

No. 215. In the case of the Earl of Athole against Robertson, use of payment to the Minister of the whole teind, was found sufficient to defend the heritor from second payment to the titular, till inhibition or citation ; but there the heritor did not pretend any right from the titular ; and citation was deemed a sufficient intimation of the titular's right.

The decision between Mr. George Shiell and his parishioners, was in the case of vicarage teinds, which do not require inhibition, as is laid down by Lord Stair, IV. 24. 11.

Replied, on the 2d point : A person possessing by tacit relocation, possesses on the same conditions as if the tack had been expressly renewed. If, in this case, the patron had granted a new tack in terms of the former, he must have relieved the heritor of the surplus teind, which he is equally bound to do, by having allowed him to possess by tacit relocation.

The Lords " found, that the citation does not interrupt the tacit relocation ; but found the defenders liable for the full teind from the date of the interlocutor ; and found the Earl entitled to repetition of the surplus stipend from the same period.

Act. *Ilay Campbell.* Alt. *Macqueen.* Reporter, *Strichen.*
G. F. *Fol. Dic. v. 4. p. 329.* *Fac. Coll. No. 18. p. 229.*

1788. December 17.

The COMMON AGENT in the LOCALITY of KIRKLISTON *against* ALEXANDER GIBSON WRIGHT.

No. 216.
In localing a Minister's stipend, those possessing the teinds of the lands by tacit relocation from the Crown, as coming in the place of a Bishop, are considered as having an heritable right.

Mr. Gibson Wright, and his predecessors, had held the teinds of their lands of Clifton-hall, in the parish of Kirkliston, for more than a century, under leases granted by the Crown, as coming in the place of the Archbishop of St. Andrew's.

One of these leases expired in 1783. And while Mr. Gibson was continuing to possess the teinds of his lands by tacit relocation, an action was, in 1785, brought for augmenting and localing the stipend due to the Minister of the parish. In 1787, Mr. Gibson Wright obtained a new lease for nineteen years.

The common agent in the locality insisted, that Mr. Gibson Wright was to be classed among those who had no heritable right to the teinds of their lands ; and

Pleaded : In determining out of what fund the stipend due to the Minister is to be paid, the rule in general is, to exhaust those tithes which are still in the hands of the Crown or other titular, before encroaching on those which are under lease. And the reason is, that the titular being at common law obliged to guarantee the tacks granted by him, and the tacksmen of the tithes being also entitled by the statutes of 1617 and 1690, in recompence of any allocation, to demand a prorogation of their tacks ; a contrary practice would give rise to many unnecessary proceedings. This principle, however, does not hold with regard to tithes held by tacit relocation, the holders having no claim to any recompence. There is no instance where a tacksmen, in such circumstances, ever thought of demanding it.

And it is of no importance, that where the titularity of the tithes, as happens in the present case, is in the Crown, as coming in the place of a Bishop, the landholders may, by the usage of Exchequer, obtain from time to time new leases of the tithes exigible from them, on paying a certain fine or composition. As this arises from no positive right, seeing a renewal of former leases may always be, and is sometimes withheld, it cannot be made the foundation of any general rule.— Indeed the case would not be altered, although those who are liable in payment of tithes to the Crown, might *de jure* insist for a renewal of former leases. The allocation of stipends must be regulated by the situation of parties when the action is commenced, agreeably to the maxim, “*Quod pendente lite nil innovandum.*” Without this there would be no end to disputes, and the state of a locality would ever fluctuate as the rights of the several landholders varied; alike contrary to the established practice, and to the directions given to the Commissioners for Plantation of Churches, to settle what, in all time coming, shall be the stipend of each Minister.

Answered: A titular can in no case lay any burden on those who are in possession of the tithes of their lands, in virtue of standing tacks, however short the endurance of these may be, while there are free teinds in the parish. The only difference arising from this circumstance is, where from a deficiency of the free teinds it becomes necessary to impose some part of the stipend on those who have tacks; in which case, the longer the current lease is, the lessee will be entitled to a longer prorogation.

The present case, however, is attended with peculiar circumstances. Besides the right to possess the tithes, founded on tacit relocation, which may continue for centuries, the tacksman is entitled, by the custom of Exchequer, to obtain a new lease for nineteen years, and so on from one period of nineteen years to another, *in infinitum*. To make a distinction in such a case, between those who have recently obtained a lease of the tithes, and those who have not, would be obviously unjust. And the rule *pendente lite*, is quite inapplicable, the other heritors having no more right to object to the granting of a new lease, before the locality of the stipend is finally ascertained, than they have to prevent one of their number, after the commencement of an action of this sort, from purchasing, under the statutes of 1690 and 1695, the tithes of his lands, on payment of the statutory price.

The interlocutor of the Lord Ordinary was in these terms:

“ Finds, That as a tenant, who, after his tack is expired, possesses on tacit relocation, is liable in all the payments and prestations therein contained, and not as a possessor would be, who had no antecedent title, he ought to be considered as a tacksman even after his tack is run out: Finds, That Mr. Gibson Wright, and his authors, possessed their teinds in virtue of tacks from the Exchequer very far back, and that he obtained one in 1764, which expired at Martinmas 1783, and that, by the custom of Exchequer, he was entitled to a renewal thereof, and would have obtained it in 1783, had he then applied for it, in the same way as he got it 1787, when he did apply for it: Finds, That as Mr. Gibson Wright possessed his teinds

No. 216. by tacit relocation in consequence of the tack 1764, when the process of augmentation was raised, he must be considered as a tacksman of the teinds at the time; and that his case cannot be assimilated to that of an heritor having no right to his teinds when a process of augmentation was raised, and obtaining an original tack of them after the augmentation was granted; and that the maxim, *pendente lite*, does not strike against Mr. Gibson Wright's right of tithes in virtue of his tack 1787," &c.

After advising a reclaiming petition for the common agent in the locality, with answers for Mr. Gibson Wright, the Lords affirmed the judgment of the Lord Ordinary.

A second reclaiming petition was preferred, which was refused without answers.

Lord Ordinary, *Dreghorn*. For the Common Agent, *Wight, Murray*. Alt. Mat. *Ross*.
C. *Fol. Dic. v. 4. p. 329. Fac. Coll. No. 51. p. 90.*

SECT. XV.

Use of Payment.

1626. *March 22.* LENNOX *against* TENANTS.

No. 217.
Tenants in use to pay certain rental teind-bolls are liable for the same, altho' exceeding the real teind of the corn produced, ay and while they make intimation to the titular, offering him the actual teinding of the corns.

See No. 222.

In an action at the instance of Lennox of Branshogill against certain tenants of Balfroon, for payment of the rental teind-bolls of the lands possessed by them, upon this reason, because they were in use to pay the same divers years preceding the year libelled; the Lords sustained the action, and found the tenants astricted to pay the rental boll, albeit it neither was libelled, nor offered to be proved by the pursuer, that there grew as many corns that year libelled as would extend, in the quantity of the teind, to the rental-bolls acclaimed, without the which the defenders alleged they could not be subject to pay the rental bolls, albeit they had paid the same before, which was but voluntarily done, and could be no reason to make it thereafter necessary; which was repelled, and the Lords found them subject to pay the said rental bolls, albeit the teinds of the corns growing extended not to that quantity; for the Lords found them still debtors thereof, ay and while they made timeous intimation to the pursuer, or the person having right to the teinds, that they would not remain obliged to pay the said bolls, and offer him teinding of the said corns; and so, in this case, the defenders are in