decerned the Earl to sell and dispone these teinds, for a price mentioned in the decreet, being about nine years purchase thereof, and therefore the pursuer cannot have right to the teinds themselves, but only to the annual-rent of that sum, which was the price. The pursuer answered, That he opponed the decreet produced, which did not, *de præsenti*, adjudge the teinds to the defender, but decerned the pursuer to sell them to him, upon payment of the said price, which can give no right to the teinds till the price be paid, or at least offered, which was never done.

No. 29. liament ordaining the titular to sell them at a certain price, that price never having been offered.

The Lords repelled the defence, in respect of the reply.

Stair, *v.* 1. *p.* 612.

1671. *July* 18. EARL of HUME *against* The LAIRD of RISLAW.

No. 30. Effect of tacit relocation in teinds.

The kirk of Fogo having been a kirk of the Abbacy of Kelso, when the same was erected; this kirk was reserved in favours of the Earl of Hume, and disponed to his predecessors; whereupon he pursues the Laird of Rislaw for the teinds of his lands, as a part of the teinds of Fogo; who alleged absolvitor, because his predecessors obtained tack of their teinds from the Minister of Fogo, as parson thereof, which tack, though it be now expired, yet he bruiks, *per tacitam relocationem*. The pursuer repled, that his tacit relocation was interrupted by inhibitions produced. The defender answered, that the inhibitions were only at the instance of the Earl of Hume, who was never in possession of his teinds, whose right he neither knew nor was obliged to know, and the Earl ought to have used declarator against the defender, and the parson of Fogo his author, which was the only habile way, and not the inhibition.

The Lords sustained the process upon the inhibition, and restricted the spuilzie to wrongous intromission, unless the defender could propone upon a right in the person of himself, or his author, that could either simply exclude the Earl's right, or at least give the defender or his author the benefit of a possessory judgment, and put the Earl to reduction or declarator.

Whereupon the defender alleged, that the parson of Fogo was presented by the King, as parson of Fogo, and did so bruik by the space of thirteen years, which was sufficient to defend him, *in judicio possessorio*. It was replied, first, that the Minister cannot pretend the benefit of a possessory judgment, because his possession was not peaceable, in so far as it was within the thirteen years it was interrupted by the pursuer's inhibitions. The defender answered, that he offered to prove thirteen years possession, at least seven years peaceable possession, before any inhibition, which is sufficient; for as thirteen years possession make a presumptive title, decennalis et triennalis possessor non tenetur docere de titulo; yet where the defender produces a title, viz. a presentation as parson, he is in the common case of a possessory judgment upon seven years possession. The pursuer further replied, that albeit the seven years were peaceable, and sufficient for a possessory judgment; yet the defender cannot maintain his possession by

No. 30.

tacit relocation, for he having no positive right in his person, his tack being expired, he can only maintain his possession upon his author's right, as parson, and so can be in no better case than his author, who if he were compearing, not pleading the benefit of a possessory judgment, he would be excluded by the reply, that he had acknowledged the Earl's right, and taken assignation from him to the tack duty, due by the defenders, which, though it would not be sufficient after the defender's tack, to exclude the same, if it were not expired, yet it is sufficient against his tacit relocation, which can only subsist, while his author hath right and possession, and being but a presumptive continuation of the right, it is easily taken away by any deed of the author. It was answered, that tacit relocation being introduced by law, was as strong as a prorogation, and continuation of the tack, which could not be prejudged by any posterior deed of the parson.

The Lords found the defence upon the parson's right clad with seven years peaceable possession relavent *in judicio possessorio*, to defend the defender's tacit relocation, but found the reply relevant that the parson had accepted assignation from the pursuer, to make the defender liable for the ordinary profits, after the assignation, and after the first inhibition, but only for the tack duty till the first inhibition, and found that the tacit relocation was not in a like case, as if the defender had a tack, or prorogation.

Stair, *v.* 1. *p.* 758.

1672. *February* 27. SCOT *against* MUIRHEAD.

No. 31.

Teinds were found to be carried by a disposition of lands which contained an assignation to the tacks of the tenants who paid a joint duty for stock and teind.

Mr. John Muirhead having sold certain lands to Walter Scot and his son, they pursue declarator, that thereby they have right to the teinds of the said lands, in so far as the disponer had right, because, by the disposition, though there be no express mention of the teinds, yet the same is implied, in so far as they are assigned to the tenants' tacks without reservation, and they are burdened with £.30 of teind to the Minister, and all subsequent augmentations, and the tenants pay a joint duty, both for stock and teind, and they gave more than twenty years purchase for the rental, comprehending both stock and teind. It was answered, That teinds being distinct rights from lands, the same cannot be conveyed with the lands, unless they be expressed, and not by presumptions or inferences.

The Lords having ordained the communers, writers, and witnesses in the disposition to be examined *ex officio*, they found little clearness thereby; but, by the tenor of the disposition, they found, that the pursuer had right to the teinds; but, in regard that the conception was so unclear, they allowed the defender to be reponed, refunding the price *cum omni causa*, except the composition to the superior.

Stair, *v.* 2. *p.* 81.