

No 3.

above one hundred years, they could never be lawfully dispossessed without a warning, especially seeing the infeftments and rentals contained a feu-mail entered in the King's rolls, paid and made count of in the checker. Notwithstanding of the which allegiance, the LORDS found the exception relevant, and assoilzied from the ejection.

Fol. Dic. v. 1. p. 115. Haddington, MS.

1628. *January 31.*NASMITH *against* HUME.

No 4.
The proprietor of the teinds of another person's land, cannot intromit *brevi manu*.

IN a spuilzie by James Nasmith against Hume of Carrolside, the defender defending himself with a tack of the teinds alleged spuilzied, whereupon he had served inhibition, and, conform thereto, he had meddled with the teinds libelled; he *alleged*, That he could not be repute a spuilzier in so doing, conform to a lawful right, specially to produce this action against him, at his instance, who had no right to these teinds, and who, if he had intromitted therewith, would have been subject in spuilzie to this same excipient therefore.—This exception was repelled, for the LORDS found, That albeit the pursuer had no right to the teinds libelled, and the defender had right to the samine only, yet that the defender could not, *brevi manu*, without a warrant of a judge, or sentence, enter himself to the possession of these corns, which were sown and win by the pursuer, from off the land pertaining to the pursuer in heritage, and that he could not enter to take the teind at his own hand, without concurrence or consent of the pursuer, who was heritor and labourer of the land, as said is, he not concurring with the defender to the teinding of the same, and to his intromission therewith.

A.G. *Nicolson & Burnet.*

Alt. *Lawrie.*

Clerk, *Scot.*

Fol. Dic. v. 1. p. 115. Durie, p. 337.

* * * The same case is reported by Spottiswood :

IN actions of spuilzie where diverse parties are convened after litiscontestation, it divides among them, *pro virilibus portionibus*.

James Nasmith of Possaw pursued Mr John Hume of Carrolside for spuilzie of the teind sheaves of Coldingknows.—*Answered*, That he had right thereto by virtue of a tack comprised from the Laird of Coldingknows by the Laird of Weems, and assigned to him.—*Replied*, Albeit he had never so good right, yet he should never have intromitted with his teinds against his will, till first he had served inhibition, and gotten decret thereupon before the Lords; which was found relevant, and the exception repelled: For none can enter into any man's possession without his own consent, but by order of law, albeit his right were never so good.

Spottiswood, (EJECTION.) p. 90.

* * Auchinleck likewise observes this case :

A tacksman of teinds, notwithstanding that he serve inhibition, yet may not *brevi manu* lead or intromit with the teind, whereof he nor his author was in use to lead the teind before, but ought to pursue the spuilzie ; and, if he intromit at his own hand, he commits spuilzie.

Auchinleck, MS. (SPUILZIE.) p. 216.

No 4.

1635. January 22. MENZIES against M'KAY.

ONE M'Kay pursuing a spuilzie of a horse, the defender *alleged*, That (conform to the law of *Regiam Majestatem*) he being infest in the miln of _____, to which miln the lands occupied by the pursuer were expressly thirled ; against which thirlage the pursuer having carried his corns growing upon these lands, and grinding the same at another miln, the defender apprehended the horses bringing back the meal, made and grinded at the said other miln, which by the said law of the Majesty, he might lawfully do ; likeas it is the custom of the country, not only in this miln, but in the other milns about, viz. in Athole, where the miln libelled, and the lands libelled, so thirled lye, to do the same. —THE LORDS sustained this exception, to liberate the defender from spuilzie, but not from restitution of the horses again ; and the reason the exception was sustained, was because the defender alleged that he sent back the horses again that same night to the pursuer's house, and re-delivered the meal to the pursuer's wife, albeit the pursuer received not the horses.

No 5.

A miller could not lawfully seize horses and meal abstracted from his miln, contrary to his right of thirlage, upon pretence of an old law giving that power ; though he should prove such seizure to have been customary in the neighbourhood.

March 14. 1635.—One Gilchrist M'Kay pursuing Archibald Menzies, both indwellers in Athole, for spuilzieing of a horse, with a sack and meal therein, being on the horse's back ; and the defender *alleging*, That he might lawfully intromit with the said horse and meal ; because, conform to the law of the Majesty, the pursuer being tenant in the lands of _____, which are thirled to the miln of _____, pertaining to such an heritor, on whom he condescended, and of which miln the defender is miller ; the said pursuer was transporting the meal of the corns growing upon the said lands so thirled, having ground the same at another miln than the said miln whereto the corns were astricted ; which he having so apprehended, it was lawful to him, conform to the law of the Majesty so to do, and keep the said horse and meal, but danger of spuilzie, at the least ay and while the pursuer be satisfied for the multures of the said corns, so abstracted.—THE LORDS found this exception relevant to purge the spuilzie, the defender re-delivering the horse again, with sack and meal, as sufficient as the same was the time of the said spuilzie, albeit it was founded upon an old law of the Majesty unallowed, and not being in consuetude and observance ; seeing it was offered to be proven by the defender, that it was the