

1665. *January 27.* BEARFORD *against* LORD KINGSTON.

No. 55.

THOUGH an inhibition of teinds, without a sentence following thereon, is no sufficient title for drawing the teinds *ipsa corpora*, yet it was found a colourable title to bar a spuilzie; and therefore the process was only sustained for wrongous intromission.

Fol. Dic. v. 2. p. 392. Stair.

* * This case is No. 7. p. 1817. *voce* BREVI MANU.

1677. *June 26.*

A. *against* B.

No. 56.

THE defender in a spuilzie having alleged, that the goods were his own, and that, having given them to the pursuer to be grazed, he might have taken away his own goods, it was replied, That the pursuer was not obliged to debate the right and property of the said goods; but *in spolio*, he needed libel no more but that the goods were upon his ground and in his possession, and taken away *vi* and in manner libelled; and *spoliatus ante omnia restituendus*.

The Lords debated among themselves, whether the defence be relevant; and did not decide the case; some being of opinion, that if it should evidently appear that the pursuer was not in possession of the goods as *suos*, but in behalf of the defender, as if there were a writ betwixt the pursuer and defender, bearing, that the goods were the defender's, and that the pursuer *contractu locationis et conductionis* had taken the same in grazing, that the defender could not be liable for spuilzie of his own goods; but if it should appear that there was any violence in taking them away, he may be pursued for a riot.

Dirleton, No. 459. p. 222.

1679. *December 2.* BETHUNE *against* HUME.

No. 57.

MR. JOHN BETHUNE having obtained a decret of spuilzie of a horse against Hume of Bastalrig, before the Lords, upon probation *in* absence, Hume suspends, on this reason, that the horse was pasturing upon the Lady Aiton's ground, to whom he was Bailie, and that he had put the horse in a pound-fold, and had offered him back, upon payment of the skaith, and therefore did no wrong to retain him, at least was free of a spuilzie, and so was only obliged to restore. It was answered, That the reason is not relevant; for though it had been true, it was no ground for the suspender to keep the horse, and apply him to his own use, even though satisfaction had been required, and refused, which could not confiscate the horse, or warrant the suspender to make use of him, but he ought to have, by a process,

Spuilzie of a horse pasturing on another's grass not elided by putting him in a pound-fold.

No. 57.

caused determine the skaith, and by that sentence poinded the horse, or other goods belonging to the charger; the custom of putting of goods in poind-folds being only to make the fact evident, and to leave the poinded goods in that condition, till another wad were offered for the skaith, but could never warrant the appropriating the goods poinded, without lawful poinding by a sentence. *2do*, The horse was taken off the ground designed for the charger's horse and kine by the act of Parliament, at which designation the suspender was present, and which gave the charger warrant to enter in possession, and for which he would have obtained letters of horning to possess it of course; and though there might have been objections against the legality of the designation, whereupon the suspender might have used civil interruption, it could not warrant the appropriating the charger's horse; and, in this process the value of the horse was proved to be £.10 Sterling, and the ordinary profits and expenses were modified to £.40 Scots, without exorbitant prices or profits, or oath *in litem*. It was replied, That the Lady Aiton was not called to the designation, and that he did not alter her possession, which behoved either to be obtained by consent, or legal executorial, *et quodlibet excusat a spolio*; and the custom of the country is, when any beast is poinded for skaith, if the transgressor do not give satisfaction, it may be retained; and now the suspender is willing to restore the horse, in as good case as he was.

The Lords sustained the decreet, and found that the suspender could not appropriate the horse, unless he had obtained a sentence, and thereby lawfully poinded him.

Stair, v. 2. p. 712.

* * * Fountainhall reports this case:

The Lords found the horse spuilzied, because it was not offered back within 24 hours after it was poinded for the skaith, that he ought not to have kept the horse longer than he might have recourse to the Judge Ordinary.

Fountainhall MS.

No. 58.

1682. *February.*KINCAID *against* MUIRHEAD.

One who went with the King's army to Bothwel, having, about two hours after the defeat, plundered some horses out of a house, about two miles from the place, and being pursued for a spuilzie, he alleged, That what he did was by occasion of war, and fell under the act of indemnity.

The Lords repelled the defence, unless it were proved that the pursuer had been then a rebel.

Harcarse, (SPUILZIE) No. 856. p. 244.