

* * Sinclair reports this case :

No. 16.

Dominus Merchiston et Jacobus Carmichael contra Dominum de Wrights-houses, It was alleged, that the actor might not pursue the spuilzie of the hail lands let, because his summons bore that he was in possession of a part of the same, by putting thereof upon his sleds, and so that he had no possession of the whole. The Lords, by their interlocutor, decerned, That by the apprehension of a part of the lands "actores erant in possessione totarum decemarum et de spoliatione totarum potest agere, quemadmodum per apprehensionem unius partis fundi apprehendi censetur possessio totius fundi quantum cunque magni."

Sinclair MS. p. 80.

No. 17.

1781. *March.* LAIRD OF GADZEARD *against* The YOUNG SHERIFF OF AYR.

The Laird of Gadzeard pursued the young Sheriff of Ayr for spoliation of certain goods, and for the demolishing of a new mill, alleging him to be heritably infest in the said mill. He was desired by the Sheriff to instruct his summons, and to produce his title where he was heritably infest. He answered, that he mistered not, for in spoliation it was enough to him to allege possession without a title, and it would come thereafter *in terminis probatorio*; the which allegiance the Lords found relevant, and found that he mistered not to produce his titles.

Fol. Dic. v. 2. p. 389. Colvil MS. p. 323.

1619. *July 14.*

DOUGLAS *against* M'CUBIN.

No. 18.

An executor may pursue spuilzie of the defunct's goods, altho' spuilzied before confirmation of the testament, and consequently before the executor obtained possession.

DOUGLAS, assignee by Cuthbert M'Cubin, executor dative of umquhile Robert M'Cubin to certain grounds confirmed, and the cedent for his interest, pursues spuilzie. Alleged, he cannot allege possession nor right to the goods the time of the spuilziation, because the eight kine were pointed by a sentence against M'Cubin and the defunct, her last spouse, for his interest; and the goods were possessed by umquhile Alexander M'Cubin, her first spouse, and by her in her widowhood, and by her and the defunct her last spouse, till his decease, as their own proper goods, upon the ground of Blackcraig, whereof Alison and her spouse were tenants; likewise she possessed them as her own after the defunct's decease, to the time of the pointing, neither ever had the pursuer right or possession of the lands of Blackcraig. Replied, They could not have been pointed from her after her husband's decease, because they fell under his testament; and farther, oppones the summons, they bearing that they pertained to the executor, and was in possession in an——. Duplied, The executor had no right at the time of the pointing, in May, not being confirmed executor till July, and he would not have recovered the possession but by a pursuit, and so cannot seek spuilziation, but res-

titution; and if the relict had been pursued, she would have had retention of her third, which will exceed the worth of the goods poided, and so they may be esteemed her proper goods, seeing she was in possession at the time, and 40 days before the working, useing, milking, and keeping them as her own; and the time of the poiding, none compeared to make faith that they were theirs; and the farthest that can be craved is restitution. Repels the allegiance and duply, in respect of the reply and summons, and possession therein qualified, but reserves the modification of the violent profits to the Lords.

Clerk, *Hay*.

Fol. Dic. v. 2. p. 389. Nicolson MS. No. 173. p. 123.

No. 18.

1626 July 26.

RUSSEL *against* L. KERSE.

IN an action of spuilzie pursued at the instance of one Janet Russel against the Laird of Kerse, who was convened for spuilzie of corns growing upon the lands libelled; and the spuilzie libelled to be committed in January 1624, and the corns being of the growth of the crop, 1623; the husband of this pursuer, who sowed the corns of this crop, dying in September 1623, before the spuilzie; whereby the defender alledged, that the corns of that crop, alledged spuilzied from the pursuer, behoved to pertain to her husband, who was his tenant of the lands, and sowed that crop and corns, he dying in September that same year as said is, at which time the corns were separated from the ground, and shorn by the defunct, and therefore until his testament were confirmed, the relict could not pursue for the corns alleged pertaining to her, for the same would pertain to his executor, who behoved to be answerable to this defender, for the farms of the lands addebt. by the defunct. This allegiance was repelled, and the action sustained at the relict's instance, without necessity of confirmation, in respect of her possession libelled continually to the time of the spuilzie. Item in this same cause, an exception was proponed upon the comprising of the corns by the birle-men, with consent of the pursuer, and delivery of the same to this defender, for satisfying of his farms owing to him by consent also of the pursuer; which exception was also found relevant, and admitted to the pursuer's probation, which the Lords found relevant to be proved in all the heads thereof, especially anent the pursuer's consent by witnesses, and found no necessity, that her consent should be proved by her oath or writ.

Fol. Dic. v. 2. p. 389. Durie, p. 227.

No. 19.

Spuilzie of corn sustained, at the instance of a relict, against the landlord, though without confirmation, and her husband had died after the corn was separated.

1629 July 7.

LADY RENTON *against* Her SON.

The Lady upon a sasine of the lands of Horslie, *cum decimis inclusis*, pursuing her son for spuilzie of the saids teinds *anno* 1628, and the defender alledging, that he

No. 20.

Spuilzie of teinds.