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which they claimed preference to the public, and, lest the rents might perish, desired a sequestration, upon security to be forthcoming to all parties having interest; so that the King having claimed the intromission with the rents as his right, and thereupon sequestration arising, the creditors had no possession that could afford this benefit; and the subject of the question is yet *in medio* in the hands of the Chamberlains or debtors; and generally tacit relocation is a defence competent to possessors pursued to remove, but was never an active title to claim or obtain preference in a competition.

It was answered for the creditors: That their debts and diligences state them in the same case, as the Earl would have been if not forefaulted; and the Fisk has no interest till their debts be purged and paid; and the factors' or sequestrators' possession is theirs; and there is no ground of competition with the Fisk, except by quarrelling their debts; and the sequestration continued only because of the number of creditors, and that the Fisk had always the reversion.

"The Lords found, that the rents being sequestrated for the behoof of all parties having interest, the creditors had not the benefit of tacit relocation.

Fol. Dic. v. 2. *p.* 426. *Dalrymple, No.* 57. *p.* 72.

1741. *June* 22. *and* 1742. *January* 28.
EARL of DARNLEY *against* CAMPBELL of Shawfield.

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Found that tacit relocation takes place in a tack of feu-duties, as well as in a tack of lands.

Kilkerran, No. 1. *p.* 532.

Lord Kames reports this case:

1740. *Nov.* 25.—In 1706, Edward Hyde, eldest son to Lord Cornbury, obtained from Q. Anne a lease for three nineteen years of the feu-duties of the Isle of Ilay, of value £.500 Sterling yearly, for an annual payment of £.500 Scots to the Crown. Campbell of Shawfield, as proprietor of the island, being liable personally for these feu-duties, obtained from the Earl of Darnley, in the right of the said Edward Hyde, tacks of the feu-duties for payment of £.300 Sterling to the Earl, and relieving him of the yearly sum of £.500 Scots, payable to the Crown. The last tack was granted in May 1737, to endure from Whitsunday 1737 to Whitsunday 1738. The tack-duties were regularly paid for that year; after which there was an interruption for two years, the Earl having gone abroad without leaving powers to call for his rent. At the next counting, the Earl insisted for the full feu-duties, payable by Shawfield as proprietor. Shawfield answered, That he had the benefit of tacit relocation, and was liable only for the rent contained in his tack. This

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communing produced a charge for the feu-duties contained in Shawfield's charter; which being brought into Court by suspension, it was argued for the charger, that tacit relocation is a privilege only to tenants in the natural possession, and not to tacksmen of mails and duties, nor of feu-duties, who have no natural possession. If a tenant continue in the natural possession after his tack is expired, he cannot pretend to possess without paying rent to the proprietor; and the best rule for determining what rent he should pay, is what he paid formerly. But, if a tacksman of mails and duties, or of feu-duties, continue to intromit after his powers are at an end, what should be the consequence, other than to account to the proprietor for every shilling he receives? Accordingly, tacit relocation is not to be considered as a privilege bestowed upon tenants, but what must follow from the nature of the thing, when one continues in the natural possession of another man's land.

To this reasoning it was answered for Shawfield, That the same expediency which in all countries has introduced tacit relocation with regard to tacks, has also introduced tacit relocation, or somewhat similar to it, in all other contracts of the same nature. In all affairs, where the same operation is to be renewed annually, and where one undertakes to work for another, especially where the nature of the work requires a *delectus personarum*, the contract must bear one of two constructions; either that it is to end at the term covenanted as if it never had been, or that matters are to continue upon the footing of the contract, unless parties declare their will to the contrary. The former construction would be attended with inconveniencies; for, however well the parties may be satisfied with each other, yet they must separate, unless the covenant be renewed *debito tempore*, which is always troublesome; often impracticable, as where a man happens to be abroad, where he becomes lunatic, or where infants without tutors succeed to an estate. Such inconveniencies have determined mankind to the other construction, that in tacks and other similar covenants, a term of endurance is specified, that the parties may be at liberty after it is elapsed; and if they seek not to be free, that matters are to continue *in statu quo*. This construction, more simple in the execution than the other, and attended with no inconveniencies, is, at the same time, so much more agreeable to the nature and purpose of such bargains, that we can be at no loss to account why it has become universal. Tacit relocation therefore is founded on the consent of parties, justly implied from the nature of the bargain. And this is Craig's account of the matter, Lib. 2. Dieg. 9. § 10. and of Lord Stair, Book 4. Tit. 26. § 14.

With regard to the pursuer's reasoning, it was observed, that had tacit relocation no other foundation but mere possession subjecting the possessor to a rent, it would not have the effect that the law gives it, nor indeed any good effect. For, if nothing were to bind the tenant but his actual possession, he would be at liberty to remove at any time he pleased betwixt terms, and be liable only to pay rent in proportion to the time he possessed. But he is bound for a year's rent, if he but enter upon a new year, or even if he do not intimate to his landlord *debito tempore* his intention to remove. And if consent be once established as the foundation of

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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.