

1625. June 17.

BROWN *against* HUDELSTONE.

No. 49.

It was not found to be spuilzie, that a cow which had been in the possession of a person, not the proprietor, was poinded as his.

IN an action of spuilziation of a cow, pursued at the instance of Brown, minister at ———, against onecalled Hudelstone, the defender proponed this exception, that he had poinded eight or nine oxen and kine, amongst the which the cow libelled was one, from one Grier, who was the defender's debtor, conform to a lawful sentence obtained against the said Grier's debtors; which Grier had the said cow, with the other goods foresaid, poinded by the defender, in his possession the time of this poinding, and by the space of two years preceding the same, pasturing by him upon his own proper ground, and used in all manner of deeds as his own, during the said space, by milking, grazing, and herding, and used the same as the rest of his goods were used, and so alledged absolvitor; which exception the Lords found relevant, not only to elide the spuilzie, but also to elide the delivery again of the cow, for the which the pursuer insisted *rei vindicatione*, though he pass from all spuilzie, violence and profits; and albeit the pursuer replied, that the exception might have appearance to put the defender *in bona fide*, and to assoilzie him from violence and spuilzie, yet it ought not to be sustained, to free him from delivery of the cow to the just owner, seeing the pursuer offered to prove that the cow was bred and calved by his own cow, upon his own proper ground, and after the calving was detained and pastured upon his own ground, while she was two years old, and then she was put in grazing to Grier; and albeit she remained with Grier two years, yet that was not enough to make the pursuer's just right to the cow to become extinct, and to establish the right thereof in the person of Grier, who had only the keeping of the cow to be grazed, and thereby to make the pursuer's goods to be subject to pay another man's debt, to whom they belonged not; notwithstanding of the which answer, the Lords sustainsd the exception of poinding to liberate the defender, not only from the spuilzie and profits, but also from the delivery of the cow, which the Lords found to come under the poinding, as Grier's cow, in respect of his two years possession foresaid, as the exception foresaid bears.

This decision was hardly thought of by some, who were of opinion, that *in rei vindicatione*, the pursuer who was dominus rei ablatae, possit rem suam vindicare à quocunq̄ fuerit possessa, quæ actio datur contra quemcunq̄ possessorem, etiam cum titulo possidentem. And as Grier, the haver of the cow, from whom the excipient poinded the same, could not have sold the cow, nor dispoind or given the same to the defender, for payment of any part of the debt owing to him, quia dominium, quod quis non habet, non potest in alium transferre, et nemo plus juris potest in alium transferre quam ipse habet; even so none could poind from him, that which was not his own: And by the sustaining of this exception, it would appear, that no person who leaves any part of his goods in a third person's hands upon trust, if he suffer the same to remain two years, but he tines his right thereof, if the same be poinded for that third person's debt; which is considerable in goods laid in pawn, or steilbow goods, or in goods.

put *in deposito*, or such like; and that for two years possession the possessor should be counted proprietor and owner: But in this the Lords reserved to the pursuer his action against the person who received his cow, for restitution of the same; wherein the Lords found that he was not, neither should be prejudged, by admitting of the foresaid exception; and that the like ought to be done when the like cases occurred.

No. 49.

Act. Hope. Alt. Cuninghame. Clerk, Hay.

Durie. p. 163.

1628. February 14. LAIRD OF MUDIALL *against* FRISSAL of _____.

No. 50.

THE pursuer of spuilzie of goods alleges a month's possession in the summons, but libels no other right to the goods. The defender alleges he had right to the goods wherewith he intromitted from the person to whom the goods pertained, and who had them in possession a year before. The Lords ordained the pursuer to condescend upon his right to his property of the goods.

Auchinleck MS. p. 216.

1628. March 4. SCOT *against* BANKS.

No. 51.

THE messenger being convened in a spuilzie as one of the spuilziers, the Lords found the allegiance proponed for him relevant to liberate him, both from the spuilzie and wrongous intromission, viz. That he pointed by virtue of the Lords' letter, directed for pointing the pursuer's goods for the debts therein contained, although the decret whereupon pointing was raised was not given against the pursuer, for it was not his fault that the letters were wrong directed; and as he had no opportunity to see the decret, so it was not his part to call for it, or search the same.

Fol. Dic. v. 2. p. 391. Durie.

* * This case is No. 220. 6015. *voce* HUSBAND AND WIFE.

1635. March 14. M'KAY *against* MENZIES.

No. 52.

A PARTY having taken a horse coming home with meal from another mill than his own, to which the owner of the horse was thirled, and in an action of spuilzie defending himself with the Book of Majesty, and the custom of that country, viz. Athole, the Lords sustained the exception to liberate from spuilzie, but not from restitution of the horse.

Fol. Dic. v. 2. p. 391. Durie.

* * This case is No. 5. p. 1815. *voce* BREVI MANU.