

1542. *March 2.* DOUGLAS *against* BOIG.

No. 3.

IN actionis of spuilzie, the defendar sould not be heard alledgeand, be way of exceptioun, that the persewar spuilzeit the samin gudis and gear fra him befor the time of committing of the alledgit spuilzie done be him aganis the persewar; quia exceptio spoliū prioris, super eadem re, non repellit actorem de spolio agentem. See APPENDIX.

*Fol. Dic. v. 2. p. 389. Balfour, No. 38. p. 475.*

1551. *March 27.* A. SPANIARD *against* TENANT, &c.

No. 4.

IN an action pursued by a Spaniard against Francis Tenant, and other burgesses of Edinburgh, the said Spaniard called the said Francis and his colleagues for wrongous intromitting with figs, and disponing thereupon, without title or right of him, or any having right to the said figs spuilzied from him, and being in his possession at the time of the spuilzie, and proper gear, and spuilzied from him by one called \_\_\_\_\_, a pirate on the sea, and brought into Scotland by the said \_\_\_\_\_, to the port of Bruntisland, and immediately intromitted with by the said Francis, and sold and disponed by them, the vice of theft and reiff not cleansed. It was excepted by the said Francis and his colleagues, That the said Spaniard had no action against them for the said figs, because he found none of them in his possession. It was answered by the said Spaniard, That the said Francis had received the said figs from the said \_\_\_\_\_, manifestly known pirate and reiffar on the sea, the vice not purged, and disponed upon them at his pleasure, and was made rich with the price thereof, and therefore the said Spaniard had good action to pursue the said Francis. Secondly, it was excepted by the said Francis, That he did no wrong in case he intromitted with the said figs, because the said \_\_\_\_\_ was a man of war, and passed forth at command of John Barton, who had a letter of marque upon the Portugueze, and a sea brief to the same effect, and the said figs were Portugueze goods, and offered him to prove the same. It was answered by the Spaniard, That this was directly contrary to his libel, who libelled the goods to appertain to him and friends in this realm, and spuilzied from them, and therefore should not be given to his proof. Thirdly, it was excepted by the said Francis, That he did no wrong in intromitting with the said figs, because he did it at command of authority, and had delivered the price thereof off his hand at the said command, long before intending the action against him for the same. It was answered by the Spaniard, That that authority could give no command which might be warrant to him to dispone upon his proper gear, without the said gear had been declared to be just prize, or escheat of that authority, or Secret Council or Session, or some other judge having power thereto; which was not done in this case; but if it had been,

What title requisite to authorise intromission, where spuilzie is alleged?

No. 4. to be kept to their profit having right thereto. The Lords by interlocutor repelled all the said exceptions, by reason of the libel and answers, and assigned to the Spaniard a day to prove his libel.

*Maitland MS. p. 110.*

1567. February 5.

LAIRD of CULTMALINDIE against LORD OLIPHANT.

No. 5.

Eating up growing corn, upon ground that had been common, but peaceably possessed by another as his property only for two years, found to infer spuilzie.

ANENT the action pursued by the Laird of Cultmalindie against Lord Oliphant, for wrongous eating and destroying, with horse, nolt, and other bestial, of certain corns tilled and sown by the said Laird and his tenants, upon their own proper ground, it was alleged by the said defender, That he did no wrong in eating of the said corn, because the ground whereupon these corns grew pertained to the said Lord Oliphant in common, by reason of an appointment made betwixt the said Lord's predecessors and the the said Laird's predecessors; and also it was alleged, That it was the first year of the riving out and sowing of the said corn, and so he did no wrong in defending his possession, he being in possession thereof from the time of the appointment to the time of the tilling thereof. It was alleged by the said pursuers, That they were in peaceable possession of the said ground as property, at least for the space of two years before the destruction of the said corn, by labouring, and tilling, and sowing of the said land and ground, in shearing, leading, and disponing of the corns that grew thereupon, for the space foresaid. It was alleged by the defender, That was not libelled, but allenarly tilling and sowing the corn alleged to be destroyed. It was alleged by the pursuer, That it was enough for him to libel for the spuilzie of the said corn, as said is; but because the defender alleged it to be the first year of the sowing, the said pursuer behoved to reply, and allege as above-written, because it resulted of the defender's allegiance. Which reply and libel of the pursuer was admitted to his probation by the Lords' interlocutor.

*Fol. Dic. v. 2. p. 388. Maitland MS. p. 181.*

1580. July 22.

————— against LORD SINCLAIR.

No. 6.

To what extent is restitution due?

THERE was a clerk in Dysart who pursued my Lord Sinclair for the violent ejecting him forth of a salt pan, which he had in feu and heritage from the said Lord; and he qualified his ejection in this sort, that the said Lord stopped the colliers who were hewing in the heugh coals for panwood to the pan, in so far as he compelled the said colliers to hew to himself, and compelled the leader who led to the clerk's pan to his own behoof, and so, through that unlake of wood, the said pan lay idle, wherefore he concluded in his libel the profits of the salt, albeit he was ejected forth of the winning of his coal. It was excepted against