

1614. *December 22.* CRAWFURD *against* MINISTER OF FAILL.

No. 24.

IN an action pursued by John Crawford, as assignee to an action of spuilzie for the teinds of Gaston and Symenton by the Minister of Faill, the Lords found the exception competent against the Minister upon a decret-arbitral, whereby he was obliged to set tack to the Laird of Craigie Wallace, relevant against the assignee, because he was not tacksman nor user of the inhibitions, but the minister; and they being *in bona fide* against him, they could not be spuilziers therefore.

Kerse MS. Fol. 198.

SECT. IV.

SPOLIATUS ANTE OMNIA RESTITUENDUS.

1541. *February 11.* SOMERVILLE *against* HAMILTON.

No. 25.

IN the cause of H. Somerville against N. Hamilton, anent spuilzieing of him of the fruits of his parish clerkship, the actor's witnesses for proving of the spuilzie produced, proved him spuilzied two years or more before that time of the spuilzie, which time was libelled, and so proved not *libellatur tempus spolii*. Nevertheless the Lords decerned sentence condemnator *contra reos* for the years libelled; and the reason was, because of the practise "spolians semel censetur et semper spoliare donec spoliatus semel sit restitutus;" and in the same cause the Lords decerned, That "titulus obtentatus domino vel habente auctoritatem disponendi de rebus per spoliatores post spolium semel commissum," may not save *spoliatores a spolio* from the date of his title *in posterum*, because "opportebat spoliatum semel restitui ante quam ipse spoliator possit justa quavis ratione possidere rem spoliatam;" and so it was a practise before *in causa cujusdam contra dominum de Crawford*, that spuilzied peats from certain poor men, and put them violently out of possession of a moss and fuel casting therein, and thereafter obtained infestment of the King, but the title saved not from the spuilzie, and was condemned to restore the actors to their possession foresaid; also the said Hamilton was condemned to restore *actorem* Somervell to the fruits of his clerkship.

A just title acquired after the spuilzie does not liberate the defender *retro* from the date of his title.

Fol. Dic. v. 2. p. 380. Sinclair MS. p. 11.

No. 25.

* * Balfour reports this case :

If any man commits ejection or spuilzie against any tenants, and thereafter obtains right and title from the Lord of the ground, or from any other having power to give the same, to the lands out of which the tenants were ejected, or to the goods spuilzied, the same title and right supervenient is not sufficient to save him from the said ejection or spuilzie; because the spuilzier may not, by such title and right, be called or understood to be just possessor, except he who was ejected or spuilzied be first restored to his possession.

Balfour, p. 471.

1541. February 13.

The MEN of SELKIRK *against* The TENANTS of KELSO.

No. 26.

In an action of spuilzie, the Lords refused to admit a third party, offering to compete for his interest, and dispute both possession and property, *quia spoliatus ante omnia restituendus est.*

In the cause of the men of Selkirk against certain tenants of Kelso, against the alleged spuilzieing of the said men of Selkirk of the possession of certain lands, which they acclaimed to pertain to the said burgh of Selkirk in property and commony in possession past memory of man, until the time of the said summons libelled, then Mr. Thomas Majoribanks, procurator for the Abbot and Convent of Kelso, desired to be admitted for their interest, alleging those lands in possession, of the which the question was, to pertain to the said Abbey of Kelso, and desired a copy of the summons and a term to answer thereto, because they were not summoned;—the Lords decerned the procurator not to have the same nor to be admitted now *ratione interesse* to dispute upon the property of the said lands for stopping of the cause of spuilzie, and albeit *de jure tertius suo interesse possit de damno suo agere, ad impediendum spoliatos restit. ad suam possessionem nam regula juris quæ habet quod ante omnia spoliatus est restituendus non obstat, tertio pro suo interesse comparente*; nevertheless *de practica dominorum concilii constat exceptio hujus regulæ, non solum spoliatorem sed etiam cuicumque alteri pro suo interesse comparenti*; and attour the said Mr. Thomas excepted, the said tenants of Kelso did no wrong in ejecting the said party in their alleged possession, because the said Abbot and Convent, and their predecessors, their tenants and servants in their name, past memory of man, were in possession of the said lands as their property and patrimony of their Abbey, and so did no wrong, for they but kept and defended their own possession;—the Lords decerned this exception not to be admitted, because it is direct contrary to the other parties, and so repelled the same exception.

In the same cause the Lords decerned that kinsmen to the Provost and Bailies of Selkirk, and others indwellers in the town, which Provost and community were actors and principal in this cause, might not be witnesses to the said Provost, Bailies, and community; and in the said cause *dubitatum fuit*, if a burgh next ad-