

1637. December 13.

A. against B.

No. 53.

TENANT'S being pursued for spuilzie of teinds, alleged, That they had *bona fide* paid their teinds to their master, who had tack and assedation set by him thereof, and who had again set to them, for a certain duty, both stock and teinds. It was replied, That their master's right was not good, but antedated. To which it was answered, That they were not holden to dispute upon their master's right. It was sufficient to liberate them from spuilzie, having made payment to their master before any inhibition was served. The Lords found the exception relevant.

*Auchinleck MS. p. 216.*

1662. January 30.

HALBERT IRVING against M'KARTNEY.

No. 54.

Spuilzie was elided, by a disposition and instrument of possession, tho' it was *omnium bonorum*, and no possession had followed for two years.

HALBERT IRVING pursues M'Kartney for spuilzie of ten oxen. The defender alleged, Absolvitor, because he intromitted with the oxen by warrant from Mr. Robert Ferguson, to whom the pursuer had given a disposition of all his moveable goods, for relief of a cautionry, for which Mr. Robert first, and now this defender is distressed. *Secondly*, He offers him to prove voluntary delivery of the oxen by the pursuer to him, for the cause foresaid. But because the pursuer hath summoned several other persons as accomplices, which are necessary witnesses, of purpose that he might exclude them from being witnesses, he desires they may be admitted witnesses, or otherwise discussed; that if they be assoilzied, they may be witnesses. The pursuer answered to the *first*, *Non relevat* a disposition, unless there had been delivery; and albeit there had been an instrument of delivery, yet, it being *dispositio omnium bonorum*, two years before the meddling, could be no warrant for summary meddling, without sentence of a Judge, and gave only *jus ad rem*; but specially the meddling with the plough goods in time of labourage, when the pursuer put other goods before the defender.

The Lords found the first defence relevant, founded upon the general disposition and instrument of possession; and that the disposition alone, though without any possession, had been sufficient against the disponent *ad vitandum spolium*, unless the defender had intromitted by violence, being resisted by force.

But they proceeded not to the second defence; which doubtless was relevant, and the desire reasonable, of discussing the remanent defenders first, that they might be witnesses, if assoilzied: Yea, it seems they could not be hindered to be witnesses, used for the defender, though they might be suspected witnesses against him, as being interested, to put the spuilzie upon him, for their own relief.

*Fol. Dic. v. 2. p. 392, Stair, v. 1. p. 89.*