

1677. November 21.

HAY against LEONARD and Others.

No 98.

Spuilzie is a *vitium reale* as well as theft, and equally competent against singular successors.

JAMES HAY pursues John Leonard for spuilzieing from him a pearl worth 9000 merks, and David Carnegy and others, as havers thereof, for restitution. It was *alleged* for Leonard, Absolvitor; because he offers him to prove, that the pursuer and he entered into a co-partnery for getting of pearls in the water of Southesk, and that they got several pearls, which were all in the pursuer's custody, and having shewn the defender the pearl in question, and given him it to see, and demanding it back, he refused, as having equal interest in it, until a division of the whole pearls were taken. It was *answered*, That this defence is contrary to the libel, expressing violence. THE LORDS sustained the defence, unless the pursuer be special in the violence. It was *alleged* for Carnegy, That he had bought this pearl as a merchant, and had no accession to any violence, and therefore cannot be obliged to restore, even though it had been violently spuilzied; for though theft be *labes realis*, that is effectual against every singular successor, yet that hath never been extended to spuilzie, and it is of public interest to secure commerce, in purchasing of moveables, which neither hath nor requireth writ, and therefore no person can be obliged to dispute the seller's right. The pursuer *answered*, *imo*, That whatever the law extendeth as to theft, must much more be extended to spuilzie, which is robbery. *2do*, Albeit the law hath allowed the purchase of moveables for an onerous cause to be valid, without necessity to prove the purchaser's author's right, which is presumed from lawful possession, so that it will not be sufficient to procure restitution, to libel that the goods in question belonged to the pursuer, and were in his possession as his proper goods, unless the pursuer do also condescend, that the goods could not pass from him by sale, or any other title of commerce, but that they were stolen, strayed, given in grasing, or custody, or that they were in a defunct's possession the time of his death; all these take off the presumption of right by possession, and much more when the pursuer condescends that the goods in question were violently taken from him.

THE LORDS sustained the first reply, and found that spuilzie was *vitium in-harens* as well as theft; but found, that if no spuilzie were proved, but that a co-partnery were proved, the buying from one co-partner did secure the buyer against the other, and left him to pursue his co-partner *actione pro socio*.

Eol. Dic. v. 2. p. 69. Stair, v. 2. p. 561.

1683. November.

ANDERSON against SPENCE.

No 99.

In a pursuit against a minor upon his bond, the defender having founded upon

minority and lesion,

It was *alleged* for the pursuer; That though the benefit of restitution might take place in things disponded, whereof a minor might have *rei vindicationem*, as goods, lands, &c. yet it cannot be effectual against successors to *nomina de-*