

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 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*

possessio ; but upon a decret of locality, wherein, though the measure be indefinite, it cannot be understood to be any other measure than the common measure of Scotland, seeing the act of Parliament anent Minister's provisions, bears expressly, that they shall have eight chalders of victual, Linlithgow measure. No. 224.

The Lords having considered the decret of locality, and that it did not extend to eight chalders of victual, but to three chalders of victual, and 400 pounds, which is the rate of four chalders of victual, at 100 pounds the chalder, as is ordinarily rated by the commission in that place of the country, they found the use of payment and common custom of the country, sufficient to declare it to be the measure of Ayr, seeing by that measure, it would not come up to eight chalders of victual.

Stair. v. 1. p. 465.

1669. *January 19.* EARL OF ATHOLE *against* ROBERTSON.

No. 225.

Use of payment to the Minister who granted yearly discharges, mentioned to be for the whole teind-duty, was found to defend the heritor from any additional teind until citation or inhibition.

Fol. Dic. v. 2. p. 427. Stair. Gosford.

* * * This case is No. 34. p. 7804. *voce* JUS TERTII.

1670. *July 15.* BIGGAR *agaigst* CUNNINGHAME.

No. 226.

In a process for teinds libelling the fifth part of the rent, the defenders produce a decree of valuation, against which the allegiance was found relevant, that it was a deserted right, never having taken effect by payment, but tacks accepted by the defenders, and duties paid by them thereafter to a greater quantity.

Fol. Dic. v. 2. p. 428. Stair.

* * * This case is No. 45. p. 14061. *voce* RES INTER ALIOS.

1677. *November 9.* RUTHERFOORD *against* MURRAY.

No. 227.

John Rutherfoord, as assignee by Mr. James Buchan, pursues Murray of Skirling for several years stipend of the kirk of Skirling, being 500 merks and two chalders of victual yearly, Skirling having the whole teinds of the parish. The defender alledged, *1mo*, That he had a tack of the teinds from the former Minister as titular, for 700 merks yearly, which was yet unexpired, and therefore could be liable for no further. The pursuer replied, that he offered to prove a greater duty paid since the said tack. It was duplied, that albeit the defender had gratified the former Minister with some more than was due, that could not annul

Use of payment to the minister of more than stated in the tack of teinds, found to constitute the rule in future, independent of the tack.