

interlocutors, so far as the same can be considered as inconsistent with that of the 14th May 1811, be, and the same are hereby reversed: and it is further ordered that the cause be remitted back to the Court of Session, further to proceed therein, as is consistent with this judgment.

1815.

STEWART
v.
KER.

For the Appellant, *John Leach, M. Nolan.*

For the Respondent, *Sir Saml. Romilly, P. J. Gordon,*
James Abercromby.

NOTE.—Unreported in the Court of Session.

ARCHIBALD M'ARTHUR STEWART of Ascog, - *Appellant*;
JOHN KER, W.S., Common Agent in the
Locality of Eddleston, - - - - *Respondent.*

House of Lords 27th February 1815.

LOCALITY—RIGHT TO TEINDS.—In a locality of the minister's stipend of the parish of Eddleston, it was objected to the appellant's titles, that no right to teinds was conveyed by the dispositive clause of his disposition, although mentioned in another clause of the deed. Held by the Court of Session, that he had no right to the teinds of the lands: reversed in the House of Lords.

This was a locality of the stipend of the parish of Eddleston following an augmentation of the minister's stipend, in which the appellant claimed a right to the teinds of his lands, so as not to be localled on as an heritor having no right to teinds, but only with the titular himself, and other heritors having right to teinds.

It appeared that the appellant had acquired his lands of Whitebarony from Sir Alexander Murray of Blackbarony. Sir Alexander's ancestors had acquired in 1593 the whole tithes of the parish, by a lease for a certain number of lives, and then for a long period after the termination of these lives. In 1688, Sir Alexander acquired from the Countess of Traquair the advocation, donation, and right of patronage of the parish church and patronage of Eddleston, and as such, it was stated he acquired right to the whole tithes of the parish not heritably disposed by the Acts of the Scottish Parliament, 1690, c. 23, and 1693, c. 25.

Sir Alexander Murray disposed to Mr Stewart, in 1732,

1815.

 STEWART
 v.
 KER.

the lands of Whitebarony. In the dispositive clause of this disposition there was no mention of tithes; but it appeared from other clauses in the deed, that the teinds were conveyed to him. The disposition was granted with a power to redeem or purchase back the lands, and the deed proceeds as follows, “But
 “in case I, or my assignee to the reversion, shall not redeem
 “the lands and rouns above disponed, so as that the same
 “shall become the irredeemable property of the said Mr John
 “Stewart, his said spouse, and their foresaids; then they shall
 “be liable for a part of the cess and public burthens effeiring
 “to the valued rent of the said lands, which is hereby agreed
 “to be one-fourth part of the valued rent of my lands and
 “estate in the shire of Peebles, but they shall not be liable
 “for a proportional part of the minister of Eddleston, his
 “present stipend; but they shall be liable for any aug-
 “mentation of stipend, if any shall thereafter happen to be
 “obtained by the present minister, or any succeeding mini-
 “sters in the said parish, and that proportionally with the
 “other lands in the parish.” “And because the sums now
 “advanced and discharged to me, are an agreed price *both*
 “for *stock and teind*, and that my right to the teinds being a
 “temporary right, and what will not absolutely defend from
 “some evictions that may emerge, therefore I bind and oblige
 “me, my heirs,” &c., “to free, relieve, and disburden the
 “teinds of the foresaid lands and rouns now disponed of, and
 “from all evictions of the said teinds that shall happen to
 “occur any manner of way, and shall keep the said Mr John
 “Stewart, his said spouse, and their foresaids, harmless and
 “skaithless from the said evictions, whenever the same shall
 “happen on any account whatsoever, and of all cost, skaith,
 “and damage, that they or their foresaids may happen to
 “sustain there-through.” Two months thereafter Sir Alexander
 had conveyed to the Earl of Portmore certain lands within
 the parish, with the teinds, great and small.

The common agent in the locality objected to the first disposition in favour of the appellant's ancestors, as giving no right to the tithes. He stated there was no mention of the tithes in the dispositive clause, and, besides, there were other indications of intention, which showed that Sir Alexander had not intended to convey these. In the deed itself, he states that his own right was “of a temporary nature,” and it was further stated, that Sir Alexander, a few months after, had granted to the Earl of Portmore, a disposition, disponing to him certain lands within the parish, “with the teinds, great

“ and small, parsonage and vicarage of the lands, and others
 “ dispoed,” from which it was inferred, that if Sir Alexander
 had intended to give a right to the teinds to Mr Stewart, he
 would have made use of the same words.

1815.

STEWART
 v.
 KER.

In answer to this, the appellant stated that it had been de-
 termined as established law, that in questions of locality, it
 is of no importance in what form the right to tithes has been
 conveyed, provided the patron or titular of the tithes, who is
 truly the party, can make no just objection to it; thus, 1st, A
 perpetual lease of tithes or an obligation to renew a lease from
 time to time for ever, upon payment of a certain fine, has
 been held to create an heritable right. 2dly, It has been
 decided that persons possessing the tithes of their lands by
 tacit relocation from the Crown, as coming in place of the
 bishops, are to be localled on in the same manner, as if they
 had a proper right to tithes. 3dly, An obligation by the
 titular of the parish, to warrant a particular heritor against
 future augmentations has, by the constant practice of the Court
 of teinds, been held in a locality to be equal to the most for-
 mal conveyance of tithes. From all which, it is plain it is a
 question solely with the titular, and that if the titular is barred
personali exceptione from challenging the right produced, the
 heritor is entitled to the benefit of it in the process of locality.
 It is plain that the titular is barred *personali exceptione* here,
 for he declared in the disposition that he received a price for
 both stock and teind, and that he sold the teinds along with
 the lands, and received a price accordingly. Besides, in two
 previous localities, one in 1772, and another in 1795, his
 lands were localled on as having a right to his teinds.

July 11, 1759.

July 22, 1784.
 Gordon v. Earl
 of Fife.
 Dec. 17, 1788.
 Common
 Agent in Kirk-
 liston v. Gibson
 Wright. Fac.
 Coll., vol. x.
 p. 90.

The Lord Ordinary found: “ That Mr M'Arthur Stewart
 “ has not instructed such a right to his teinds as to entitle his
 “ lands to an exemption from being localled upon in propor-
 “ tion with the lands of the other heritors, and therefore repels
 “ the objections.” On representation, the Lord Ordinary
 “ Finds that the representer's lands are liable to be localled
 “ upon *proportionally with the lands of other heritors in the*
 “ *parish, who have no heritable right* to their teinds, and there-
 “ fore refuses the representation, adheres to his interlocutor.”
 And on reclaiming petition, the Court adhered.

May 12, 1804.

May 14, 1805.

May 29, 1805.

Against these interlocutors the present appeal was brought
 to the House of Lords.

Pleaded for the Appellant.—1st, Although the scheme
 of locality, which is objected to by the appellant, was pre-
 pared by the respondent calling himself common agent for

1815.

 STEWART
 v.
 KER.

the heritors, it must be liable to the same objections at the instance of individual heritors, as if the allocation had been made by the patron and titular, whose province it is to allocate upon the teinds of the parish, whatever stipend is modified to the minister; and 2d, The predecessor of the appellant in the present case is clearly established to have purchased from the titular the teinds of his lands in this parish, and paid their price so far back as 1732. The appellant is consequently by that transaction entitled to the drawing of his own teinds, and to be localled on for stipend, only proportionally with the titular himself, and such other heritors in the parish as have acquired rights to their teinds in the same manner as his lands were localled on in the process of locality in 1772, and in the process of locality in 1795.

Pleaded for the Respondent.—Tithes in Scotland, held in property by laymen, have long formed distinct real estates, which, as in the case of lands or other feudal subjects, can only be conveyed by a charter or disposition. Delivery is made by an appropriate symbol, analogous to the symbols used in cases where a right to tithes is granted by special statute (Here a passage from Erskine was referred to, B. ii. tit. 10, § 40).

Purchasers of real estates in Scotland rely on the records. But if a mere intention to convey tithes not expressed in what are termed dispositive words, were sufficient to give a right to tithes, the security arising from the records would be lost. Now, in the present case, the appellant founds on the disposition executed by Sir Alexander Murray in 1732; but by this disposition he merely conveys certain lands, but does not convey the tithes of these lands. Consequently, no right to the tithes could be vested by this disposition in the person of the appellant's predecessor. Intention, it has been observed, would not be sufficient, but it does not appear that Sir Alexander Murray had an intention to give an heritable right to the tithes. He had two rights in his person, the one founded on the lease, which right was of a temporary nature, the other founded on the disposition by the Countess of Traquair, under which he became titular of the tithes of the parish. It may not be improbable that he intended to impart his temporary right to the appellant's predecessor; but it is utterly inconceivable that, if he had intended to grant an heritable right, he should *not* have expressly conveyed the tithes.

After hearing counsel,

It was ordered and adjudged, that the interlocutors of the

12th May 1804, and 14th and 29th May 1805, be, and the same are hereby reversed. And it is declared, that the persons entitled, under the deed or disposition, 21st August 1732, made by Sir Alexander Murray of Blackbarony, Baronet, in pursuance of the contract of marriage therein recited, are entitled to hold the teinds of the lands specified in such disposition heritably against the said Sir Alexander Murray, and his successors, patrons, and titulars, of the said parish of Eddleston; and that in localling the stipend of the minister of the said parish, the teinds of the lands of the appellant comprised in such disposition, ought to be considered as having been heritably disposed by the said Sir Alexander Murray by the said deed of disposition of the 21st August 1732. And it be further ordered, that the cause be remitted back to the Lords of Council and Session in Scotland, as commissioners for plantation of kirks and valuation of teinds, to proceed in localling the stipend of the ministers of the said parish, in such manner as shall be consistent with this declaration.

1815.

STEWART
DENHAM
v.
LOCKHART,
&c

For the Appellant, *Wm. Adam, Jas. Moncrieff.*

For the Respondent, *John Greenshields, Fra. Horner.*

NOTE.—Unreported in the Court of Session.

[Fac. Coll., vol. xvi., p. 279.]

SIR JAMES STEWART DENHAM of Coltness, Baronet,
Appellant;

Colonel WILLIAM LOCKHART of the 30th }
Regiment of Foot, and the Rev. Dr JOHN }
LOCKHART, one of the Ministers of Glas- } *Respondents.*
gow, }

House of Lords, 20th March 1815.

ENTAIL — SALES — PROHIBITORY, IRRITANT, AND RESOLUTIVE CLAUSES.—An entail contained an express prohibition against selling, but the irritant and resolute clauses omitted to fence against sales, and the estate was sold. In an action brought by the next substitutes, to have the heir who sold the estate to account for the price to the next substitutes, and to re-employ the same in the purchase of land to be entailed in terms of entail. Held