

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.

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.*