1763. *December* 7. EARL of SELKIRK *against* M'MORRAN.

No. 77.

Citation by the titular, in a process for payment of the full teind, was found to be a sufficient interruption of tacit relocation. But the judgment was afterwards altered.

Sel. Dec.

*** This case is No. 214. p. 15324. *voce* TACK.

1764. *February* 1.

MARGARET, AGNES, and ANNE SHORTHEADS, and their CURATORS, *against* The DUKE of BUCCLEUGH, and his CURATORS, and The EARL of HADDINGTON.

No. 78.

Whether a vassal, by the acceptance of a new right, is barred from founding upon more ancient titles established in his person, because these were not mentioned by the superior in the renovation of his feu; and whether the superior, by granting such a right, is brought within the clause of the act 1693, respecting the sale of teinds?

The pursuers, heirs-portioners of William Shorthead of Colmslee, brought an action of sale of the teinds of Colmslee against the Duke of Buccleugh and the Minister of Melrose, setting forth, That the teinds of these lands had been valued as far back as the 16th December, 1629, agreeable to a decree of valuation, which was discovered in the hogsheads in the Low Parliament-house, and recorded in the new register of the commission of teinds, 11th December, 1728.

In this process, the Duke of Buccleugh appeared, and alleged, That the teinds of the lands now in question, along with several others, had been purchased by his predecessors from the family of Haddington; and that the present Earl was obliged to protect him against every process of this nature.

Lord Haddington having been called, contended, That no sale could proceed of these teinds, because the lands had been feued out by his predecessors to the pursuer's author, upon the 18th of May, 1621: That the then Earl of Haddington had, at that time, right both to the lands and the teinds; and that, as he had not disponed the teinds, he must be understood to have reserved them; and therefore, in terms of the act of Parliament 1693, Chap. 23, the heritor could not insist upon the privilege of buying these teinds; for by that statute it is expressly declared, "That whereas there is a great difference as to teind, whereof the right has never come in the person of the heritor of the lands, and those teinds whereof the right has come in the person of the heritor, and the lands thereafter sold or feued out by the heritor, reserving the teinds, or where the teinds are not disponed; and that, in such a case, the heritor who sold or feued out the lands should no more be obliged to sell those teinds, than a superior or other heritor can be obliged to sell his feu-duties, or any other right of property that he has reserved, when he sold or feued out the lands; therefore, it is statuted and ordained, that this commission shall not be extended as to the selling or buying of such teinds, whereof the right has once been in the person of the heritor of the lands, and which lands were thereafter sold or feued out by the heritor, with the

No. 78. reservation of the right of the teinds, or without disponing of the said teinds; without prejudice always to the vassal or heritor of the lands to value these teinds, in the terms of the said act and commission, and only to be liable thereafter for payment of the valued duties."

To this defence the pursuers answered, That though their predecessors in the lands of Colmslee had accepted of a charter, in the year 1621, from the Earl of Haddington, who was lord of erection of the abbacy of Melrose, and undoubted superior of these lands at that time, yet their title was not originally constituted by such a charter, and that it could never annihilate their more ancient rights, established long before this period, nor put their lands in the situation of those referred to in the act 1693; as this statute has relation only to those superiors who granted original feu-rights of lands of which they possessed the actual property, having at the same time a right to the teinds.

Upon production of the pursuers' title-deeds, it appeared, That their predecessors had received a charter of the lands of Colmslee from Andrew, Abbot of Melrose, with consent of the Dean and Chapter, as far back as the 7th of January, 1535; of the same date, a precept of sasine was granted, and infeftment taken upon the 8th of February, 1585. This charter and infeftment was afterwards confirmed by the Archbishop of Glasgow, the Dean of Restalrig, and Provost of Seaton, in virtue of a commission granted to them by Pope Paul III. for that purpose.

Andrew, Commendator of Melrose, afterwards granted, upon the resignation of William Cairncross, who had received the former confirmed right, a new charter of the lands of Colmslee, and of certain other lands, containing a novodamus.

Upon the 24th of March, 1594, the said lands were resigned by William Cairncross in the hands of King James VI. in virtue of the act of annexation, and a charter of the same date, in favour of the said William Cairncross, was granted by his Majesty.

In consequence of this charter, and a precept under the quarter seal, Cairncross was infeft, upon the 25th of February, 1595.

Such was the situation of the rights to the lands of Colmslee in the family of Cairncross, when Thomas Earl of Melrose, President of the Court of Session, and Secretary to the King, upon the 18th of May, 1621, entered into that contract with James Cairncross, younger, of Colmslee, which is now contended to bring these lands within the clause of the act 1693, and effectually to bar the sale of the teinds that is now demanded.

This contract proceeds upon the narrative, That as the noble Earl had an undisputed right to the hail lordship and barony of Melrose, &c. and as Cairncross of Colmslee, and his predecessors, had been for time immemorial kindly and native tenants of the lands specified, therefore, the said Earl, having no inclination to dispossess James Cairncross, younger, of Colmslee, but, on the contrary, to protect and continue him in his possession, binds himself duly to infeft and seise

the said James Cairncross, his heirs, &c. in the lands of Colmslee, to be holden of the said Earl, for the yearly payment of fifty stones of butter, or 6*s.* 8*d.* Scots, for ilk stone of the same. The Earl, in the same contract, grants a tack of the teinds, parsonage and vicarage, of the foresaid lands of Colmslee, &c. for the space of nineteen years after the term of Whitsunday 1621; which tack he binds himself to renew at the expiration of every nineteen years. No. 78.

In implement of this contract, a charter was granted by the Earl, upon which infeftment followed, the 28th of June 1621.

These lands came, by progress, into the hands of David Blair, who passed charters of them under the great seal, as holding of the Crown, from whom they were purchased, in the year 1745, by William Shorthead, the pursuer's father.

Upon this state of the case, it was pleaded by the pursuers, That the general intention and spirit of the acts of Parliament passed by Charles I. relative to teinds, was plainly this, that every proprietor of land should have a right to value and to purchase the teinds payable out of his lands, in so far as they were not provided for the maintenance of the Ministers serving the cure. That these acts were intended for the benefit of the vassals of kirk-lands, as well as other proprietors. It therefore appeared certain, that, in the year 1688, when these acts were made, the proprietor of Colmslee had a right to pursue a valuation and a sale of his teinds against the Earl of Haddington, then Lord of erection, unless it should be thought that the charter in the year 1621 excludes him from this privilege; but as an interpretation of this nature would be diametrically opposite to the words and the meaning of the contract upon which the charter proceeded, his title, at this hour, must be as good to insist in this process as if it had been commenced a hundred years ago.

It appeared from the contract itself, in which the pursuers' predecessors are acknowledged by the Earl of Melrose to have been, past memory of man, kindly tenants in these lands, that a renewal, not an extinction, of their more ancient rights was intended: And as to the argument drawn from the tack of the teinds being granted in the same contract, it only proves, that the teinds were in the person of the Earl; but does not instruct, that he was in such a situation as to entitle him to the privilege of the statute 1693.

On the other hand, it was pleaded for the defenders, that this contract, by every rule of equitable interpretation, must be understood to import, not a renovation of the vassal's right, but an entire abolition of the title deeds formerly established in his person. The Earl's right to these lands, erected into a temporal lordship, was superior to every objection. He is acknowledged to be the uncontroverted proprietor, and the family of Cairncross, destitute of every title of property, are confessed to have been his native and his kindly tenants. His title was not a partial one, like that of other superiors; for not the superiority alone, but the *dominum directum*, and the *dominum utile*, were at one time consolidated in his person. Out of affection for his old vassals, he becomes bound to divest himself of the one in their favour, and to accept of an acknowledgment from

No. 78. them as their superior. The charter, proceeding upon these two express acknowledgments of the Earl's universal right of property, and the family of Cairncross being his kindly tenants, was accepted by him, and has been their title of possession for more than a hundred years. If no antecedent rights had been produced but the charter alone, upon which the defence is now founded, there could not be the smallest dubiety that the pursuers were not entitled to insist in this process; and, if such is the case, the production of other antiquated deeds, the import and tendency of which must at this time be extremely precarious and uncertain, when there is an utter impossibility of receiving any intelligence or information what objections might justly have been brought against them, must be equally ineffectual; perhaps they may have been forged and fabricated, or obtained by fraud and circumvention, or qualified by back bonds, to be in trust for the Earl himself; or, what is not at all improbable, they might have laboured under a clause of redemption. In short, every thing must be presumed against them at this hour; and no great stress and dependence can be laid upon transactions involved in all the darkness of remote antiquity.

Moreover, this appears to be a split-new right, and, for the best reason in the universe, that it was granted to James Cairncross younger, his father being then alive, in whose person the antient title deeds could only at that time be vested. The son had no right, that could be renewed, and was incapable of receiving any, except a new one. William Cairncross, the father, obtained his charter from the Crown, and had taken infeftment upon it long before the Earl of Melrose got a grant of the Abbacy. So it was altogether impossible for the Earl to renew the right in favour of the family of Cairncross, as William the father was still alive and the Crown's vassal in these lands. It was with the son only that the Earl entered into this transaction, and gave him a complete new right, when there was none before established in his person, as his predecessor, whose right could alone be renewed was in life at that time.

The Lords found the teinds of the pursuer's lands libelled saleable.'

Act. *William Johnstone.* Alt *Alexander Lockhart.*

A. C. *Fac. Coll. No.* 132. *p.*, 308.

1770. *March* 7.

OFFICERS of STATE and EARL of BREADALBANE *against* DUNCAN CAMPBELL.

No. 79. In this case the question was, Whether teinds, called the Bishop's quarter tithes, in the bishoprick of Argyle, are to be considered as free teinds, and subject to allocation, in augmentation of stipend, before teinds to which the proprietors had heritable rights? It was found, That no part of the stipend could be allocated upon the fourth of the teinds which formerly belonged to the Bishop, till the other teinds within the parish, as well those heritably disponed as not, were exhausted.

Fac. Coll.

*** This case is No. 22. p. 14796. *voce* STIPEND.