

1669. *January 5.*WILLIAM YEOMAN *against* MR. OLIPHANT and DAME GIELS MONCREIF.

No. 29.

Another instance of the maxim *spoliatus, &c.*

IN a compt and reckoning betwixt these parties, anent the satisfaction of an apprizing, the auditor, in respect that Mr. Patrick Oliphant and Dame Giels Moncreif, were contumacious and compeared not, did decern conform to William Yeoman's summons, finding the sum satisfied, and ordained them to remove; whereupon William Yeoman obtained possession, and having been several years in possession, Mr. Patrick Oliphant obtained himself and the said Dame Giels to be reponed against the said decret for his contumacy; and a Writer to the Signet past letters of possession in his favours, against William Yeoman, but without a warrant from the Lords, which were found null, and this writer deposed; but Mr. Patrick having attained possession by these letters, William Yeoman insists against him as an intruder to quit the possession. It was alleged for Mr. Patrick, that William having obtained possession unwarrantably by decret, upon his pretended contumacy, and he being now restored thereagainst, he is *in statu quo prius*, before that decret, at which time he was in lawful peaceable possession, which only should stand, and neither of the unwarrantable possessions be regarded. It was answered, that William Yeoman's possession was by virtue of a decret then standing, *auctore Prætoris*, and so was not vitious, but Mr. Patrick's was without warrant of the Lords, and so was most vitious. It was answered, that Mr. Patrick was instantly content to debate his right, *et frustra petitur quod mox est restituendum*. It was answered, that *spoliatus ante omnia est restituendus*, and is not obliged to dispute any right, till first he be restored;

Which the Lords sustained, and ordained William Yeoman instantly to be restored to the possession.

Fol. Dic. v. 2. p. 390. Stair, v. 2. p. 578.

 SECT. V.

 Goods offered back DE RECENTI.

1532. *July 16.* HUMPHRY ROLLOCK *against* JOHN STRIVILING of Keir.

No. 30.

If any man be pursued for spoliation and away-taking of any goods and gear, he ought and should be assoilzied therefrom, if he or any in his name, restored really, and with effect, after the committing of the spuilzie, and before the intend-

ing of the summons, the same goods and gear to the owner thereof, or to his wife and servants, as good as they were the time they were taken away.

No. 30.

Fol. Dic. v. 2. p. 390. Balfour, p. 472.

1541. *March 24.* MILLAR *against* LORD KILLAIRNIE.

A MAN may be pursued for spuilzie of all the goods away taken, though he offered back a part thereof.

No. 31.

Fol. Dic. v. 2. p. 390. Balfour. Sinclair.

* * This case is No. 2. p. 14323.

1575. *April 21.* DUNBAR *against* CRAWFURD.

ANENT the action pursued by J. Dunbar against Crawford for spoliation of certain goods, and especially of a brown cow, the defender alleged that the pursuer, upon the sixth day after the alleged spuilzie, intromitted and took again the said brown cow, and therefore has no action for the said cow; which allegiance of the defender the Lords repelled.

No. 32.

Fol. Dic. v. 2. p. 390. Colvil MS. p. 243.

1610. *January 12.* ——— *against* FOSTER.

A PURSUIT being moved against Mr. Duncan Foster and his brother, and accomplices, for spuilzie of a horse, he excepted that he received him *incontinenter* within four or five days after the alleged spoliation, in as good case as he was taken away, with offer of a merk for the profit of that he had detained him, and because the pursuer refused to receive him, he left him upon the pursuer's ground which he was taken from. It was answered, That the offer was not relevant after so many days detention, unless the restitution had been really offered within 48 hours, because the pursuer was not holden to receive back his horse, after his adversary had violently taken him away, and outridden and bursen him by the space of five or six days, especially seeing this summons was raised within 43 hours after the spuilzie, and divers days before the pretended offer of restitution. The pursuer offered to prove, that *incontinenter* after that offer, the pursuer's brother, who was with him at the spuilzie, took away the horse immediately after

No. 33.

It is not sufficient to offer a spuilzied horse again back after the defender has been summoned, except he be in as good a case as at the time of the spoliation.