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

No 103. apprisings were led in the years 1669 and 1670, by which the teinds of Fedderat, as well as the lands, were particularly apprised.

Robert Keith of Lentush acquired right to several of these apprisings. He obtained also, in 1687, a disposition of the lands and teinds of Fedderat, containing an assignment to an obligation for conveying these teinds, said to have been granted by William Earl Marshall in 1631 to Robert Irvine elder, with the charter and sasine following thereon; and also an assignment to a tack for five times 19 and 203 years of these teinds: But neither this obligation, nor the charter and infeftments said to have followed upon it, nor the long tack, were extant at the time of this question. The teinds had, however, been possessed by the proprietors of the lands of Fedderat without challenge for time immemorial.

In 1673, James Irvine of Artamford obtained a decreet of apprising of the lands and teinds of Fedderat for L. 10,144 Scots. Artamford applied to Robert Irvine the proprietor, as Lentush had done, and obtained from him a voluntary disposition of the lands and teinds, dated 28th November 1689, upon which he was infeft. The sasine particularly bears infeftment in the teinds.

In 1694, Keith of Lentush and Irvine of Artamford entered into a submission to Lord Rankeilor, who, by decreet-arbitral, decerned Artamford to convey to Lentush his apprisings, and also the disposition of the 28th November 1689; and, on the other part, decerned Keith to pay to Artamford 14,000 merks at Whitsunday 1694; and, if he failed to make payment or grant security betwixt and the 10th of March then next, decerned that Artamford might enter to the possession for payment of the annualrents of the sum, and a fifth part more *nomine damni*.

Forbes of Ballogie acquired right to several apprisings and adjudications affecting the estate of Fedderat; and, in order to complete his right to these lands, he, on the 7th December 1697, obtained a disposition from Artamford, which narrates the decreet-arbitral, and subsumes, that Artamford had required Lentush under form of instrument to implement, and that he would not perform his part: 'And that seeing Forbes of Ballogie had made payment to Artamford of the sum of 14,000 merks, with the bygone annualrents, and a fifth part more, (except what Artamford had previously uplifted out of the lands, conform to a condescendence then given in to Ballogie): Therefore, to the effect Ballogie might be in a condition not only to perform Artamford's part of the decreet-arbitral, by transmitting the apprising in manner therein mentioned, but also that he might the more effectually recover payment of the 14,000 merks and annualrents, the said Artamford, for all right he had to the lands, sold, annailzied, and disponed, conform to and in terms of the decreet-arbitral, and for security of the sums therein contained, to and in favour of the said Forbes of Ballogie, the lands of Fedderat, with the teind-sheaves and other teinds thereof, now by the said decreet-arbitral declared to be redeemable for the said sum of 14,000 merks.'

Upon the 22d of April 1698, Ballogie, in consequence of this disposition was infeft in the teinds as well as the lands. No 103.

Balogie possessed the estate till his death in 1716. His son John Forbes was served heir to him in special, and also in general.

In consequence of a decreet-arbitral pronounced in a submission betwixt this John and his father's Creditors, the lands and teinds of Fedderat were sold by public roup, and purchased by the late Earl of Aberdeen; to whom, after being infeft upon a precept of *clare constat* from Irvine of Drum, in the lands, but not in the teinds, John granted a disposition, 14th October 1725, conveying the lands and teinds, and all writs and evidents, and particularly Artamford's apprising.

Upon this state of the rights, the Earl of Aberdeen *contended*, 1*mo*, That there was strong presumptive evidence, from the narrative of the disposition 1687, that the teinds of Fedderat had been conveyed in 1631 to Robert Irvine; and, 2*do*, That by the possession which had followed under the dispositions and infeftments granted by Irvine of Fedderat to Artamford, and by Artamford to Ballogie, he had acquired an unquestionable right by prescription.

Answered by the heritors; There is no legal, nor even presumptive evidence, that the Earl of Aberdeen's authors acquired right to these teinds from the Earl Marshall; and, as to the right he claims by prescription, the conveyance by Artamford to Balogie was only a right in security. Artamford had himself no other right to the lands after the decreet-arbitral, but a right in security for 14,000 merks redeemable by Lentush; no more was conveyed to Ballogie, and no tract of time could transform this right in security to an absolute right of property.

Replied; A redeemable right has been found by the Court to be a good title of prescription. For example, where a wadset is granted *a non domino*, redeemable for a certain sum, and the wadsetter possesses for the space of forty years, the true proprietor has been found to have no right to the lands, not even upon payment of the wadset-sum; and therefore, if thereafter the wadset be redeemed by the *non dominus*, his right, in consequence of the possession of the wadsetter, will be established by the positive prescription. This was decided in a case which occurred in 1755, between Alexander Duke of Gordon and Macpherson of Benchar, *infra h. t.*, where the question resolved into this abstract point of law, Whether prescription, being completed upon a title that did not carry the total and absolute right to the lands, was sufficient to evict from the true proprietor any more than the right that was vested in the party who pleaded the prescription? And the Court found, "That the wadset in the person of Benchar, and infeftment thereon, did not *per se* exclude the Duke of Gordon's title; but sustained the defence of prescription, and allowed Benchar to prove his possession for forty years." By which decision, Benchar the wadsetter was found to have an absolute property by prescription against all mortals, the reverser only excepted.

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.