No 99. possession by tacit relocation; and since the possession was begun in that manner, it could not be inverted and ascribed to any other title. As to the prscription founded on for the defender, it was *answered*, That, for any thing he had produced, he appeared to be no more than a naked possessor, and so could neither propone the negative nor positive prescription; for by his documents it appeared that the ground in controversy was a vicar's manse, and consequently a separate tenement from the lands of Ardwall, and could not be part and pertinent of them; and therefore no right to the manse could be acquired by forty years possession of the lands of Ardwall, because of the want of a title to found the prescription.

To all which it was *replied*, That tacit relocation could never be sustained, where there was no deed of possession for the space of forty years after expiring of the tack, from whence the tacit relocation was to proceed. *2do*, Tacit relocation does not take place betwixt the heir of the tacksman and the setter, till once it is acknowledged by mutual consent, *L.* 14. *D. locati.* *3tio*, In the present case, it would be absurd to pretend that the proprietor of Ardwall possessed by virtue of tacit relocation, since, in the year 1660, Episcopacy was established, by which all deeds flowing from Presbyterian ministers were effectually sopite; and neither Mr Laurie, when he was restored, nor his successor Mr Campbell, pretended any claim to this glebe. As to the defence of prescription, it was qualified in this manner, That the heritor of Ardwall had possessed the lands of Toscarton, whereof the ground in question was a part, for the space of forty years, by virtue of charter and sasine, before commencement of this process; and it was contended for him, that his title was good, since the ground lay locally within the barony; and though it was appropriate to a special use, yet when that use failed, it returned to belong to the barony.

"The Lords found, that the documents produced were sufficient to show that there was a separate glebe out of the lands of Ardwall to the separate parish of Toscarton: But found, that prescription might run, notwithstanding that the defender and his authors were not specially infeft in the said glebe."

Reporter, *Lord Newhall.* Act. *Ja. Fergusson*, sen. Alt. *And. Macdowal.*
Clerk, *Dalrymple.*

Edgar, *p.* 46.

No 100. Found, that a subtack of teinds granted to the heritor, though flow-

1746. *July* 2. Muir of Caldwall *against* Heritors of the Parish of Dunlop.

The parish of Dunlop is one of the many parishes the teinds of which belonged to the abbacy of Kilwinning; and about the time of the Reformation, when the practice was to give long tacks of teinds in place of heretable rights,

No 100.
ing *a non habente potestatim*, may be validated by the positive prescription.

the commendator of Kilwinning set in tack to Cunningham of Aiket, his heirs and assignees, the parsonage and vicarage teinds of the parish of Dunlop, for four lifetimes, and five times nineteen years. The abbacy of Kilwinning being afterward erected into a temporal lordship, in favour of the Earl of Eglinton, the Earl came to have right to the tack-duty of eight score merks yearly, stipulated to be paid by this tack; but the tack itself was a burden upon his grant, as all such grants of the patrimony of the church were made with the burden of prior rights.

In August 1655, Hugh Lord Montgomery, upon the narrative of having right by progress to a tack of the teinds of the whole lands belonging to the abbacy of Kilwinning, granted a sub-tack to Muir of Caldwall of the teinds of his own lands, locally within the parish of Dunlop. And the family of Caldwall have, past memory of man, possessed the teinds of their own lands without interruption, though Cunningham of Aiket, by his said tack, had a prior and preferable right to these teinds.

In a process of locality at the instance of the minister of this parish against the heritors, it was insisted upon for Caldwall, that however defective his title might be *a principio*, as flowing *a non habente potestatim*, yet that, by the positive prescription, his sub-tack was validated; and therefore, that with regard to the locality, he must be put upon the same footing with such other heritors of the parish as have sub-tacks from Aiket of the teinds of their own lands. This was opposed by the other heritors, who insisted that the positive prescription is a privilege confined to land-rights passing by infeftment, and that there are no words in the statute to support an extension of this privilege to tacks; that the matter therefore must be considered as it was at the date of Caldwall's sub-tack, at which time the teinds of Caldwall's lands belonged to Aiket, and consequently they are to be held as free teinds in Aiket's hands, to be allocated *primo loco* to the minister.

"Found, that the teinds of Caldwall's lands are not to be held as free teinds in the hands of Aiket, but teinds to which Caldwall has right by tack; and therefore, that they are to be burdened proportionally with the teinds to which the other heritors have right by sub-tacks from Aiket."

It was the opinion of the Judges, that the positive prescription is a favourable plea; and though the statute mentions infeftments only, yet that prescription has been introduced by practice to take place with regard to many other subjects, particularly with regard to tacks.

In the process of locality of the parish of Dunlop, the following question occurred.—Cunningham of Cherrylands had feued out his lands in that parish, reserving the teinds. The other heritors insisted, that these must be considered as free teinds; because they belong to a person who is not proprietor of the lands out of which these teinds are payable. It was *answered* for Cherrylands, that *quoad* every mortal, save the feuars, he is proprietor, and consequently that

No 100. these teinds must be considered as the teinds of his own lands. It is for this reason that the feuars cannot purchase these teinds, and it is for the same reason that they cannot be allocated to the minister, while there are any free teinds in the parish.

" Found, That the teinds of the lands feued out by Cherrylands are to be considered as if no such feus had been granted; and therefore, that they cannot be allocated to the minister, while there are any free teinds in the parish."

This point was much struggled. Elchies, in particular, was of opinion, that these teinds were to be considered as the teinds of other mens lands, in the hands of Cherrylands. And he put the case, What if a man should feu both stock and teind, and after purchase back the teind?

This seems, in a good measure, an arbitrary question. Though it may be said that the superior is the proprietor, and that the vassal's right is no more but a burden upon the superior's property, yet we are beginning to think that the vassal, who has commonly the substantial interest, is truly the proprietor. If a blench superior should purchase the teinds of the estate, I suspect they would be held to be teinds of another man's land: the same, if they should be purchased by a feu superior, where the land is considerable, and the feu-duty small. But if a man feu his land at the full rent, which obliges the feuar to live like a tenant, the teinds in the superior's hands will naturally be considered as the teinds of his own land; precisely as in the case of a long lease of land, perhaps ten or twelve (hundred) years, which is equivalent, or near equivalent, to a feu-right.

The Lords were generally of opinion, That the statute 1693 does not determine this point in favour of the superior; because the statute supposes an implied paction, that the feuars shall not have liberty to purchase the teinds from the superior. And the observation is just; for, even supposing a paction betwixt the titular and any single proprietor that the latter shall not have liberty to purchase the teinds of his own land from the former, this paction would not hinder the teind to be free teind to be allocated to the minister.

But with respect to the judgment in the present case, a doubt may arise, from considering that it is the genius of our law to give every man, as far as possible, the possession of his own teinds: that this is the foundation of the rule of allocating to the minister *primo loco* free teinds, or teinds in the possession of another than the heritor himself; for since the stipend must be paid out of the teinds, it is better that these be allocated, than teinds in the heritor's own hands. If this be the foundation of the rule, the consequence is, that teinds which cannot be purchased by the heritors, nor consolidated with the property, ought to be allocated to the minister *primo loco*, to save the teinds which are consolidated. See Teinds.

Rem. Dec. v. 2. No 77. p. 117.

*** D. Falconer reports this case:

No 100.

CUNINGHAM of Cherrytrees, an heritor in the parish of Dunlop, had obtained a sub-tack of the teinds of his own lands from Cuningham of Aiket, who had right by tack to the whole teinds of the parish, except thoss of the lands of Caldwall, to which the heritor himself had right by a sub-tack from a different tacksman, and which he supported by prescription, notwithstanding they were comprehended within Aiket's right.

Cherrytrees feued part of his estate, reserving the teinds.

A process of modification and locality was brought by the minister against the heritors, in which the Lord Ordinary found, 25th June 1745, 'That the teinds of the lands feued out by Cherrytrees were to be considered as if no such feus had been granted.' By which interlocutor these teinds came to be burdened *pari passu* with Mr Muir's of Caldwall, as they had all tacks of their own teinds.

Caldwall reclaimed, and *pleaded*, That the feuers of Cherrytrees having no right to their teinds, these teinds were free, and behoyed to be first allocated. And whereas it might be objected, that by act 23d, Parl. 1693, no heritor who had acquired right to his teinds, and thereafter sold off the stock, reserving the teinds, could be obliged to sell them; and consequently if the teinds of Cherrytrees, could not by the feuers be purchased as free, neither could they be allocated as such;—this failed in two respects; for 1*mo*, The statute only respected heritors purchasing the heritable right to their teinds, and acquirers of tacks were out of the case of it; and 2*do*, It was not a consequence that teinds could not be bought, therefore they could not be allocated; for by the same statute, bishops teinds, or those of colleges and hospitals, were exempt from purchase, and yet they might be localled: And indeed if those teinds, which an heritor may buy in for six or nine years purchase, can be allocated, and he thereby cut out from that right, much more ought those which he cannot purchase be subject to allocation.

Answered, That a superior of lands was to be reckoned the proprietor in dispute with every other person than the vassal, and therefore Cherrytrees was to be considered as having right by tack to the teinds of his own lands.

The petitioners *argued*, That the act 1693 did not exclude the feuers from purchasing. But it was *answered*, That they were excluded by their own contract, having acquired the lands subject to the reservation. And supposing it not to hold universally, that teinds cannot be sold, therefore they cannot be allocated; yet the argument might be good from analogy, when there were no special reasons to the contrary. And here the analogy was complete, since the reason why a vassal could not purchase the teinds of his lands, which his superior had reserved at granting the feu, was, that he possessed them as the teinds

No 100. of his own lands, and for the same reason they could not be allocated to the minister.

The Lords commissioners adhered.—*See* Teinds.

Petit. *W. Grant.* Resp. *H. Home.*

D. Falconer, v. 1. *No* 126. *p.* 153.

1756. *February* 25.

John Straton of Lauriston *against* the New College of St Andrews.

No 101.
A clause *cum decimis* in a charter of adjudication, though repeated in subsequent charters, was found not to give right to the teinds by the positive prescription, in the person of him who continued to take leases of the teinds from the Crown, the former titular.

The lands of Lauriston lie in the parish of Marytoun. The teinds belonged to the bishopric of Brechin until the abolition of episcopacy in the 1690, when they became vested in the Crown. The lands belonged to the Earl of Middleton, and were apprised from him in the 1670. On this apprising Colonel Charles Straton obtained a charter in the 1695, wherein a clause *cum decimis tam rectoriis quam vicariis* is contained; which clause is repeated in all the subsequent charters. In the 1721, Colonel Straton obtained from the Crown a lease of the teinds of Lauriston; which lease was renewed in 1740, and is still current. In a process of augmentation, modification, and locality, raised by the minister of Marytoun, the question occurred, Whether the teinds of Lauriston, were to be considered as belonging heritably to Straton, or as possessed under lease.

Straton of Lauriston *pleaded*, That the teinds were heritably conveyed to his predecessor by charter from the Crown, and have been transmitted in all subsequent charters, during a space much longer than is required by the act 1617. Neither can the leases of the teinds, which have been inadvertantly taken, vacate this heritable right, or imply a dereliction thereof; the teinds therefore must be held as belonging heritably to Straton, and the augmentation localled accordingly.

Answered for the New College of St Andrews, as having right to other teinds in the parish of Marytoun: The question is not, whether an heritable right already established to the teinds of Lauriston has been vacated or delinguished? but, whether such heritable right has ever been constituted in the person of the proprietor of Lauriston? The act 1617 requires not only heritable infeftments, but also continued possession for forty years; now, Straton and his authors have not possessed the teinds as heritors, but as tenants by lease from the Crown. The consequence of the argument used by Straton would be, that if an heritor can once procure a clause *cum decimis* to be inserted in his charter and sasin, he may continue to take leases of the teinds from the crown, and after the expiry of forty years, may plead an heritable right to the teinds by positive prescription, notwithstanding his possession as tenant.