possession of the teinds in dispute had ever followed upon the precept; any possession which the Sinclairs of Mey had enjoyed from that period to the judicial sale of the estate in 1694, and from thence forward to the 1708, being in consequence of tacks from the parsons of Cannisby; and which, from the tacks themselves, appeared to have been current not only in 1662, but to have subsisted till 1708, when the parson obtained his decree of modification and locality. In the 1694, when the judicial sale took place at the instance of the creditors, as the Sinclairs of Mey had no right to their teinds, they were not included in the sale and division of the estate. In all the various processes already mentioned, in which the defender's father and grandfather had been the leading parties, so far from pretending to have an heritable right to their tithes, they had repeatedly acknowledged both their right and possession to be in consequence of these tacks from the parsons of Cannisby, said to be then current.

As these tacks accordingly had been the real title of possession from the 1662 to the 1708, the defender and his predecessors were not authorised to invert the title of their possession, and now ascribe it to the precept and infeftment in 1662. Though a party, who had more than one proper title of possession, might, in a question with third parties, ascribe his possession to whichever should prove beneficial; yet it was an undeniable proposition in law, confirmed by uniform practice, that in competition with that person from whom the possession was originally derived, his heirs, or others standing in his place, the title of possession could not be inverted to his prejudice. And as this would have been a good argument in a question with the parson himself, it was equally competent in a question with Freswick as coming in his place. Stair, b. 2. t. 1. § 27. 30th January 1629, Blackburn *contra* Gibson, No 65. p. 9212. Spottiswood, tit. DOMINIUM. See MUTUAL CONTRACT, Section 6th, p. 9211.

The defender *pleaded*;

1*mo*, The precept of *clare constat*, and infeftment following in 1662, was an unquestionable title of prescription as to teinds, or whatever was conveyed in that grant; and this, whether that grant flowed *a vero vel a non domino*, it being the object and intendment of this statutory prescription to secure rights and possessions from challenge, where the title itself was *ex facie* good, and the limited period of forty years had elapsed.

The objections stated, and limited construction put upon the precept of *clare*, were erroneous and without foundation. There was no evidence that the charters 1622 and 1623 were the investitures of the estate that immediately preced-

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The argument was entirely contrary to the just ideas of the law relative to the nature of a prescriptive right. Where a subject had been possessed upon a proper title for the space of forty years, all enquiry into the nature of the right anterior to the title was cut off; the law presumed *præsumptione juris et de jure* in favour of it; nor was any man entitled to go back one hour beyond the commencement of the prescription, or to enquire how the right of the party had formerly stood.

The clause respecting the teinds was conceived in terms sufficient to comprehend the whole lands enumerated in the preceding part of the precept, and could not be limited, as contended for, to the teinds of the particular parcel called Pyper's Croft, a separate and distinct tenement. The words "Una cum decimis garbalibus dict. terrarum aliarumque prædict. except. terrarum in Myrelandnorn," in the common construction of language, applied to the whole lands that were previously recited; particularly as there was an express exemption made of the lands of Myrelandnorn, though these were mentioned amongst the parcel of lands immediately preceding the lands of Pyper's Croft.

2*do*, As it could not be disputed, that the defender's predecessors and authors had been in full possession of the lands for upwards of forty years subsequent to the precept 1662, it was a necessary consequence that they must have had possession of the teinds also; unless it could be shewn that some other person had been in the use of drawing or of uplifting a certain teind-duty. It was impossible for the defender to prove a negative, viz. that no person had uplifted the teinds from his predecessors during the period mentioned, or had brought a challenge of the right; so that the question came to be, Whether the pursuer had brought sufficient positive evidence to the import required? The tacks founded on, from the 1574 downwards, altered not the question, or reared up any bar to the plea of prescription; as it did not from thence follow, nor did they afford any evidence, that from the 1662 to the 1702, when the prescription was completed, the defender's predecessors possessed the teinds under these tacks, but in consequence of their heritable right established by infeftment.

It was perfectly consistent for an heritor to procure an heritable right to his teinds, though he had tacks current at the time; in which case, the temporary right could afford no objection to the supervening heritable one he had acquired. It was also clearly founded on the principles of law, and sound construction of the statute 1617, that where a person had various titles to a subject, and was in possession, no one had a right to set up one of these titles against the others; but the possessor was supposed to possess upon all and each of the titles

he had in his person, and might ascribe his possession to that which was the most beneficial. This point was confirmed by a decision in the case of Wilson *contra* Campbell of Ottar, (See APPENDIX,) and in the very late case of Bruce *contra* Bruce Carstairs, No 90. p. 10805. No 105.

The proposition maintained, That the defender's predecessors possessed these teinds as heritable proprietors, was confirmed, by no discovery having been made of any discharges or receipts for stipend paid by them from the 1662 down to the 1708, when the process of augmentation and locality at the minister's instance was raised. From the judicial sale of the estate in 1694, no conclusion could be drawn; for as the titles of the common debtor had not been produced in that process, so that it did not appear that he had a right to his teinds, the fifth part of the rental fell naturally to be set aside; but as that was not a judgment against the common debtor in favour of the titular, it could not, if he had a right, either affect it, or prevent him from completing it by prescription. The inference drawn from the proceedings in the reduction of the minister's decree in 1708, by which Freswick was relieved, and a proportion of stipend thrown upon the lands of Mey, and from the decrees thereafter obtained in 1731 and 1734, was easily obviated. The period of prescription was completely run before these proceedings were commenced. The defender's father, as soon as it was in his power, had called them in question, having, in 1736, obtained a reduction of the decree 1734; which had been acquiesced in till the 1766, when the present action was commenced.

The Judges were of opinion, That the clause in the precept 1662 neither did nor was intended to convey the teinds of the whole lands. The judgment, however, was rested chiefly upon the point of possession; and as that had not been maintained in virtue of the charter and sasine founded on as the title, but upon the tacks, no prescriptive right had been acquired. They accordingly altered their interlocutor of the 16th June, and returned to that of the 18th January 1769, which found, "That the defender had produced no heritable right to the teinds of his lands in question."

Lord Ordinary, *Stonefield.* For Sinclair of Freswick, *A. Lockhart, J. Dalrymple.*
For Sinclair of Mey, *Macqueen, Rae.* Clerk, *Kirkpatrick.*

R. H. *Fac. Col. No 92. p. 269.*