

1614. *November.* LORD MADERTIE *against* HIS VASSALS.

No 277.

IN a reduction pursued by my Lord Madertie against one of his feuars for reduction of his feu for not payment of the feu-duties, the LORDS found, That the exception *quod minor non tenetur placitare, &c.* was not competent in a reduction of this nature, *et quod mora non erat purgabilis* by offer after the terms past, and the failzie incurred; they found also, that a chamberlain may not receive these duties after the failzie incurred without express warrant.

*Fol. Dic. v. 2. p. 159. Haddington, MS. No 2578.*

1627. *February 8.* EARL OF CASSILLIS *against* HIS TENANTS.

No 278.

IN a removing of the Earl of Cassillis against his Tenants, *alleged* by them, That since the warning, they had made payment of some customs and services to the Earl's factors and chamberlains, which were applied to his use. Found not relevant, unless it had been by his knowledge, command, or allowance.

Sicklike in a spuilzie of teinds, payment of any part of them at direction of the chamberlain, not relevant to purge the spuilzie, inhibition once being served.

*Fol. Dic. v. 2. p. 159. Spottiswood, (REMOVING.) p. 279.*

\* \* A similar decision was pronounced 5th March 1629, Lord Lee against Kirkwood, No 26. p. 7195, *voce* IRRITANCY.

1628. *Februury 22.* LORD LOUDON *against* PARISHIONERS of Killimuir.

No 279.

IN a spuilzie of the Lord Loudon against the Parishioners of Killimuir, the LORDS found the payment of the King's taxation, imposed upon the teinds libelled, made by the defenders for the crop libelled, to the pursuer's chamberlain, who was his chamberlain and receiver of his rents that year libelled, and diverse years before, and who continued yet his chamberlain, and which chamberlain had paid to the King's collector, for the pursuer, the same year's taxation for these teinds, to be sufficient to liberate the excipients, who had so paid to the chamberlain the duty imposed upon the said teinds, for the taxation, as said is, from all spuilzie of that year, notwithstanding of the preceding inhibition, used against the defenders before any payment made by them to the pursuer's chamberlain of the said taxation; in respect whereof, and that the pursuer *replied*, That no deed of the chamberlains could prejudice the force of his inhibition, except the pursuer had given express warrant for the said receipts from the defenders, or that the chamberlain had given up his accounts

In a spuilzie of teinds, found sufficient to liberate from spuilzie and wrongous intromission, that the defender had made payment of the King's taxation imposed upon teinds to the pursuer's chamberlain, who had paid it to the King's collector, tho' the pursuer had before served inhibition.

No 279. to the pursuer, and had accounted and received allowance from the pursuer of these receipts from the defenders; which not being alleged but by the contrary, the chamberlain having in his hands much more of his rents, the time of the paying of the taxation to the King's collector, than these receipts received from the defenders, or the said taxation would extend to, the tenants could not ascribe the payment of the said taxation to be made out of the receipts from them, and so being done without consent or warrant of the pursuer, could not prejudice his spuilzie and inhibition, no more than a warning to remove might be prejudged by the chamberlain's receipt of the old duty from the tenants warned, except the master had consented thereto; notwithstanding whereof, the exception was sustained to liberate from the spuilzie, and also from wrongous intromission, whereto the spuilzie was restricted.

Act. *Hope, Nicolson, Aiton, & Stuart.*

Alt. *Cunningham.*

Clerk, *Gibson.*

*Fol. Dic. v. 2. p. 159. Durie, p. 348.*

## SECT. V.

### Whether Mandate presumed in unlawful Acts.

1582. *June.*

DUNBAR *against* ENTERKIN.

No 280.

THERE WAS a process advised, wherein the Laird of Enterkin, Dunbar, was pursued for the spoliation from one John Dunbar of Harthill, of certain gold, silver, and other precious jewels, forth of his coffers, and chests, and lockfast. It was found proved by the LORDS, that the servants of Enterkin were at the deed doing, and carried forth of the house a chest or coffer. The question was, if that was proved Enterkin's servants, nothing being proved against himself, or to have been there, as is libelled, was sufficient to put him *in mala fide*, and to give condemnator against him. Some were of the opinion, that condemnator ought to pass against him, because of like practick past before betwixt the Laird of Aiton and the Homes of Prendergust, (See APPENDIX). Others were of the contrary opinion, and that the circumstances were different in the practicks, because it was proved, that Aiton's servants and his brother came forth of his place to the doing of the deed, and immediately thereafter returned again; and here it was but proved that they saw but Enterkin's servants within two or three days thereafter return to his place. THE LORDS, for the most part, after long reasoning, voted, that no condemnator could be given against the Laird, albeit his household and domestic servants were at the doing of the same deed.

*Fol. Dic. v. 2. p. 159. Colvil, MS. p. 333.*