

No. 219. his tack duty, it is commonly estimated to be prejudicial to the tack, the same being proved by writ or oath; which wanted not the same scruple, for the tacksman may, upon many considerations, pay more than he is obliged by his tack, and yet have no purpose but to keep his tack in integrity; as when the setter may become depauperat, or when the tacksman has made an easy purchase, or otherwise may be moved voluntarily to do more than he can be obliged to do in law; in which case it were hard his tack should fall, for his kind dealing: But where this is admissible, it would appear necessary to be alledged and proved, that that payment of a greater quantity was expressly conditioned betwixt the parties to be made for the lands, or teinds set in tack, and consented to betwixt them, and conform thereto, payment was made *eo nomine*, viz. as for the duty addebted therefore.

Act. *Hope, Aiton, & Cheaf.*

Alt. *Stuart & Russel.*

Clerk, *Hay.*

Fol. Dic. v. 2. p. 428. Durie. p. 516.

1630. *July 2.*

MR. GEORGE SYMMOR *against* L. BALGILLO,

No. 220.
Use of payment of a lesser quantity of teind-bolls, tho' for thirty years, was found not to bar the Minister, who was titular, from drawing in *futurum* according to the old rental.

Mr. George Symmor, Minister at Megill, being assigned by the Bishop of Dunkeld, to the parsonage of Megill, to which bishopruck the parsonage was annexed, pursues by way of action the L. Balgillo and his tenants, intromitters with the teind-sheaves, for the rental bolls thereof, viz. 36 bolls, whereof his predecessors were once in possession about 30 years since. And the defender alledging, that he could not be subject, nor yet his tenants, in any greater quantity than 26 bolls, because they have been even these 30 years byepast in use to pay yearly, only the said quantity of 26 bolls, as the ministers serving the cure at the said kirk their acquittance thereof bears, so that after so long and constant use of payment, the Minister now cannot pursue for any greater quantity, after so long desuetude of paying more; and albeit the Bishop has subscribed this greater rental of the teind acclaimed, yet that ought not to prejudge the possessor; especially seeing the Minister at this Kirk has by the decret of plantation, *anno* 1628, a constant stipend modified, which is complete by this quantity used since-sine, ever to be paid out of these teinds, [and so he can never seek any more. The Lords repelled the allegiance, and found, that the Minister had right to seek the quantity acclaimed, notwithstanding of the said decret of plantation and use of paying of the foresaid lesser quantity, the Minister proving that of before, he, or his predecessors, had received payment of the said greater quantity acclaimed; seeing the Minister sought the same, not as his modified stipend by the decret of plantation, but by virtue of the Bishop's assignation, to whom the right of the parsonage teinds belongs; seeing the use of payment alleged was interrupted now by this pursuer, for these years pursued for.

Clerk, *Gibson.*

Fol. Dic. v. 2. p. 427: Durie. p. 525.