

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 comonty 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-

jacent to the said burgh, and who pastured oftentimes their goods and cattle upon the said commonty, may be witnesses to the said Provost, Bailies, and community, and it then appeared to the Lords, that they were suspected *ratione affectionis ad causam*, and because they got in pasturing foresaid profit of the said community; and also it was alleged by one of the Lords, that for the same cause witnesses were repelled of before in the like cause of the community of Renfrew and Rugland, in *qua causa erat quidam pauper N. Nicolson*; but this day, in *causa communitatis de Selkirk non fuit decisum*.

No. 26.

Fol. Dic. v. 2. p. 390. Sinclair MS. p. 9.

* * Balfour reports this case :

In an action of ejection and spuilzie pursued betwixt two parties, if a third person compares and alleges the lands to pertain to him, and desires to be admitted in the cause for his interest, he ought not nor should not be admitted, because he, by disputation upon the property and ground right, may not stop the action of spuilzie or ejection.

Balfour, p. 473.

1541. *March 9.* HALIBURTON *against* RUTHERFORD.

THE brocard, *spoliatus ante omnia restituendus est*, does not hinder the defender to insist in a reduction of the decret of spuilzie, although he has not obtempered the same. That brocard only takes place *quando agitur de proprietate rei spoliatae, vel de alia re, agendo principaliter, at non quando agitur per viam reductionis ad retractandam sententiam super spolio contra aliquem latam*.

No. 27.

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

* * This case is No. 2. p. 13491 *voce* REDUCTION.

1629. *July 7.* LADY RENTON *against* Her SON.

IN a spuilzie of teinds, found, That although the pursuer's title had not been good, but that the defender's had been better; yet she had good ground to pursue this action, *quia spoliatus ante omnia restituendus est*.

No. 28.

Fol. Dic. v. 2. p. 390.

* * This case is No. 20. p. 14733.