No. 213. tacit relocation, there is *quam proxime* the same reason for implying consent in tacks of mails and duties, in tacks of teinds, and in tacks of feu-duties, as in common tacks, and the same utility and conveniency of execution in all of them. And to show that this is agreeable to the common sense of mankind, it shall be supposed that a tacksman of mails and duties, after expiring of the term contained in his tack, continues in the civil possession, but loses the bulk of the rents by bankrupt-tenants: *Quæritur*, Is he liable for the duty contained in his tack, or is he only liable for what he has received? If there be no tacit relocation, he is only liable for the latter. The pursuer must maintain this proposition, and yet no sensible man will be of his opinion.

"The Lords sustained the defence of tacit relocation."

Fol. Dic. v. 4. p. 329. Rem. Dec. v. 2. No. 15. p. 27.

1763. *December* 7. EARL of SELKIRK *against* M'MORAN of Glespine.

No. 214. A tack of the teind of his own land, obtained by an heritor from the titular, being expired, he was allowed to continue his possession by tacit relocation, upon paying the tack-duty of £.200 Scots An action was brought against him by the titular in the year 1750, concluding for payment of 1000 merks yearly, as the true value of the teind. This process proceeded slowly, and when it was drawing to a conclusion, the question occurred, Whether the citation in this process was a proper interruption of the tacit relocation? It was urged for the defender, that inhibition of teind is the only legal interruption. It was answered for the pursuer, that tacit relocation has no other foundation than the consent of parties; and that a process rejecting the tack-duty, and demanding the full value of the teind, is as strong a specification of the titular's dissent, as any legal act can possibly be.

"The Lords accordingly found this process a sufficient interruption."

Sel. Dec. No. 210. p. 277.

*** This judgment seems to have been afterwards altered. See the case which follows.

1765. *November* 14. EARL of MARCH *against* LEISHMANS.

No. 215. Tacit relocation of teinds. The proprietors of Pewlands had right to a sub-tack of the teinds of those lands, for payment of £.80 Scots.

The Minister of Newlands got an additional stipend by a decree of augmentation, and there was localled, on the lands of Pewlands, 19*s.* 11*d.* of money, and four bolls of victual more than the teind-duty payable by the sub-tack, whereof the patron was ordained to relieve the heritor yearly, during the course of the tack, after which the heritor was appointed to pay the stipend conform to the locality.

The tack expired in 1743; but the Earl of March, the patron, continued to pay the surplus stipend till 1757, when he brought an action, concluding 1*st*, for payment of the free teind in time coming; 2*do*, for repetition of the surplus stipend. No. 215.

Pleaded for the defenders: They possessed by tacit relocation, and can only be liable for the tack-duty.

Answersd: The pursuer insists for the free teind, only from the date of the citation, which is equivalent to an inhibition. Tacit relocation is founded on the presumed consent of the titular, and that is necessarily excluded by a process for the full teind.

In lands, warning was introduced for the protection of tenants, that they might not be thrown destitute by being removed on the term day without notice; but no such inconvenience can take place in tacks of teinds. Again, the value of teinds is fixed by law at a tenth of the produce: In lands, there is no legal value for which a tenant can be made liable; and yet, even in the case of lands, an action for a greater duty, in time coming, has been found to interrupt tacit relocation, without warning; M'Brair against Romes, No. 211. p. 15320.

In several cases, citation in a process has been found to interrupt tacit relocation of teinds, Earl of Athole against Robertson, No. 34. p. 7804. *voce* JUS TERTII; Shiel against Parishioners of Prestonhall, No. 61. p. 10761. *voce* PRESCRIPTION. Forbes on Tithes, holds citation to be equivalent to inhibition, p. 320, 355.

2*do*, The surplus stipend, paid by the patron, since the expiry of the tack, must be restored as *indebite solutum*, in consequence of the decerniture of the decree of locality.

Replied, on the 1*st* point: All our lawyers have agreed that inhibition is the proper method of interrupting tacit relocation of teinds; Stair, II. 8. 23. and IV. 24. 2; Mackenzie, II. 10, 19; Bankton, II. 8. 179; Erskine, II. 10. 21.

Whether an action, concluding that the heritors should be ordained to surrender the possession, would be competent, it is unnecessary to inquire. But an action for payment of a higher duty cannot deprive him of the possession; on the contrary, it clearly supposes that the heritor is to continue to possess; and, so long as his possession continues, he can be liable in no higher rent than what he agreed to pay; nothing but a joint agreement can subject him to an additional rent. Suppose a tenant, after the expiry of a lease of lands, should notify to the heritor, that he is to pay a lower rent in time coming, still he would be liable for his original rent, unless he gave up the possession; and a like notification by the proprietor, would be equally ineffectual to increase the rent above what had been formerly paid.

Indeed, the present question was expressly determined between the Earl of Selkirk and Macmorran of Glespine in 1764, *supra*, where citation was found not to be equivalent to inhibition, and the heritor was subjected to the full teind only from the date of the interlocutor.

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 2*d* 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 localling 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 localling 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 tacksman, in such circumstances, ever thought of demanding it.