

appeared from Glasgow, and the next we hear of him is that he is living with a woman, who is said to be a bad woman, somewhere in Essex, and the adultery on which the action is founded is said to have been committed there, and in the opinion of the Lord Ordinary is established.

Now, so far as I am able to find in the evidence, the only proof of his being in England at all is this evidence about his having taken up with a bad woman in Essex. The Lord Ordinary seems to have assumed that he was an Englishman by birth. But we have no evidence of his birth. The only part of the proof bearing on it is where his wife says—"I understood my husband had been born in England, and had come to Scotland about two years before I made his acquaintance." I cannot receive this as evidence that the defender is an Englishman. There is one other passage, and the only other bearing on this subject, in the evidence of Elizabeth Stewart Hosie, who says he came about her house—"I knew he was an Englishman." There is really no other evidence. Now, I cannot take this as evidence that he was an Englishman or was born in England. There is no evidence of any witness who saw him there prior to his marriage, nor is there any evidence of his birth at all. I think a case might be stated and proved here which would exclude the jurisdiction of the Court, but none such is here stated or proved—that is to say, that he was a domiciled Englishman whose home was in England. There is no evidence that his home is in England, or that he ever had one there. One witness says his mother lives in Devizes, but that fact will not exclude the jurisdiction of the Court, for we do not know if she had a home for him there. All the evidence about him is connected with Glasgow, and that is the place where he met his wife, and married her, and lived with her. The action was served on him personally, and he has not appeared to dispute the jurisdiction of the Court, as was competent for him to do if he preferred to have the question of divorce tried elsewhere, and had grounds for that contention. On the contrary, he has assented to the jurisdiction, because I see that Mr Craigie, appeared for him at the proof, though no defences were lodged, and cross-examined witness, not on the question of jurisdiction but on that of adultery.

Now, in these circumstances I am not disposed to raise any question of jurisdiction. If it was incumbent on the Court to raise this question which the parties do not raise for themselves, it would of course be necessary to direct a further exhaustive inquiry as to the birth and home of the defender. But the summons having been personally served on him, and he having appeared and consented to the jurisdiction, and taking the evidence as it stands, all we know of him is that he was in Glasgow for some years, that he married there, that his wife is there, his child there. I do not think it is fitting for the Court to raise the question if the one of the parties interested to do so does not.

I should propose, therefore, that we do not enter on the question of domicile, but should recal the Lord Ordinary's interlocutor and grant decree of divorce.

LORD CRAIGHILL and LORD RUTHERFURD CLARK concurred.

THE LORD JUSTICE-CLERK was absent.

The Court recalled the Lord Ordinary's interlocutor and granted decree of divorce, finding the pursuer entitled to the custody of the child.

Counsel for Pursuer—Comrie Thomson.
Agents—Smith & Mason, S.S.C.

Friday, March 20.

FIRST DIVISION.

[Lord M'Laren, Ordinary.]

LORD ADVOCATE v. DUKE OF ATHOLE.

Teinds—Tack of Teinds—Inhibition—Tacit Relocation.

In 1791 the titular granted a tack of teinds of the lands of B., which included the lands of P. and D., for 19 years. On the expiry of the tack in 1810 the tacksman continued to possess the teinds on tacit relocation till 1839. In that year an inhibition was used by the titular, which was admittedly invalid. Nothing followed upon this inhibition until 1860, when, on a demand from the titular, the tacksman made payment of the surplus teinds of P. from 1841 to 1861. No surplus teind was paid for the lands of D. after the date of the tack. In 1884 the titular raised an action against the tacksman for payment of (1) £30, 4s., the amount of the surplus teinds of P. from 1861 to 1881; and (2) £227, 19s., the amount of the surplus teinds of D. from 1844 to 1881, on the ground that the defender by making payment in 1860 of the teinds of P. had recognised the inhibition as valid, and as putting an end to tacit relocation. The defender answered that the payment had been made in ignorance of the invalidity of the inhibition. *Held* that the payment in 1860 was inconsistent with the continuance of tacit relocation as regarded the teinds of P., and decree granted for £30, 4s. the admitted amount of the surplus teind, but (*diss.* Lord Shand, *rev.* Lord M'Laren) that nothing had been done to put an end to the possession of the teinds of D. upon tacit relocation, and that the defender should be assolvied from the demand for arrears of teinds from these lands.

Question—Whether the rule established in the case of *Burt v. Home*, 5 R. 445 (*Calton* case), with regard to a locality, that unvalued teinds are to be estimated at one-fifth of the rental, is applicable to the case of a titular suing for arrears?

This was an action at the instance of the Crown as titular of the teinds of the lands of Pitdornie and Dalcroy, in the parish of Dull and county of Perth, against the Duke of Athole, the proprietor of these lands, for payment of (1) the sum of £30, 4s., being the amount of the surplus teind of the lands of Pitdornie from 1861 to 1881; and (2) the sum of £227, 19s., being the amount of the surplus teind of the lands of Dalcroy from 1844 to 1881.

By a tack of teinds, for 19 years from the term of Lammas 1791, the Crown let to the then Duke

of Athole, at a yearly rent of 5s. 3d. sterling, "All and Hail the teind sheaves and other teinds, both great and small, parsonage and vicarage, of all and sundry the lands of Boahally," &c, including the teinds of the lands of Pitdornie and Dalcroy.

On 27th September 1839 letters of inhibition of teinds were raised at the instance of the Crown, and the pursuer in the present action averred that "Following upon the said inhibition of teinds, surplus teind was collected by the Crown from the lands of Pitdornie, mentioned in the said tack, for crops 1841-60, both inclusive, with the knowledge, consent, and acquiescence of the defender or his predecessors, who thus recognised and homologated the said inhibition as a valid inhibition, and as putting an end to tacit relocation under the said tack. The teinds of the crops of 1839-40 were discharged *ex gratia*, and this discharge was accepted by the defender's predecessors as being *ex gratia*. No tack-duty has been paid by the defender's predecessors or himself under the said tack since the date of the said inhibition."

The defender stated that on the expiry of the tack at Lammas 1810 the teinds of the lands were possessed by the tacksman upon tacit relocation. He further stated that the letters of inhibition were executed on 27th September 1839, "and were directed against the instant crop, as to which tacit relocation had already taken place," and that no action or proceeding was taken to oust the tacksman from possession. It was denied "that surplus teind was collected by the Crown from the lands of Pitdornie for crops 1841-60, but explained that the Crown receiver having in or about 1859 asked payment of the surplus teind of Pitdornie, the defender's predecessor, by mistake, and in ignorance of the inhibition being then and *ab initio* ineffectual and inoperative, made payment." The defender admitted that no surplus teind had been paid from the lands of Pitdornie since 1860. He stated that there had never been any surplus teind paid from the lands of Dalcroy, and that the Crown had made no demand for payment of the teinds of Dalcroy until 1882. He averred that "Before that time, however, the inhibition, even if originally good, which is denied, had expired, or had been derelinqushed and rendered inoperative by the lapse of more than forty years from its date, and the defender still possesses the teinds upon tacit relocation." It was further averred—"The teinds of the miln lands of Bohally or Dalcroy are unvalued and unascertained, and so blended with the stock as to be undistinguishable from it, and the whole produce of these lands has been consumed by the defender and his predecessors for a period far exceeding forty years, without question or interruption."

The pursuer explained that the reason why no surplus teind was collected from the lands of Dalcroy was that the defender and his predecessors had denied that the lands of Dalcroy were in the parish of Dull, or that any teind was due the Crown therefrom. Reference was made by them to the process of augmentation raised in 1861 by the minister of Dull, and to the procedure therein, which is detailed in the opinion of the Lord President *infra*.

The pursuer pleaded—" (2) The teinds of lands belonging to the Duke of Athole, lying

within the parish of Dull, having been let as a *unum quid* by the tack of 1791, the inhibition of 1839 was validly followed up and rendered operative to the effect of putting a stop to tacit relocation by the collection of part of the teinds thereby let. (3) The non-collection of surplus teinds from the lands of Dalcroy for forty years after the said inhibition, having been due to the unfounded representations made by the defender and his predecessors, to the effect that there were no lands of Dalcroy belonging to the Duke of Athole in the parish of Dull, the defender is not entitled to plead such non-collection against the validity of the inhibition, or the pursuer's present claim. (4) The defender is not entitled to plead *bona fide* consumption, in respect—(1st) that the said inhibition, and the collection of teind following thereon, was valid and sufficient notice to him or his predecessors that his title to the teinds of his lands in the parish of Dull had come to an end; (2d) that thereafter there was no colourable title to which he could attribute his possession and consumption of surplus teind from the said lands, or any part thereof; and (3) that he has paid no tack-duty since the date of the said inhibition."

The defender pleaded—" (1) The said tack having subsisted by tacit relocation to the date of the present action, the defender is not liable for the teinds, or surplus teinds, of the said lands, or for the sums sued for as the alleged amount thereof. (4) The titular having dealt with the tack and the two subjects therein contained as divisible, by applying for the teind of the one and never applying for the teind of the other, and by acquiescing in the defender possessing the teinds as aforesaid for upwards of forty years, is now barred from maintaining his second plea-in-law. (5) *Separatim*, the teinds of the said miln lands of Bohally or Dalcroy being unvalued and undistinguished from the stock, and the defender having under a colourable title *bona fide* consumed the whole produce for a period of more than forty years, he is entitled to absolvitor. (6) The teinds being unvalued, the titular ought to have timeously teinded the crop of each year, and having failed to do so the defender is not now liable for such teind. At all events, the pursuer can only claim such teind as he can prove to be the actual victual teind of each separate crop and year, and his claim ought not in any view to be admitted to probation without specification."

The Lord Ordinary (M'LAREN) on 19th July 1884 pronounced this interlocutor:—" Finds (1) That the inhibition of tithes libelled was irregular, in respect that it was used after the commencement of tacit relocation for the crop and year 1839-40, to which the inhibition has reference; (2) That the right to object to the letters of inhibition on the ground of such irregularity was waived by the defender's author in 1859 making payment of arrears of surplus teind to the Crown; (3) That by this payment of arrears the inhibition was recognised by the defender's author as an effectual inhibition for all purposes, and therefore that the Crown is entitled to sue for the surplus teinds of Dalcroy and Pitdornie; and (4) That the benefit of the letters of inhibition has not been lost by dereliction; and with reference to these findings, appoints the case to be enrolled with a view to the ascertainment of the value of

the surplus teinds of the foresaid lands, and grants leave to reclaim.”

“*Opinion.*—This is an action at the instance of the Crown, as titular of the teinds of the parish of Dull, against the Duke of Athole, heritable proprietor of the lands of Boahally and others in that parish, concluding for the payment of arrears of surplus teind of the parish. The Duke’s ancestors in 1791 obtained a tack of the teinds of the lands in question at the (apparently) nominal rent of five shillings and three pence sterling.

“In 1839 inhibition was used at the instance of the Crown against the heritors, tenants, and possessors of the lands out of which these teinds were payable. On the authority of the case of *Lord Advocate v. Drysdale*, 1 R. (H. L.) 33, it must be held that the inhibition was irregular—(1) because it was given after the term of Lammas, at the term at which tacit relocation would commence; and (2) because being an inhibition applicable ‘to this instant crop,’ it could not be supported as an inhibition applicable to the teinds which were to come into existence in the immediately following year. But in the year 1859 it is admitted that the Crown demanded and received from the Duke of Athole the surplus teinds of Pitdornie (part of Boahally) for crops 1841-59, and this payment is said to have been continued in the year 1860, though I am not sure whether I am to take this second payment as admitted. Since 1861 it is stated on behalf of the Crown that its officers were not in a position to demand surplus teinds, because there was a pending locality, which has only recently become final.

“The first question is, whether the defender’s predecessor, by the payment of the arrears of tithe in 1859 is to be held to have waived, for himself and his successors, the objection which might have been taken to the inhibition of 1839. I am of opinion that the payment in question is equivalent to a waiver of the objection. I think that such objections admit of being easily waived, and that the objection, if once waived, cannot be taken thereafter. It must be considered that a tenant who holds by tacit relocation does not possess by the will of the proprietor, but in virtue of the rule of law, which in questions of rural tenancy treats the year as an indivisible unit, so that if the tenant has entered on a new year of possession, he cannot be evicted until the termination of that year. The proper way of terminating such a right is by inhibition, but it may be that the tenant of tithes is willing to remove without inhibition, and where such is the case inhibition would be unnecessary. It might be putting it too strongly to say that there is a duty to remove from the possession of tithes without warning, or its equivalent, inhibition; but if a tenant of tithes is willing to accept something less than full legal notice, I think that there is a sufficient rational cause to support such a renunciation even in a question with creditors.

“In this case it is said that in 1859 the Duke or his advisers were ignorant that the inhibition had been used. It is only said that payment was made in ignorance that the inhibition was ineffectual. If the Duke of Athole had suffered any inconvenience from the circumstance that inhibition was used too late, it is most likely that the objection would have been discovered and

founded on. But here payment is made of arrears extending over a period of eighteen years; and it must be assumed that when the payment was made the Duke meant to acknowledge that his right as tenant had come to an end, and that he was willing to account to the Crown as titular. In these circumstances I think it would be contrary to equity to allow the defender to plead an objection which was not taken at the proper time, when it might probably have been obviated by the execution of new letters of inhibition.

“The next question is, whether the waiver of this objection, when a demand was made for payment of the teinds of Pitdornie, will bind the defender when a demand is made for teind for the larger subject of Dalcroy? Now the objection was that the inhibition was served too late, and that the whole tithes described in the tack were therefore possessed by the tenant by tacit relocation. I cannot understand how such an objection can be maintained as to one part of the subject, and departed from as regards another part of the subject. In the absence of any indication to the contrary, I must hold that the inhibition is treated by the parties as an effectual inhibition for all purposes.

“For similar reasons I am unable to give effect to the plea of dereliction of the inhibition as regards the teinds of Dalcroy. Dereliction is only to be presumed in consequence of no action being taken on the inhibition for the period of forty years. But here there was payment of tithe from part of the subject in 1859, and this payment, I think, was sufficient to keep the inhibition in force as an effectual interruption of the tenant’s possession to all intents and purposes.”

The Lord Ordinary on 28th November pronounced this further interlocutor:—“Finds that the teinds sued for are unvalued, and that the value thereof is to be estimated according to the rule established in the *Locality of Calton*, at one-fifth of the rental of the estate from year to year: *Quoad ultra* continues the cause, and grants leave to reclaim against this interlocutor.”

The defender reclaimed against both these interlocutors, and argued—There could be no waiver of the objection to the inhibition, because it was null *ab initio*—2 Ersk. Inst., 10, 45; *Lord Advocate v. Drysdale*, February 24, 1872, 10 Macph. 499, 1 R. (H. of L.) 27. Moreover, inhibition in itself was not enough; the Crown should have brought an action of spuilzie, or stepped in and levied the teind—*Governors of Trinity Hospital*, December 20, 1848, 11 D. 266; *Lord Advocate v. Skene*, March 15, 1860, 22 D. 987; *Urquhart v. Earl Moray*, December 10, 1823, F.C., 2 S. 567. At all events, the payment as regarded Pitdornie could not affect the position of Dalcroy. There was no necessary connection between them, simply because they were included in the same tack, and so far as Dalcroy was concerned, the Crown had done nothing more than use inhibition. The authority of the *Calton* case, *Burt v. Home*, January 12, 1878, 5 R. 445, was not disputed, but it only decided that in a locality one-fifth of the rental was to be taken as teind. It had been decided in *Scott v. Heritors of Ancrum*, M. 15,700, Bell’s Cases, 152, and *Lady C. Graham*, M. 11,063, that when a titular sues for teinds he must aver and prove the amount of crop teinded each year by the tenant. There was here no relevant aver-

ment to remit to probation — *Burt v. Home, supra.*

The pursuer replied—The inhibition was, it might be, not unobjectionable, but any objection had been cured by the actings of parties. The payment of arrears in 1859 must be taken as a waiver of any objection, and as the lands had been let as a *unum quid*, payment of the teinds of Pitdornie must be held to bind the defender in a question with regard to the teinds of Dalcroy. The question as to the amount of the teinds was ruled by the *Calton* case—*Forbes on Titles*, 318; *Sinclair*, M. 15,656; *Smith*, M. 15,660; *Earl of Galloway*, M. 15,786.

At advising—

LORD PRESIDENT—This is an action by the Lord Advocate on behalf of the Crown for recovery of the arrears of surplus teinds of certain lands belonging to the defender the Duke of Athole in the parish of Dull. The Crown is titular of the parish of Dull, and it is not said that the Duke of Athole has any heritable right to his teinds or any right of ownership of any kind, but he did take a tack of the teinds of two parcels of lands in the year 1791, and that tack being only for nineteen years of course it expired in 1810. The expiry of the tack, however, did not lead to any change in the nature of the possession. On the contrary, for twenty-nine years thereafter the Duke continued to possess these teinds upon tacit relocation, and in 1839 an inhibition was used at the instance of the titular, but that inhibition has been found by the Lord Ordinary to be invalid for reasons into which it is not necessary particularly to inquire, but it is not suggested that the Lord Ordinary is wrong in the judgment he has formed upon the invalidity of that inhibition, and therefore if nothing more had taken place the tacit relocation would not have been interrupted until the institution of the present action. But it is averred on the part of the pursuer in the fourth article of the condensation that surplus teind was collected by the Crown from the lands of Pitdornie—one of the two subjects in question—for crops 1841 to 1860, both inclusive, “with the knowledge, consent, and acquiescence of the defender or his predecessors, who thus recognised or homologated the said inhibition as a valid inhibition, and as putting an end to tacit relocation under the said tack.” He says further that the teinds of 1839–40 were discharged *ex gratia*, and the discharge accepted; and the answer to that is, that the Crown Receiver having in 1859 “asked payment of the surplus teinds of Pitdornie, the defender’s predecessor, by mistake and in ignorance of the inhibition being then *ab initio* ineffectual and inoperative, made payment.” Now, I think the defender is quite entitled to say that that admission must be taken as it stands, and that when he made the payment in 1859 of the arrears of teinds from 1841 he was not aware of the objection which there was to the inhibition. But still it is quite plain that this payment of teind was utterly inconsistent with the continuance of tacit relocation, and I do not think it is possible to go back upon that. It seems to me that by his act in 1859 of making payment for all these nineteen years of the surplus teinds he has shut himself out or barred himself from any longer maintaining that as to the lands of Pitdornie he is in pos-

session under tacit relocation. Of course that is what he must maintain in order to make good his defence, and as regards the teind which has become due since 1860 there is no doubt at all about what that is. It is averred in the sixth article of the condensation that the surplus teinds of the lands of Pitdornie from 1861 to 1881, both inclusive, amount to £30, 4s.; and the answer is that the “amount of surplus teinds here stated for the lands of Pitdornie is admitted.” I think, in these circumstances, the only defence which the heritor could have against the titular’s demand that he was possessing under tacit relocation being removed in consequence of his own proceedings he cannot resist this claim for the £30, 4s. for the teinds of Pitdornie.

But the teinds of Dalcroy—the other subject in the old tack—stand in a very different position. There never has since that tack was executed been any payment of teinds for the lands of Dalcroy, and therefore it appears to me that as regards these the defender is quite entitled to stand upon the invalidity of the inhibition to the effect of maintaining that nothing has been done to put an end to his possession upon tacit relocation. The way the Lord Ordinary deals with this matter in deciding against the defender is this. He says—“The next question is, whether the waiver of this objection, when a demand was made for payment of the teinds of Pitdornie, will bind the defender when a demand is made for teind for the larger subject of Dalcroy? Now, the objection was that the inhibition was served too late, and that the whole tithes described in the tack were therefore possessed by the tenant by tacit relocation. I cannot understand how such an objection can be maintained as to one part of the subject and departed from as regards another part of the subject.” Now, I think the Lord Ordinary has not quite adverted to the extent of the demand made by the defender in his answer to the fourth article of the condensation, because while he admits that he paid in 1859 all that amount of teind for the lands of Pitdornie, he says he did so under error as regards this inhibition, not knowing the objection to it. It is not very easy to say that because he only mistook in that respect as regards one parcel of the lands he is therefore bound to go on and repeat the same mistake as regards another parcel of lands. The inhibition is bad. He has paid not knowing the invalidity of the inhibition as regards Pitdornie; he has not paid as regards the lands of Dalcroy; and therefore it seems to me that he is well entitled still to maintain that he is in possession of the teinds of Dalcroy under tacit relocation down to the date of this action. There are some specialties relied on by the pursuer, stated in the fifth article of the condensation, to which, however, it is necessary to advert, and these refer really to what took place in the locality of Dull. There were objections made by the Crown to the way in which the Duke of Athole was localled upon for the stipend of the minister of Dull, and these objections maintained, among other things adversely to the Duke of Athole, that the lands of Dalcroy were truly in the parish of Dull, although the Duke of Athole maintained that they were not, and that was a subject of controversy between them in that locality. But that question was settled by a joint minute, and the point raised, as I understand

it, in the fifth article of the condescendence is what is to be the effect of that joint minute. It is in these terms,—“Murray, for the Duke of Athole, stated that his Grace had now discovered that the lands described in his titles as the Miln lands of Boahally are the lands now called Dalcroy, and he therefore admitted that these lands of Dalcroy are situated in the parish of Dull, and so far as known are unvalued for teind; that the rent thereof is £40, one-fifth thereof for teind, being £8; and consented to the revised objection for the Lord Advocate on behalf foresaid being sustained, and the revised answers being repelled, and to a remit to a teind clerk to rectify the locality accordingly,”—and Mr Keir on behalf of the Lord Advocate accepted of that concession, and “both parties concurred in moving the Lord Ordinary to interpone authority to the minute and to sustain objections, and to remit to the teind clerk to rectify the locality.” Now, what is the effect of all that? It merely settles this, that the lands of Dalcroy are to be localled upon for minister’s stipend to a certain amount, and in that as every other locality where the teinds are unvalued one-fifth of the actual rent is taken as the amount of the teinds, no matter what may be the condition of the teinds as regards title or possession or anything else. *Quoad ultra* nothing is fixed by that joint minute, or could be fixed within the locality itself, except what was to be the amount of the minister’s stipend, and who was to pay it, and the amount to be paid by each heritor either according to his valuation or according to the one-fifth of the rent of the lands. Is there anything in all that to prevent tacit relocation going on under a tack of teinds. I am quite unable to see the slightest inconsistency between the two, and that is all that the defender is here maintaining. Suppose there never had been an inhibition at all, and never a penny of surplus teinds paid to the titular, what would have been the effect of this joint minute? Nothing at all in the way of interrupting tacit relocation. And so if the defender is entitled, as I think he is, to plead possession on tacit relocation as regards the lands of Dalcroy down to the institution of the present action, it does not appear to me that the proceeding in the locality has any effect upon that at all, and therefore while I concur with the Lord Ordinary as to the one parcel of lands—the Pitdornie lands—I think he is right in deciding as he has done in regard to the other lands of Dalcroy, and I am for altering that part of the interlocutor.

LORD MURE—I have come to the same conclusion. The inhibition here was used, but it was a bad inhibition, and therefore there is no reason for saying that there was not tacit relocation going on as regards the lands of Dalcroy all along. I think it comes almost to be substantially the case of the *Governors of Trinity Hospital*, where there was a good inhibition used but nothing followed on it, and it was held that the surplus teinds were not payable to the titular.

LORD SHAND—I agree with your Lordships in thinking that the interlocutor of the Lord Ordinary should be adhered to in regard to the lands of Pitdornie, but I am of opinion that his Lordship’s interlocutor is also right as regards the lands of Dalcroy. The question between the

parties really is, was there a subsisting tack of the teinds of the defender’s land of Dalcroy at the date this action was raised. No doubt originally there was a tack of the teinds of the lands of Pitdornie and Dalcroy in 1791. That tack expired in 1810, but it was continued for a number of years as a subsisting tack by tacit relocation. Now, your Lordships are of opinion that tacit relocation is not a plea in the mouth of the defender as regards these lands of Pitdornie in respect of what occurred as stated in article 4 of the condescendence, and from which it appears that in 1860 both parties treated that tack as at an end so far as the lands of Pitdornie were concerned, and a large payment was made to represent the teinds of these lands instead of a payment as representing any rent under that tack. Whether that was because the defender’s predecessor had the impression that the inhibition was effectual or ineffectual appears to me to be of no consequence. It rather occurs to me that the only probable explanation of his paying the teinds at that time must be that the inhibition was regarded as effectual. But assuming that it was not so, what was the meaning of the act by which for a number of years the actual teinds of the lands of Pitdornie were paid to the Crown in place of the rent under that tack? The only meaning of it must be that the right under the tack was at an end, because if the right under the tack then subsisted the heritor could have met his liability under it by paying 5s. 3d. a-year, instead of which he paid a sum which was five or six times that amount, if not more. Now, that being so, the question that I put to myself is this, if that tack was valid, if tacit relocation had ceased in regard to the teinds of the lands of Pitdornie, how could the tack subsist to any other effect? The subject let under it was the teinds of the lands there specified. There is one rent, and only one, given for that subject—a rent of 5s. 3d.—and a payment of five or six times that rent as representing the teinds of Pitdornie could only be given on the footing that the right under the lease was at an end. I am unable to see that with an acting of that kind it can be held that the lease shall subsist so far as regards the teinds of Dalcroy but shall not subsist so far as regards the teinds of Pitdornie. If indeed no rent had been paid, and no other payment had been made, tacit relocation would undoubtedly have run on. But it appears to me that the sums which were paid in respect of the teinds of Pitdornie were so paid on the footing that a rent of 5s. 3d. a-year could no longer be tendered, and if 5s. 3d. a-year could not be tendered, it could only be for this reason, that tacit relocation was at an end. And so taking the rent here as one and indivisible, it appears to me that the tacit relocation came to an end. I do not know how it might be proposed by the heritor or the Crown to estimate the rent for the teind of Dalcroy, now that it is admitted that the actual teind for Pitdornie is to be paid, and on that ground I am of opinion, with what I take in substance to be the opinion of the Lord Ordinary, that the plea of tacit relocation here in regard to the lands of Dalcroy is bad as a defence to this action.

In regard to the statements in condescendence 5, I quite agree that nothing there stated can have the effect of interrupting the tacit relocation,

but I had rather apprehended that these averments were made by the Crown, not for the purpose of stating that these facts interrupt tacit relocation, but rather with the view of meeting the defence of *bona fide* perception and consumption of these teinds. It is pleaded by the heritor that the Crown has done nothing for a number of years since 1861, but has allowed matters to lie over till now. As an answer to that the Crown has stated that this locality had been going on, and until matters came to a settlement in this locality—until it became clear whether Dalcroy was within the parish of Dull or not—it was needless to prosecute their claim. It appears to me that for the purpose for which these averments were made it is quite a sufficient answer to any objections on the part of the defender as to the delay that has taken place in making this demand. That being my view, I am of opinion that the interlocutor of 19th July ought to be adhered to.

The interlocutor of 28th November 1884 raises another and an important question: I see the Lord Ordinary puts the ground of his judgment in the interlocutor itself on this, that the value of the teinds was to be estimated according to the rule established in the locality of Calton. The question raised by that interlocutor is whether that case has established a rule to which the Lord Ordinary has given effect. Upon that matter, looking to the judgment that your Lordships are to pronounce on the first branch of the case, I do not think it necessary to give a final opinion. I can only say that for my part I agree so far with the Lord Ordinary that I think there are weighty considerations in the opinions that were given in that case for saying, or at all events there are indications shewing, that the rule to which the Lord Ordinary refers has been established. If so, the older cases of *Sir John Scott* and *Lady Graham* would be seriously affected. But while that is the leaning of my opinion, in the state of division of opinion between your Lordship and myself in the present case I reserve my final opinion on that point.

LORD ADAM—There are two sums claimed here, one the sum of £30, 4s. as the surplus teinds of the lands of Pitdornie from the year 1861 to the year 1881, and second, a sum of £227, being the surplus teinds of Dalcroy, or otherwise the miln lands of Boahally, from the year 1844 to the year 1881. Now, the teinds of these several lands were let by the Crown to the Duke of Athole or his predecessor by a tack dated the 5th of July 1791, for nineteen years at a rent of 5s. 3d. That tack, therefore, came to an end in 1810, and from that time onwards the teinds were possessed by the Duke of Athole or his predecessor by tacit relocation. I notice in the Lord Ordinary's note a remark which he makes which I confess I do not understand. He says—"It must be considered that a tenant who holds by tacit relocation does not possess by will of the proprietor." Now, I do not know how far that view of the case may have entered into his judgment, but it is obvious that the tenant must possess by the will of the proprietor, because if the proprietor does not choose to have him possess by tacit relocation, he had nothing to do but give the requisite notice. And accordingly when the proprietor here—the Crown—wished to put an end to the tacit relocation following on

the tack, he used, or endeavoured to use, the proper means for doing so by using an inhibition. Unfortunately for his case that inhibition was bad, and had really no effect. It was not followed up in this case until the year 1859, when the Crown for the first time came forward, and founding upon the inhibition claimed the teinds of Pitdornie. Now, what took place upon that was that the Duke of Athole consented to pay the arrears of teind claimed from him, and he did so. He did so, he says now, in ignorance of his rights, and without any proper investigation, but certainly as regards the teinds of Pitdornie it must be held that he waived all objections which he might have insisted on had he known of them to this inhibition. And I confess that as regards these lands, after the Duke of Athole paid from 1841 to 1860, it is impossible for him to go back upon that and say that he was still possessing upon tacit relocation. As your Lordship has pointed out, the amount of teinds since due from Pitdornie is ascertained by the admissions of parties in this process, and no difficulty arises upon that. On that matter I agree with the interlocutor of the Lord Ordinary.

The teinds of Dalcroy are in this position, that although the inhibition had been used in 1839, no demand was made by the Crown for the arrears of teinds of the lands of Dalcroy or the miln lands of Boahally in 1859, when they claimed and got the arrears of the teinds of Pitdornie, and in point of fact no demand has been made for the arrears of the teinds by the Crown until this action. Accordingly the Duke of Athole has been allowed to possess the teinds, and has possessed them down to the raising of this action, just as he possessed them before the using of this inhibition at all. Now, it is said, as I understand, that no demand was made, because the Crown did not know what the lands were, that they did not know where the miln lands of Boahally were, and that they did not know that the lands of Dalcroy were the same lands. It appears to me that that is no excuse for the Crown not asking these teinds. When any proprietor—the Crown, or anyone else—grants a tack of property to a tenant, he surely ought to know where his property lies. I think the proprietor was bound to know where the lands of Boahally were, and to make the requisite claim for the surplus teinds. But in point of fact, though the Crown did claim the teinds of Pitdornie, they did not claim the surplus teinds of Dalcroy, and they never claimed them till they raised this action. Now, as I understand, the ground on which the Crown now claims these teinds is this—not that they say the inhibition of 1839 was good, and therefore that it put an end to tacit relocation, but they say—because you waived any objections that you might have had as regards the teinds of Pitdornie, that necessarily implies a waiver of all objections you might have had to the claim for arrears of teind for Dalcroy. That is the proposition, and unless that proposition is sound it appears to me that the Crown has no case. Now, I think that both in law and in justice the Duke of Athole cannot be held to have waived his objections to his inhibition to any further or other extent than he actually waived them in the claim made against him at that time. The claim made on Pitdornie was a comparatively small claim—a few

shillings a year; and for anything I know the Duke of Athole's advisers may not have thought it worth their while to embark in an expensive litigation or investigation as regards that. But when a large claim like that with reference to Dalerooy is made against him, I do not see how it can be pleaded that because he made an admission in another case he therefore must be held to have made an admission in regard to this case. I do not think it would be fair or just to hold that, and I do not think it is law, for in my opinion the waiver he made as regards the teinds of Dalerooy cannot be held to go to any further extent than this particular subject. It has been suggested that the subjects are both in the same tack, and that the same tack-duty, 5s. 3d., is payable for them, and that it is not possible now to hold the tack subsisting as regards one of the subjects and not as regards the other, because we do not know what tack-duty will be payable for the one that is still included in the tack. I think that is a difficulty which would be easily got over, and if there is to be a division of the tack-duty the fair way would be to take it *pro rata* of the value of the teind subjects. But that would not stand in the way of doing what I think justice to the Duke of Athole. The only other matter that I need refer to is the Lord Ordinary's finding as to the judgment in the *Locality of Calton* ruling this case as regards arrears. In the view I take of the present case it is unnecessary to consider that matter, but I wish to reserve my opinion entirely upon it, because I have personally very considerable doubt as to how far the Lord Ordinary's judgment is sound upon that point. On that point therefore I wish to reserve my judgment.

The Court pronounced this interlocutor—

“Having considered the cause and heard counsel for the parties on the reclaiming-note for the Duke of Athole against the interlocutors of Lord M'Laren of 19th July 1884, and 28th November 1884, recal the said interlocutors: Decern against the defender for payment of £30, 4s. sterling, being the amount of surplus teinds of the lands of Pitdornie from 1861 to 1881, both inclusive: *Quoad ultra* assoilzie the defender and decern: Find the defender entitled to expenses,” &c.

Counsel for the Crown—Keir. Agent—Donald Beith, W.S.

Counsel for Defender—Pearson—Graham Murray. Agents—Tods, Murray & Jamieson, W.S.

Friday, March 20.

FIRST DIVISION.

[Sheriff of Chancery.

MAITLAND v. MAITLAND.

(*Ante*, p. 418).

Process—Proof—Specification of Documents—Excerpts from Writs in Publica Custodia—Examination of Havers.

A specification of documents, for which a diligence was craved, included, *inter alia*, acts of the Legislature in a foreign country,

wills, probates, and church registers. *Held*, as to all these documents, that the proper course to follow was to examine the custodiers of these writs as witnesses with reference to the entries under their charge, and *diligence* for their recovery *refused* accordingly.

In obedience to the interlocutor of the First Division, of date 19th February 1885, reported *ante*, p. 418, a condescence was lodged by Sir J. R. G. Maitland and answers were lodged by Major Frederick Maitland. The condescender alleged himself to be descended from the Hon. Sir Alexander Maitland, fourth son of the sixth earl. Major Maitland, the competing petitioner, also alleged his descent from the sixth earl. He traced it to the Hon. Richard Maitland, an elder son than Sir Alexander Maitland. He alleged that this Hon. Richard Maitland married, on 11th July 1772, in New York, according to the rules of the Church of England, a certain Mary M'Adam, that his, respondent's, grandfather Patrick Maitland was a son of this Hon. Richard Maitland and Mary M'Adam born before the date of the marriage, that the Hon. Richard Maitland was a Scotsman and never lost his Scottish domicile, and that Patrick Maitland was therefore legitimated by his parents' marriage.

The condescender denied that Hon. Richard Maitland ever married, and further averred that he was at his death, and for a long period before it, domiciled in British North America, where the law of legitimation *per subsequens matrimonium* did not exist.

By interlocutor of 18th March 1885 the Court allowed the parties a proof of their averments, Major Maitland to lead in the proof, but with the declaration that the proof was for the present to be limited to an inquiry as to what was the system of law relating to marriage which prevailed in New York in the year 1772.

Specifications of documents, to secure which diligence was sought, were put in by both parties. Sir J. R. Gibson Maitland (the condescender) sought to recover documents relating to real property in what was then British North America, acquired by or granted by the Hon. Richard Maitland in or prior to 1776; Acts of the Local Legislature regarding lands belonging to the Hon. Richard Maitland, including certain Acts specified; wills and probates of wills executed by him; agreements relating to mines in which he was interested; file of newspapers circulating in New York in 1772; church registers in the province of New York for 1772; writings and letters of or by him relating to his *status* or domicile.

Major Maitland objected to this specification, and argued that the commission was too wide, and sought to include Acts of Parliament and public writs in other countries which could not be recovered to be put into process, and even if recovered would not thereby be rendered competent evidence.

Authorities—Dickson on Evidence, sec. 1354; *M'Lean & Hope v. Fleming*, Mar. 9 1867, 5 Macph. 579.

No material objection was taken to the specification of Major Maitland.

At advising—

LORD PRESIDENT—The articles of this specification to which objection is taken are numbers