

No. 13. sessions, and carry off with them their plenishing, &c. leaving only the crop upon the ground ; but in harvest thereafter sent and made offer to him under form of instrument of their year's money rent, and caution for all other debts which he should verify against them, and thereupon required liberty to cut down their corns, which Drynie refused ; whereupon their procurator protested against him for damages, if he should hinder or divert them from shearing or ingathering their corns, at any time after the date of the instrument. Notwithstanding whereof, Drynie caused shear and inbring the corn ; whereupon a process of spuilzie being intended at the tenant's instance ;

It was answered for the defender, *1mo*. That action of spuilzie is only competent to the natural possessor ; but in this case the corns were deserted by the possessors, and left open to the defender's possession. And it is observed by the Lord Stair, B. 1. T. 9. § 19. That a spuilzie of corns was elided by the defender's entering to the possession of the ground whereupon the corns were growing ; Elliot *contra* The Lord of Buccleugh. Sect 7. *infra*. And is also observed by Durie, in a case betwixt Alison and Traill, No. 9. p. 14728. That a defender being convened for a spuilzie of certain of the pursuer's goods, which were libelled to be in the defender's own house, the Lords found no action of spuilzie could be sustained for the goods libelled to have been in the defender's house, albeit the same pertained to the pursuer. *2do*, That what he did, was for preserving his right of hypotheque.

To all which the pursuer's opponed the above instrument, wherein offer was made of payment of the silver, and caution for other things which were indefinite ; and therefore concluded, that debarring by actual shearing of the corns, and entering to the possession, was in itself a spuilzie.

The Lords found the defender's intronission with the goods libelled, belonging to the pursuers, was illegal and unwarrantable, and inferred a spuilzie, &c.

Alt. Boswel.

Clerk, *Sir James Justice.*

Bruce, v. 1. No. 197. p. 119.

SECT. II.

What Title requisite to found an Action of Spulzie.

1541. *November 18.* OGIIVIE *against* RESTALRIG.

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IN causa spolii intentata contra Dominum de Restalrig per Walterum Ogilvie de ——— interlocuti sunt domini, quod ipse actor Walterus de proprietate suarum terrarum de quarum spoliatione hic agebat, non tenebatur dicere ex eo quod

spoliatus non tenetur de titulo suæ possessionis docere, quam vis de titulo mentionem facit in libello; but in case he would conclude that restitutiones et possessiones terrarum tanquam hæreditarie sibi pertinentur, hunc enim dicebant, oportet eum summarie docere de sua proprietate et titulo, licet hunc plenariæ proprietatis cognitis non haberet locum; de hoc vide, ut in nostris decisionibus, quibus spoliatus docere debeat de titulo possessionis suæ etiam plene.

Fol. Dic. v. 2. p. 389. Sinclair MS. p. 6.

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1543. *March 6.* DUNDAS *against* HOG.

THE LORDS decerned Nicol Dundas' precept of spuilzie against Helen Hog relevant, so far as it bore the said Nicol in possession of the mill and mill lands of ——— at the time of the alleged spuilzie, although the man's quantity of the possession was not specified in the precept and libel.

Fol. Dic. v. 2. p. 389. Sinclair MS. p. 57.

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* * * Balfour reports this case :

In actions of spuilzie, the pursuer ought and should libel, that he was in possession of the lands or goods spuilzied the time of the spuilzie; and it is sufficient to libel the same in possession in general, suppose he specify not in his libel the manner and quantity of his possession.

Balfour, p. 315.

1548. *March 22.* JANET MONTGOMERY *against* JOHN HAMILTON:

IN actions of spuilzie and ejection, the pursuer ought and should libel possession, and violent ejection, and prove them both sufficiently; and it is not requisite that he libel any title: But if he libels a title with his possession, it is not necessary to prove the same, but ought and should show the same, *quia tenetur ostendere, sed non probare.*

Fol. Dic. v. 2. p. 385. Balfour, p. 315.

No. 15.

Found in conformity to Ogilvie *contra* Restalrig, No. 14. p 14630.

1549. *January 21.* L. of MERCHISTON *against* NAPIER of Wrightshouses.

ONE being in possession of any part of teinds, by virtue of any right or title which he has to the whole, may call and pursue for spuilzie of the whole; because possession of one part in this case induces possession of the whole.

Fol. Dic. v. 2. p. 389. Balfour, p. 472.

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