No 104.

In the present case, the disposition by Artamford to Ballogie was granted for two purposes, 1*st*, That Ballogie might be in a condition to perform Artamford's part of the decreet-arbitral to Lentush; and, 2*dly*, That he might the more effectually recover payment of the 14,000 merks.

If the disposition had been simply granted for security of the 14,000 merks, yet, by the possession which followed upon it for forty years, an absolute right was acquired to the whole subjects disponed against every mortal except Lentush the reverser, providing the 14,000 merks were not during that time paid by intromission, which, on account of the other debts in Ballogie's person, was not the case,

But the disposition by Artamford is not merely a right in security, since one of the purposes of granting it was, that Ballogie might be in a condition to perform Artamford's part of the decreet-arbitral.

"The Lords found, that the Earl of Aberdeen had produced a proper heritable right to his teinds, and ought to be rated accordingly."

Act. *Johnston*. Alt. *Garden*, *Ferguson*.

A. W. *Fac. Col. No* 15. *p.* 25.

1764. *November*.

Alexander Irvine of Drum and his Curators *against* Sir Thomas Burnet of Leys.

No 104.
Personal right to teinds a good title of prescription.

The family of Drum purchased from that of Marr the patronage of the parish of Drummoak in 1618.

Alexander Irvine of Drum, in 1683, executed an entail of his estate, comprehending the patronage of Drummoak, in favour of his eldest son Alexander; whom failing, to Charles his son of a second marriage; whom failing, to Alexander Irvine of Murthill, his nearest collateral heir-male.

Charles, the substitute in this entail died soon after its execution, and old Alexander Irvine died in 1687, after contracting a great deal of debt. In 1688, Alexander his son was served heir of entail to him, and infeft in the estate.

A number of adjudications were deduced by the Creditors of old Alexander, both against his *hæreditas jacens*, and after his son had entered, which adjudications comprehended the patronage of Drummoak, the *teinds*, parsonage and vicarage thereof. Of these adjudications, some were led before, some after 1693; and upon them Murthill obtained a charter of adjudication from Sir Thomas Burnet of Leys, of some particular lands, of which Sir Thomas was superior to Drum, and was thereupon infeft. But, in other respects, these adjudications remained personal, no infeftment having followed upon them in the barony of Drum, or patronage of Drummoak.

Murthill sold these lands to Sir Thomas Burnet; and, by disposition of date 6th August 1694, conveyed not only these lands to Sir Thomas, but also all and sundry the teinds, parsonage, and vicarage, in so far as the said umquhile Alexander Irvine of Drum had right thereto, of all and hail the town and lands of Collanach, &c. all pertaining to the said Sir Thomas Burnet, lying within the parish of Drummoak, and sheriffdom of Aberdeen; 'together with all 'right, title, interest, claim of right, property, and possession, petitor or pos-'sessor, which I or my predecessors had, have, or any ways may have, claim, 'or pretend to have thereto, or any part thereof, in time coming.' He also dispones all infeftments, tacks, sub-tack, and right to teinds, decreets of platt, &c. together with all writs, rights, &c. 'conceived in favours of me, my pre-'decessors or authors from whom I derive right, or to whom I may succeed in 'any manner of way;' and particularly, eight adjudications, five of which were produced in this process, and bear date in January 1693. In this disposition, Murthill grants absolute warrandice as to the lands conveyed, but only warrandice as to fact and deed as to the teinds. No 104.

In 1696, Alexander Irvine, the son of the maker of the entail, died, upon which the succession opened to Murthill, who was served heir of tailzie to the last Alexander, and infeft.

The creditors of Charles, the substitue in the entail, having obtained in the year 1726 a judgment of the Court of Session, finding a bond granted by old Alexander to Charles for L. 80,000 Scots, a subsisting debt affecting the tailzied estate of Drum, No 9. p. 3042., that estate was brought to a judicial sale by the creditor, and purchased by Alexander Tytler, writer in Edinburgh, as trustee for the Earl of Aberdeen, and Mr Duff of Premnay, who had by that time acquired right to the bond for L. 80,000, and all the other preferable debts.

These two creditors took conveyances from their trustee Mr Tytler to such parts of the estate as they thought sufficient for their own payment, and thereupon expede charters and infeftments. But they, by disposition in 1741, conveyed to John Irvine, eldest son of the deceased Alexander Irvine of Murthill, and the other heirs of tailzie therein mentioned, the residue of the estate; and, *inter alia*, 'the advocation, donation, and right of patronage of the parish-kirk 'of Drummoak, and hail privileges thereof.'

Upon this title, the deceased Alexander Irvine of Drum brought a process against the deceased Sir Alexander Burnet of Leys, for declaring his right to the patronage of Drummoak, and teinds of the lands of Collanach, and others.

The defence was laid upon the disposition from Murthill, and adjudications, both which gave a right to the teinds, and upon which possession had followed, and been continued far beyond the years of prescription.

Answered for the pursuer; The creditors who deduced the adjudications had no view to adjudge the teinds of the parish of Drummoak, which indeed they could not do, as they did not belong to their debtor Alexander Irvine of Drum,

No 104. against whose heir the adjudications were led. All they meant to do, or could do was to adjudge the patronage of Drummoak; nor is there any mention of teinds other than what is usual in every description of a patronage, which almost always bears, 'as well parsonage as vicarage teinds thereof,' even where the teinds do not belong to the patron, but to another titular; because the patron has right to present the incumbents who are to enjoy the teinds, has a right to dispose of the fruits of the benefice during a vacancy, and, if the benefice be a parsonage, as in the present case, he has a legal title to take tacks from his presentee; and, therefore, such description imports no more than that the patron has a right of patronage, not only of the parish and parish-church, but of the teinds parsonage and vicarage, which are to be possessed by his presentees.

Murthill's disposition is a title as insufficient as these adjudications, which are all the title he had, and which did not, and could not, carry the teinds. They are thrown indeed *per aversionem* into the disposition; but the conveyance of them is limited, in so far as Alexander Irvine of Drum had right thereto; and the warrandice is only from fact and deed; therefore, neither the adjudications, nor the limited disposition, could be a sufficient title of prescription as to these teinds, even though infeftment were not by law necessary to complete such title.

But, 2*dly*, Though the teinds had been absolutely conveyed by the disposition, or the adjudications, yet such personal right could not be a good title of prescription. We have no positive prescription but what is founded upon the act 1617, and that requires charter and sasine, in order to evict, by prescription, an heritable subject that belonged to another. This is agreeable to the analogy of the common principles of law, by which no *usucapio* can proceed, without *traditio;* nor have tithes been considered as an exception from this rule in the statute; Stair, lib. 2. tit. 12. § 21. Bankton, lib. 2. tit. 8. § 144.; 25th June 1745, Chatto *contra* Moir, *voce* TEINDS; 1738, Minister of Roxburgh against Fairnington, *see* TEINDS.

In this case, the patronage was annexed to lands, and consequently could only be carried by infeftment. Now, if the principal right cannot be transmitted but by infeftment, every accessory, which by law accresces to the right, must be transmitted in the same manner. If one infeft in the tenement, A. should acquire by possession, as part and pertinent, a separate piece of ground which was anciently no part of that tenement; though he has acquired this without an express infeftment, yet, he could not be denuded of it in any other form than that which would be necessary to denude him of any other part of the estate. If he should dispone this separate piece of ground, in which he never was infeft, first to one and then to another, the second purchaser, if first infeft, would be preferable. The application of this reasoning to the present case is obvious. The property of the teinds is vested in the patron *vi statuti*, without infeftment. The teinds thereby become a part and pertinent of his right of patronage, as much as if, by the common law, the teinds had been all

along understood to belong to the patron. If he is infeft in the patronage, or if the patronage is annexed to lands in which he is infeft, as in this case, it is admitted, that he cannot transmit the patronage without infeftment, and that a second purchaser, if first infeft, will be preferred to an anterior purchaser, who relied upon a personal title. And, if this is the effect of an annexation, when made by a charter from the Crown, the effect of an annexation of the teinds to the patronage, when made by an act of the legislature, cannot be less. The enactment of the statute 1693, gives the patron a more solemn and public investiture in the teinds than could be had by any sasine, and supersedes the necessity of any other solemnity for vesting the property of the teinds in him: But, when he disposes of the teinds so vested in him, *utitur jure communi*, and must follow the common rules by law established for the transmission and completion of such rights. If he should sell his patronage, reserving the teinds first to one, and then to another, the second purchaser would be preferred, if first infeft; and, on the other hand, if he sells the teinds, reserving the patronage, there is no reason why the preference should not go by the same rules. This Court, the Court of Exchequer, and the nation in general, have hitherto understood, that patrons are vested in the property of the teinds by the acts 1690 and 1693, in the same manner as if they had been infeft; and that, in order to be properly denuded thereof, the disponee's right must be completed by infeftment; for, in every decreet of sale of teinds, the patron is decreed to dispone the teinds with procuratory and precept; and, upon such procuratory, resignations are every day received by the barons, and charters granted by the Crown, upon which the disponees are infeft; and, if patrons are vested in a property which ought to be transmitted by infeftment, it is a plain consequence, that prescription cannot run upon a disposition of such teinds *a non habente*, no more than it can run upon a disposition *a non habente* of teinds in which the titular had been infeft. If the form of transmission is the same in both cases, the title of prescription must also necessarily be the same. No 104.

If the patron's right could be excluded by possession, on personal titles derived *a non habente*, nothing can be more easy than, in every case, to defeat the patron's right; for a man has only to take a disposition of the teinds of his lands from any third party whatever; and, after keeping it for 40 years in his pocket, he acquires an unchallengeable right. If this be law, in vain has it been established as a principle, that the right of a titular or patron cannot be excluded by the negative prescription; for it gives no security to the proprietor of the teinds, that the positive prescription is required to exclude his right, if a personal right is found to be a good title.

Replied for the defender; *Post tantum temporis*, he is not obliged to show the ancient rights of his authors. It is to be presumed, that Alexander Irvine of Drum had right to these teinds, prior to, and independent of the act 1693; but Murthill's disposition not only conveyed the right of Alexander Irvine to the defender's author, but also all right, which he, Murthill himself, had or-

No 104. might acquire; and he did afterwards acquire a full and complete right. The defender's author, therefore, in consequence of Murthill's *jus superveniens*, ought to be considered in the same light as if he had purchased this disposition to the tithes of his own lands from the true titular or proprietor. It is a mistake to say, the adjudications do not carry the right of patronage. Some of these were posterior to the act 1693; and, as that act granted the teinds to the patron, the adjudications of the patronage undoubtedly carried them; and, as the patron might have effectually disponed the patronage, reserving the teinds, so might he effectually dispone the teinds, (as he did in this case), without conveying the patronage

Supposing Murthill to have had no other right than the adjudication, and that the disposition from him was to be considered as granted *a non habente*, it was a good title of prescription; for, though the act 1617 mentions infeftment as the most common and ordinary title for transmission of heritable property, yet, as it proceeds upon a general narrative, bearing its scope to be, to secure people in their rights and heritages, it has been justly extended to such heritable rights as, by their nature, do not require infeftment. Of such a nature are teinds, which are *debita fructuum* not *debita fundi*; and, although they may be constituted and transmitted by infeftment, yet they may be transmitted and vested by rights merely personal. And it is an established rule, that, if once they have been vested by infeftment, the former proprietor can be divested only by another infeftment: But, if they have not been vested by infeftment, they are transmissible by a right merely personal. And accordingly, upon these principles, the Court unanimously found, that an adjudication without infeftment is a good title of prescription as to teinds; 11th July 1758, Gordon of Earlston against Kennedy of Knockgray, No 102. p. 10825. In this case, the teinds never were established by infeftment, but are claimed by the pursuer as patron upon the acts 1690 and 1693; and there is no solid ground for distinguishing this statutory grant from any other grant or disposition upon which no infeftment was taken. Had the act granted these superplus tithes to the heritors severally, (who had the most natural title to them), it cannot be maintained, upon any principle or reason, that antecedent infeftments, or subsequent infeftments, in the lands only, would have been held as infeftment in the tithes. The tithes, in this case, would have been considered as personal rights, only transmissible by personal conveyances; and there is no shadow of reason to distinguish the two cases, or to introduce a constructive infeftment unheard of and unknown in our law, in order to cut down an honest right, purchased from the true owner, and possessed without challenge for more than half a century.

"The Lords sustained the defence of prescription."

Alt. *Ferguson, Lockhart.* Alt. *Garden, Dav. Dalrymple.*

J. M. *Fol. Dic. v. 4. p. 96. Fac. Col. No 145. p. 343.*