

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.*