No. 216. by tacit relocation in consequence of the tack 1764, when the process of augmentation was raised, he must be considered as a tacksman of the teinds at the time; and that his case cannot be assimilated to that of an heritor having no right to his teinds when a process of augmentation was raised, and obtaining an original tack of them after the augmentation was granted; and that the maxim, *pendente lite*, does not strike against Mr. Gibson Wright's right of tithes in virtue of his tack 1787," &c.

After advising a reclaiming petition for the common agent in the locality, with answers for Mr. Gibson Wright, the Lords affirmed the judgment of the Lord Ordinary.

A second reclaiming petition was preferred, which was refused without answers.

Lord Ordinary, *Dreghorn.* For the Common Agent, *Wight, Murray.* Alt. *Mat. Ross.*
C. *Fol. Dic. v.* 4. *p.* 329. *Fac. Coll. No.* 51. *p.* 90.

SECT. XV.

Use of Payment.

1626. *March* 22. LENNOX *against* TENANTS.

No. 217.
Tenants in use to pay certain rental teind-bolls are liable for the same, altho' exceeding the real teind of the corn produced, ay and while they make intimation to the titular, offering him the actual teinding of the corns.

See No. 222.

In an action at the instance of Lennox of Branshogill against certain tenants of Balfron, for payment of the rental teind-bolls of the lands possessed by them, upon this reason, because they were in use to pay the same divers years preceding the year libelled; the Lords sustained the action, and found the tenants astricted to pay the rental boll, albeit it neither was libelled, nor offered to be proved by the pursuer, that there grew as many corns that year libelled as would extend, in the quantity of the teind, to the rental-bolls acclaimed, without the which the defenders alleged they could not be subject to pay the rental bolls, albeit they had paid the same before, which was but voluntarily done, and could be no reason to make it thereafter necessary; which was repelled, and the Lords found them subject to pay the said rental bolls, albeit the teinds of the corns growing extended not to that quantity; for the Lords found them still debtors thereof, ay and while they made timeous intimation to the pursuer, or the person having right to the teinds, that they would not remain obliged to pay the said bolls, and offer him teinding of the said corns; and so, in this case, the defenders are in

worse estate than where spuilzie is pursued; for, in spuilzies, the quantity, of necessity, must be proved, either by witnesses, or the pursuer's oath or the defender's. No. 217.

Clerk, *Gibson.*

Fol. Dic. v. 2. *p.* 427. *Durie, p.* 195.

1629. *January* 13. EARL of GALLOWAY *against* GORDON.

No. 218.
Similar to the above.

The Earl of Galloway pursues certain parishioners of Mochron for payment of a certain quantity libelled against each person of rental-bolls, whereof they had been in use of payment divers years before the year libelled; at least, such prices as the pursuer and the said persons occupiers of the said lands libelled could agree upon; which alternative, viz. the last part, was not found relevant to bind upon the defenders use of payment of rental bolls; but the Lords ordained the pursuer to give the greatest price that he could prove was paid to him any year before the year contained in his libel. The reason was, because it might be that the rental bolls claimed were more than the true avail of the teind; and seeing the pursuer might serve inhibition, and obtain the worth of his teind that way, it was not equitable to draw upon them the payment of rental-bolls because they had been in use to pay a sum but small for their teind.

Auchinleck MS. p. 202.

1630. *June* 10. VISCOUNT of STORMOUNT *against* Mr. WILLIAM HUNTER.

No. 219.
Payment of a different species of victual than that mentioned in the tack of teinds, does not destroy nor innovate the tack, nor oblige the tacksman to continue to pay disconform to the tack.

In a pursuit for payment of rental bolls of teinds, being elided by a tack, for payment of the bolls therein contained, and it being replied, that since the tack the defender had paid other qualities of victual, divers years, than the species contained in the tack, viz. wheat, whereas the duty of the tack was bear, whereby the pursuer alledged, that the defender had prejudged his tack, either to make it fall, or at least to make him subject, during the years thereof to run, to pay that same quality, and sort of victual, which he has been used to pay the preceding years, since the said tack; this reply was not respected, but the exception notwithstanding thereof was sustained; for the Lords found, that the tack was not prejudged by the tacksman's payment of other sorts of victual, than was conditioned by the tack, the change of which quality derogated not to the tack, neither did the said payment bind the payer, to pay the quality which he paid for any bygone years, or for any years of the tack to run, there being no condition alledged, that the like payment should be made in time coming; and so the concession acknowledged by the defender of the said change of the quality of bygone years, was not found sufficient to oblige him to continue in that payment in time coming; but if the tacksman had paid a greater duty in quantity than