1665. *January* 27.

LAIRDS of BERFOORD and BINSTOUN *against* LORD KINGSTOUN.

No 7.
A person having right to teinds, and using inhibition thereon, cannot turn out the possessor *brevi manu*, if he has any pretence of right.

BERFOORD and BINSTOUN pursue the Lord Kingstoun for spuilzie of certain corns; he alleged absolvitor, because he legally drew the same, as their teind, by virtue of his tack, from the present minister, and inhibition thereon. It was *answered*, 1*st*, That was not sufficient summarily to draw the defender's teinds, unless there had been a sentence on the inhibition, which is but a warning, and so must not infer removing, *brevi manu ad vitandum tumultum*. 2*dly*, If he had legally pursued them for a spuilzie, they would have alleged, and now allege, that they have tacks standing from the minister for the time, who, though deposed, yet lives; and all incumbents' tacks serve during their natural life, and no tack from the next incumbent prejudges during the life of the former, conform to an express act of Parliament.—The defender *duplied*, That albeit an act of Parliament required removing not to be summarily in lands, it did not so in teinds. 2*dly*, The pursuer's tacks are null without consent of the patron. The pursuer *triplied*, That they are standing cled with seven years possession, and their tacks are subscribed by the patron. *Quadruplied*, he was not then patron, but was standing fore-faulted unrestored. *Quintuplied*, It is sufficient *coloratus titulus cum possessione*, till the reduction; and the Lord Bothwell's son, patron, was after restored, whereby it revived.

THE LORDS repelled the defence, in respect of the pursuer's tacks, and found the defender might not *brevi manu* intromit, there being any pretence of title; but they desired the pursuer to restrict to wrongous intromission, and without oath *in litem*. *See* SPUILZIE.

Fol. Dic. v. 1. *p.* 115. *Stair, v.* 1. *p.* 257.

1667. *January* 3. —— *against* BRAND.

No 8.
A pedlar left his pack in pledge. The creditor, by warrant of a Judge, got the goods valued and sold. This found irregular. They ought to have been poinded.

—— CHAPMAN having left his pack in custody with Brand, in Dundee; about ten or twelve days after, Brand opened the pack, and made use of the ware. The Chapman now pursues him for a spuilzie; who alleges absolvitor, because the pack was put in his hands for security of a debt due by the packman, and he being informed that the packman would not return, did, by warrant of a Bailie in Dundee, cause four of the neighbours inventory and price the ware.—It was *answered*, *Non relevat*, for though the pack had been impignorate, the defender could not apprise it summarily, but behoved to take a sentence to poind the same.

THE LORDS repelled the defence.

It was further *alleged*, That there could be no spuilzie, nor oath *in litem* of the pursuer, because there was no violence.—It was *answered*, That the oath

No 8. *in litem* is competent, whether it were a spuilzie or a breach of trust, *actione depositi.*—It was *answered*, That the oath *in litem* being granted, mainly because parties injured by breach of such trusts, cannot be put to prove by witnesses, that which is taken from them, none being obliged to make patent his pack, or other private goods to witnesses; yet, where there is another clear way to prove the quantities, viz. the oaths of the four persons who opened the pack, there is no reason to put it to the pursuer's oath, especially seeing their inventory is not the eight part of what he claims.

THE LORDS admitted the pursuer's oath, *in litem*, reserving their own modification, with liberty to the defender, if he thought fit, to produce what of the ware he had; and to produce these four persons, that the packman may depone in their presence. *See* OATH IN LITEM.

Fol. Dic. v. 1. *p.* 116. *Stair, v.* 1. *p.* 423.

1667. *June* 22. HAY of Strowy *against* FEUERS.

No 9.
A miln once set a-going for 48 hours, cannot be demolished *brevi manu.* A proprietor may hinder the building of a miln-dam on his ground, without necessity to allege detriment.

HAY of Strowy being infeft in the miln of Strowy, and having lately built a waulk-miln, and made a new dam-head therefor over that burn, which is the march betwixt him and the feuers; thereupon the feuers demolished the miln and the dam. He now pursues the feuers to hear and see it found and declared, that he has right to enjoy the wauk-miln and dam, and that they did wrong at their own hand to demolish the same. It was *alleged* for the feuers, and the Laird of Keir their superior, absolvitor; because the building of this miln being *novum opus*, they might lawfully stop the same, and might demolish the dam, the end thereof being fixed upon their ground, without their consent. The pursuer *answered*, 1*st*, Albeit the defenders might have impeded while the work was doing, yet they could not, after the waulk-miln was a going miln, demolish the miln, or dam thereof, *via facti*, albeit they might have used civil interruption, and stopped it, *via juris*; because it is a known and competent custom, that a going miln cannot be stopt summarily, being an instrument of service for common good. 2*dly*, The defenders could have no detriment by putting over the dam, because it was a precipice at their side to which the dam was joined, so that they had no detriment, either as to the inundation of their ground, or watering. The defenders *answered*, That *cui-libet licet uti re sua ad libitum*, and they were not obliged to dispute whether they had damage or not, but might cast down the dam built on their ground unless their consent had been obtained; and that there is no law nor decision for such a privilege of milns, neither was it ever extended to waulk-milns.

THE LORDS found the defenders might hinder the building of a dam upon their ground, without necessity to allege detriment; but they found, if the waulk-miln was a going miln forty-eight hours, that the defenders could not *brevi manu*, without the authority of a judge, demolish the dam or miln.

Fol. Dic. v. 1. *p.* 116. *Stair, v.* 1. *p.* 464.