ſame Seſſion of parliament, " for explaining the law concerning " the trial and admiſſion of the Ordinary Lords of Seſſion." This act of parliament gives his majeſty the right of judging in future, with regard to the matters ſimiliar to that which was at iſſue by the preſent appeal. 10.G.1.c.19.

Kenneth Mackenzie, brother of George Mackenzie of Balmuckie, Roderick Mackenzie younger of Reidcaſtle, Lewis Mackenzie his brother, Donald Mackenzie of Kilcowie, John Chiſholm of Knockfin, and Archibald Chiſholm his brother, *Appellants;* Caſe 96

Mr. Daniel Mackilligin, and Mr. John Mackilligin, Miniſters of the Goſpel at Allneſs, - - - - - - *Reſpondents.*

6th Feb. 1722-3.

Spuilzie.—Art and Part.—Certain perſons who were preſent with the rebels, (under the command of Lord Seaforth,) when a ſpuilzie was committed, are found liable in damages, conjunctly and ſeverally, for the damages committed by the ſaid party.

The amount of the damages aſcertained by the oaths of the purſuers.

Intereſt allowed from the day, after the party of rebels had left the premiſes ſpuilzied.

Coſts and Expences.—The appellants having failed to appear, on the day appointed for hearing, the reſpondents' are heard, and the judgment affirmed with 100*l.* coſts.

IN May 1718 (*a*), the reſpondent Daniel, in his own right, and by virtue of a factory from the preſbytery of Dingwall, and the other reſpondent John, brought an action of ſpuilzie againſt the appellants, before the Court of Seſſion, for ſatisfaction of certain damages occaſioned by the appellants; and the reſpondent ſtated, that upon Monday the 10th of October 1715, the appellants with a party of armed highlandmen, under the command of the late Earl of Seaforth, came to the village of Allneſs where the reſpondents reſided, and continued there till Saturday the 15th, during which time, they took poſſeſſion of the houſes of the reſpondents, carried off a great part of the houſhold furniture, and cut and deſtroyed the reſt, carried off, or tore, and deſtroyed all the reſpondent Daniel's books, and likewiſe a library of books belonging to the preſbytery of Dingwall, and likewiſe two parochial libraries, of all which the reſpondent Daniel was the keeper, deſtroyed all their corn, and cut and deſtroyed the planting, and every thing of value that could be found belonging

(*a*) This is entirely taken from the caſe for the reſpondents; none appears for the appellants, and as they deſerted the appeal, it is probable that none was preſented for them.

to

to either of the reſpondents, who upon the approach of the ſaid rebels were obliged to fly for their own ſafety, and live private for ſome time; and could not return to their houſes for above five months.

The appellants made defences, in general, denying the libel; and a defence of *alibi* was alſo ſet up by the appellants Roderick and Donald Mackenzie. In June 1720, of conſent, a commiſſion was granted for examining witneſſes by the reſpondents to prove their libel, and for the appellants to prove their defences; and accordingly ſeveral witneſſes were examined for the reſpondents, but none were examined by the appellants; and the term was circumduced againſt them.

The cauſe coming to be heard, the appellants did not appear, but the Court having heard and conſidered the depoſitions in the cauſe, on the 8th of July 1721, "found it proved, that at the "time libelled a party of the rebels, which were then under the "command of the late Earl of Seaforth, came to the town of "Allneſs, within which the reſpondents' houſes are ſituated; "and that the ſaid party continued there ſeveral days, and that "by the ſaid party, the reſpondent Mr. Daniel's houſe was "plundered, his doors, trunks, and cheſts broken open, and his "books and the pleniſhing and furniture of the houſe carried off "and deſtroyed; and that his growing corns, his corns in his "barn, and barn-yard, and his peats and herbage of his yard, "were alſo conſumed or deſtroyed by the ſaid party: And alſo "found it proved, that at the ſaid time, and by the ſame party, "the reſpondent Mr. John Mackilligin's houſe was rifled, his "pleniſhing carried off, his corns, peats, and planting deſtroyed, "and his bee-hives and the locks and doors of his houſe carried "off; and found it proved, that the appellants were all of the "ſaid party; and found the defence of alibi not proved; and "alſo found that the aforeſaid qualifications proved are relevant "to infer that the appellants were art and part in the commiſſion "of the above ſpuilzies; and that they are therefore liable con-"junctly and ſeverally *in ſolidum* for the damages which were "thereby done to the ſaid Mr. John and Daniel Mackilligins, re-"ſpondents; and remitted it to the then next week's ordinaries "or to either of them, to take the ſaid Mr. Daniel's oath *in* "*litem* on the particulars and the extent and value of his "damages, and on the violent profits."

The reſpondent Daniel having been examined ſwore to the extent of his damages, and exhibited an inventory thereof; and on the 28th of July 1721, the Court "Having "conſidered the inventories referred to by the reſpondent "Daniel in his oath, and having adviſed the ſaid oath, found the "appellants liable conjunctly and ſeverally to the ſaid Mr. Daniel "Mackilligin for the values of the books in the two inventories "produced, and alſo for the ſums in the inventory of the goods "ſpuilzied from the ſaid Mr. Daniel, extending in all to the ſum "of 2482*l.* 12*s.* Scots, and for the intereſt of the ſaid ſum from "the 16th day of October 1715 years, and in time coming during

" the not payment, deducing as is deduced in the above calcul " the value of the books which the ſaid Mr. Daniel expects to " get back; and alſo found the defenders liable to Mr. Daniel for " the expence of this proceſs, and for his perſonal expence in " attending, in ſo far as the ſame ſhould be found neceſſary or " reaſonable; and remitted to the Lord Ordinary in the cauſe to " liquidate the expence of the proceſs according to the regula- " tions, and to modify the perſonal expences." And the Lord Ordinary accordingly decerned for Daniel's expences amounting to 645*l.* 9*s.* 4*d.* Scots. The appellants having reclaimed, the Court, on the 29th of July 1721, adhered to theſe interlocutors.

The reſpondent John being examined upon a commiſſion, alſo ſwore to the particulars which he had loſt, and the values thereof; and the Court pronounced another interlocutor (*a*) of the ſame nature in John's cauſe, and decerned the appellants to make him ſatisfaction for the ſum of 1279*l.* 7*s.* Scots, with intereſt; and his expences were decerned for, amounting to 134*l.* 16*s.* Scots.

Both theſe decrees having been extracted, the appellants brought an action of reduction; but after a hearing of the cauſe on the 24th of July 1722, the Court " repelled the reaſons of reduc- tion;" and to this interlocutor they adhered on the 31ſt of July 1722.

The appeal was brought from " ſeveral interlocutory ſentences " or decrees of the Lords of Seſſion of the 28th of July 1721, " 23d February 1721-2, and the affirmances thereof the 24th and " 31ſt of July 1722." Entered, 23 Oct. 1722.

Heads of the Appellants' Argument.

Whatever damage the reſpondents may have ſuſtained, there was no proof that the ſame was occaſioned by means of the ap- pellants, or that any of them took any of the reſpondents' goods, or gave any orders for ſo doing; it were therefore unreaſonable to load them with making reparation for what damage the reſpon- dents ſuſtained.

There is no proof of the value of the reſpondents' damages, but their reſpective oaths *in litem*; which was an indulgence they did not ſo much as pray to be allowed by their libel, and conſe- quently must avoid the decree as being *ultra petita*, eſpecially ſince the action was not commenced ſoon after the damage done.

The decree gives the reſpondents intereſt for their ſeveral de- mands from the 16th of October 1715, though in the libel the charge is, that the facts were committed on one or other of the days of September, October, November, December, January, or February of the ſaid year.

The appellants are decreed jointly and ſeverally, to pay the reſpondents their damages, though it was not prayed by libel.

(*a*) The date is not mentioned; but it appears to have been the interlocutor 2 February 1721-2, which was appealed from.

The reſpondent Daniel had allowance for the expences of both actions, and his perſonal expence in attending the ſame; and yet, by the decree in favour of the reſpondent John, he is likewiſe allowed his expences; ſo that the appellants were ſubjected to a double payment of expences.

Heads of the Reſpondents' Argument.

It appears by the proofs in the cauſe, that all the appellants were preſent in the village of Allneſs with the armed Highlanders; that ſeveral of them were in the reſpondents' houſes at that time; and that during the time the appellants and the rebels were there, the houſes of the reſpondents were plundered by the ſaid rebels, and every thing therein carried off and deſtroyed. Theſe facts being eſtabliſhed, the decree againſt the appellants muſt be juſt; for where a number of men commit violence, it may be very difficult (nor indeed is it neceſſary) to prove the particular perſons who deſtroyed or took away the goods: It is ſufficient to prove that the injury or damage was done by ſuch a party, and that the appellants were of that party, which is ſufficiently proved by a multitude of witneſſes.

An oath *in litem* is, by the law of Scotland, as much the determined method of proof where a ſpuilzie is libelled, as writ or witneſſes are in any other caſe; and indeed in moſt caſes of that nature, any other proof is impoſſible: And no man in his libel is obliged to ſet forth the method of his proof, and conſequently this decree has proceeded regularly and according to the uſual forms in ſuch caſes. The action was commenced in May 1718, which will avoid any objection from delay.

The libelling of a ſpuilzie in its own nature implies violent profits, damages, and expences; that is, where the nature of the thing ſpuilzied admits of violent profits, they are decreed; otherwiſe the Judges decree intereſt: and the decree has been very indulgent to the appellants in giving intereſt, for certainly the reſpondents muſt have ſuſtained much greater damage; and their demand thereof was actually libelled. It appears by the proofs that the rebels came to the village of Allneſs on Monday the 10th, and continued till Saturday the 15th of October, during which time the damage was done; and it was therefore regular to decree intereſt from the 16th of October, ſince before that time the damage was done.

A ſpuilzie being libelled againſt ſeveral perſons, it imports their being liable jointly and ſeverally; for ſince they were all acceſſary to the wrong, the judgment was rightly pronounced, and the ſame is particularly ſo libelled.

The reſpondent John has no allowance for expences, but ſuch as were not allowed to the reſpondent Daniel; and therefore the appellants are not liable to a double payment; and the reſpondents conceive that the Court has made them but the juſt and uſual allowances in caſes of ſpuilzie, which indeed are leſs than the half of the expences which the reſpondents were out of pocket.

Whereas

Whereas this day was appointed for hearing counſel upon this appeal and anſwers: Counſel appearing for the reſpondents, but no counſel for the appellants, and the reſpondents' counſel being heard and withdrawn, It is ordered and adjudged, that the petition and appeal be diſmiſſed; and that the interlocutory ſentences or decrees therein complained of be affirmed: And it is further ordered, that the appellants do pay, or cauſe to be paid to the reſpondents, the ſum of 100l. *for their coſts in reſpect of the ſaid appeal.*

Judgment, 6 Feb. 1722-3.

For Reſpondents, *Ro. Dundas.* *Will. Hamilton.*

James Macpherſon, of Killyhuntly, - *Appellant;* Caſe 97.
John Macpherſon, of Dalrady, - *Reſpondent.*

11th *Feb.* 1722-3.

Truſt—Qualifications of truſt found to be irrelevant.

THIS appeal related to certain deeds executed in favour of the reſpondent, by Elias Macpherſon, of Invereſbie, being conveyances of his whole eſtate, bearing to be for onerous conſiderations, and containing abſolute warrandice. Theſe deeds were executed in 1693, 1694, 1695, and 1696.

The appellant's father had a wadſet upon the eſtate of this Elias; and Elias, on the 7th of February 1696, conveyed his right of reverſion of this wadſet to a truſtee for the appellant's father, by a deed bearing to be for onerous conſiderations. Elias alſo executed an inſtrument on the ſame 7th of February 1696, *declaring upon his ſoul and conſcience*, that the deeds formerly executed by him, in favour of the reſpondent, were in truſt only.

After this period, on the 24th of February 1696, Elias executed another deed in favour of the reſpondent, reciting certain bonds formerly granted by him in the reſpondent's favour for money lent, and that the ſame bonds being returned, he acknowledged the ſame as the price of his eſtate remaining unencumbered with wadſets. Elias died without iſſue, and the reſpondent having taken ſteps for the redemption of the wadſet now belonging to the appellant, the appellant brought an action of declarator before the Court of Seſſion, to have it declared, that all the deeds formerly executed by Elias Macpherſon, in the reſpondent's favour, were only in truſt for the grantor. In this action he inſiſted that the cauſe of action having ariſen before the act 1696 c. 25. was paſſed, the truſt might be proved by other means than writ, or oath of party, he founded upon the declaration of *ſoul and conſcience*, and other ſpecial circumſtances in the ſituation of the parties. 1696, c. 25.