

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.

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.

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

No. 218.
Similar to the above.

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.