

1632. December 4. DRUMMOND against The FISHERS of NEWHAVEN.

James Drummond, being tacksman to the Lord Hally-rude-house of the teind-fishes of Newhaven, and pursuing spuilzie against the fishers of the year 1630, which was the first year of the tack, and they defending themselves with a continual use of payment of a particular duty condescended on, of all years preceding this year now acclaimed, and so alleging they could be convened for no greater duty of the year libelled, there being no inhibition executed against them, preceding the said year, to make them thereby liable to a greater duty than they were in use of before; this allegiance was repelled, seeing the defenders alledged not, that they were ever tacksmen, or had any right made to them of the teinds libelled, for payment of the duty excepted on, whereby after that right expired, they might have bruiked for the same duty *per tacitam relocationem*, not being ever interrupted, or that the teinds libelled were ever contained in the Abbot's rental, and given up and bruiked, as a stocked rental for that duty; which not being, the Lords repelled the allegiance, and found no necessity of an inhibition, but reserved the modification of the quantity after probation to the Lords themselves.

Act. Gibson,

Alt. Dunlop.

Clerk, Hay.

Fol. Dic. v. 2. p. 428. Durie, p. 656.

1633. February 20. COLLEGE of GLASGOW against STUART.

The College of Glasgow charging, by general letters, Mr. Patrick Stuart of Rosland, for certain rental teind-bolls due to the College, who suspending, that these 20 or 30 years bye-past, the College received some years *ipsa corpora*, and other years, such duties for the teinds as he and they agreed upon, at the sight of persons chosen by them to estimate the teinds, and so that he was not holden to pay the rental bolls acclaimed the year libelled, seeing he was content, and offered to pay whatever the College should prove the worth of his teinds extended to this year libelled; and the College answering, that they had divers decreets, whereby the rental was established, for the quantity whereof they now charged this year; and whatever payment has been made since, different from that rental, it cannot prejudice the College in their rental, the same being done without their consent, and not being a constant tenor of payment, which might have made another rental. The Lords sustained the rental for the year controverted, which rental was found not prejudged by the posterior use of payment of *ipsa corpora*, or other deeds contained in the reason; and the Lords repelled the offer made by the suspender to pay all the teinds the year libelled, which shall be proved his teind extended to, notwithstanding whereof they found him subject in payment of the rental bolls acclaimed, albeit the teinds of the crop libelled did not extend to

No. 221.

Use of payment of a particular quantity will not protect in an action of spuilzie of teinds where there has been no previous title of possession.

No. 222.

Found in conformity with Lennox, No. 217. p. 15328.

No. 222. the quantity thereof; in respect the suspender, before the time of teinding the year libelled, did not intimate to the College that he would not pay these rental bolls, and required them to draw their teinds; which either he should have done, or otherwise transacted with them thereanent, as he was in use to do other years before, in which he paid not the rental bolls; and having done no such thing, he was found liable the year libelled, and all other years thereafter, wherein he should not do the same, in the quantity of the said rental.

Act. *Nicolson & Neilson.*

Alt. *Cunningham et Burnet.*

Clerk, *Gibson.*

Fol. Dic. v. 2. p. 427. Durie, p. 677.

1662. *February.* The LAIRD OF BASSINDEAN *against* BELL.

No. 223.
Effect of voluntary payment of a greater quantity of teinds than due.

George Home of Bassindean, as tacksman of the teinds of the parishes of Gordon and Woolstruther, pursues William and George Bells for certain quantity of teind duties, whereof they have been in use of payment. It was alleged, Their teinds are valued by a decret of valuation, and that they are obliged to pay no more, but according to the said valuation. It was answered, That notwithstanding of the valuation, they have been in use of payment of a greater quantity, by the space of ten or seven years. It was replied, That voluntary use of payment cannot prejudice the payers further than during their voluntary payment, and cannot take away their right constituted by the decree of valuation, no more than if a vassal should, for divers years, pay a greater feu-duty than what is contained in his infestment.

The Lords found the allegiance relevant.

Fol. Dic. v. 2. p. 428. Gilmour, No. 36. p. 468.

1667. *June 27.* MINISTER OF DALRYMPLE *against* EARL OF CASSILLIS.

No. 224.
The use of payment by a particular measure found to denote the measure meant, when not expressed.

The Minister of Darlymple having charged the Earl of Cassillis for his stipend^r he suspends on this reason, that he offered payment of the bolls in the Minister's decret, conform to Linlithgow measure, which was the common measure of Scotland, by the act of Parliament, and is by the act of Parliament, the measure of Ministers' stipends. It was answered, that the Minister's decret of locality, was indefinite, and mentioned no measure, and the meaning thereof was sufficiently cleared, because it was offered to be proved by the Earl's oath, that he paid ever since the decret of locality, being 15 years, conform to the measure of Ayr, and that he knew it was the common custom of that country to pay all Ministers with that measure. The suspender answered, that his use of payment, either by mistake, or benevolence, of more then he was due, could not oblige him to the future, especially where the Minister did not found upon his *decennalis* & *triennalis*