

‘ tenant : Find him also entitled to deduction of £16s. 9d. as the interest  
 ‘ of a sum advanced by him to a tenant to put his farm in good condition :  
 ‘ Find, That the rent of cot-town of Balheillieds, let *anno* 1785, must be the  
 ‘ rule of valuation of that farm : Find the pursuer entitled to deduction for  
 ‘ lime allowed annually below the market-price, as claimed : Find him also  
 ‘ entitled to the deduction claimed of additional rent for the bridge over the  
 ‘ Esk : Find him entitled to deduction for the expense of such stone-dikes as  
 ‘ have been erected within seven years previous to the commencement of the  
 ‘ process of valuation ; and, with these variations, refuse both petitions ; and  
 ‘ remit to the Lord Ordinary to rectify the scheme.’

No. 14.

Lord Ordinary, *Methven.*  
 Alt. *Maccormick.*

Act. *Robertson.*  
 Agent, *P. Anderson,* W. S.

Agent, *Jo. Grame,* W. S.

J.

*Fac. Coll. No. 235. p. 530.*

1807. February 18.

EDMONSTON and Others, *against* GRAHAME.

No. 15.

IN the year 1755, the minister of the parish of Strathblane raised a process of augmentation of his stipend. The process was finally concluded in 1758, and by the locality, the sum of £10. 6s. was allocated upon the lands of Craigallian.

Dereliction of a subvaluation not always inferred from over-payments for a long time.

When the minister charged upon his decree for payment, James Colquhoun, the proprietor, founding on a subvaluation of his teinds, 7th November 1758, took a protest, that payment should infer no homologation of the decree, but that it should be leisome for him to insist for redress, and obtain repetition of the money. The payments for 1758 and 1759 were made 17th May 1759, and 7th March 1760, under similar protests.

The subsequent payments were regularly made without taking any protest, till, in the year 1793, the incumbent raised a new process of augmentation, and an additional burden was by the scheme of locality to be imposed upon the lands of Craigallian.

James Colquhoun, 11th March 1794, made payment of the £10. 6s. due for crop 1793, under protest; and a similar protest was taken for the next year's stipend.

He now raised a process of approbation of the report of a subvaluation in 1629, in which (1st July 1795) decree was obtained in absence. He also raised a process of reduction of the decree of modification and locality in 1758, against the minister and heritors, and contended, that the subvaluation must in future be the rule for ascertaining the stipend payable by him. These were afterward insisted in by Adam Grahame, Esq. who became proprietor of the estate by purchase.

The minister also raised a process for setting aside the decree of approbation of the subvaluation. The processes were conjoined, and the cause reported to the Court.

No. 15. Sir Archibald Edmonston and others, heritors of the parish, and the Reverend Dr. Gibb, the minister,

Pleaded : When any person is in a situation to vest in his person a valuable right, and continues to do something totally inconsistent with it, he loses the benefit of his privilege, as it is presumed that it labours under some essential informality, which deters him from claiming it. It is not necessary that the neglect should continue during the period of prescription, which cuts off a claim from disuse alone : But the principle of dereliction proceeds upon an abandonment of the right, by doing what he was not bound to do. A subvaluation vests a right, which by certain steps may be made effectual ; but if no such steps are taken, and payments greater than the subvaluation warrant, are made for a long period of years, he loses all title to insist afterward for a restriction of these payments. One year or two years of over payment might not fix upon him the legal presumption of abandonment, but there can be no reason why twenty or thirty such payments should not. During that period he must have had sufficient time to reflect upon the validity of his rights, and this is all which either common sense or law can require ; Lord Gray against Dunbar, 22d May 1799, No. 169. p. 15773. Now here, after the proprietor had taken a protest, which proved his knowledge of his right, he shewed that he had abandoned all intention to exercise it, by overpayment for no less a period than thirty-two years ; and by doing so, he has lost all claim to the immunity.

Answered : The right conferred upon an heritor by a subvaluation of his teinds, cannot be lost by the negative prescription. It may indeed be lost by a contrary usage of payment, provided this be for a long period ; but wherever such has been sustained, the over payment has been immemorial ; Earl of Morton against Officers of State, 28th February 1753, No. 7. p. 10672 ; Sir James Maxwell against College of Glasgow, 1st February 1764, No. 13. p. 10692 ; Sommerville against the Earl of Lauderdale, 4th August 1773, No. 158. p. 15764. Here no less than five protests, taken at different times, have been recovered ; against these it is impossible to infer any presumption of abandonment.

The Court held, that, as in every other case which depends upon the principle of presumption, attention must be paid to the nature, the effect, and constancy of the approbatory acts, which are to mark the opinion entertained by the party of the extent and validity of his right ; and, upon the whole circumstances, they were clear that dereliction had not taken place, and they found accordingly.

Lord Ordinary, *Meadowbank.* Act. *Forbes.* Agent, *J. & A. Ferrier, W. S.*  
 Alt. *Connell.* Agent, *J. A. Higgins, W. S.*

F.

*Fac. Coll. No. 271. p. 610.*