

No. 20.

intromitted by virtue of a lawful tack in his person, set before the pursuers' right, and opposing a nullity against her right; the Lords found, seeing the pursuer alledged possession of the teinds in her person divers years preceding the year libelled, by virtue of her foresaid right, that the excipient could not debar her from continuing her possession *brevi manu* by stopping and apprehending thereof at his own hand, without order of law; and found, that albeit her title had not been good, but that the excipient's had been better, yet that she had competent action to pursue this spuilzie, *quia spoliatus ante omnia est restituendus*, neither was it respected what the defender alledged, that the maxim *spoliatus est ante omnia restituendus*, holds only where there is *spolium corporis ejusdem*, which was before possessed by him who seeks restitution, which is not here, where the pursuer's possession of other crops, cannot infer that she was possessor of this crop libelled, whereof she never had possession; and it was not respected where the pursuer also replied, that there was no other form of interruption against her right and alledged possession in matter of teinds, but only to alledge the insufficiency of her right, and to exclude any pursuit founded thereupon, when the same is drawn in dispute, by maintaining of his own right; for in teinds it is not as in lands, where the possession is interrupted by warning; but in teinds, albeit inhibition be used, yet the same needs not to be used by him who is in possession, so that he needed to serve no inhibition himself, being possessor by virtue of a sufficient right; which reply was repelled, and the spuilzie sustained.

Act. Stewart.

Alt. Nicolson et Craig.

Clerk, Gibson.

Fol. Dic. v. 2. p. 389. Durie, p. 457.

* * Auchinleck reports this case:

A colourable title may sustain action of spuilziation of teinds, where the pursuer has been sundry years in possession, and is dispossessed by him who pretends no right of his own, but to maintain his violent deed of spuilzie alleges the title whereby the pursuer bruiked the teinds was not good; which allegiance the Lords repelled.

*Auchinleck MS. p. 21.*1724. July 10. ANNA FALCONER *against* BURNET of Criegie.

No. 21.

A person being for eleven years in peaceable possession of a moss, to which she and her husband had a disposition, but no in-

IN an action of spuilzie pursued at the instance of Anna Falconer against Mr. Burnet, for wrongously and riotously carrying off the peats which she had caused cast in the Moss of Criegie; the defender objected to her title, and pleaded an exclusive right in this person, in as far as he stood infest in the said Moss, and she not being infest, had no title to insist against him.

It was answered for the pursuer, That she had produced a disposition signed by this defender to her husband and her, of what part of the Muir and Moss of

Criegie belonged to the lands contained in the said disposition ; and she contended, That although no such right had been produced, yet her possession by itself was a sufficient title, without shewing any right of disposition or infeftment ; and she offered to prove her constant yearly possession since the time of her husband's decease in the year 1712.

It was replied for Criegie, That though in moveables possession presumed property, yet that did not hold in the right of lands, unless an infeftment was produced ; for sasines are become so necessary a solemnity, that none can properly be said to possess real rights without them.

Duplied for the pursuer, That right and possession, whether of heritage or moveables, were in law things of a different nature, and had quite different effects : Possession is a right and title of itself, and where it has been lawfully attained, the possessor is as much entitled to be maintained in his possession, as any other person having the most unquestionable right ; and in the present case the pursuer's possession must be presumed lawfully attained, both from the disposition produced and her peaceable possession for so long a time.

The Lords found, That the pursuer being in the peaceable possession, without any interruption from the defender before the year 1723, she is entitled to carry on her action of spuilzie.

Cited for the Pursuer, Stair's Institutions, B. 1. T. 9. and B. 4. T. 24. ; No. 4. p. 3607. and No. 17. p. 10511.

For the Defender, Maxwell against Ferguson, *June 25. 1673.* No. 17. p. 10628. *voce* POSSESSORY JUDGMENT.

Act. *Graham, sen.* Alt. *Dalrymple, sen.* Reporter, *Lord Milton.* Clerk *Mackenzie.*

Fol. Dic. v. 4. p. 298. Edgar, p. 76.

No. 21.
feftmeot, was
found to have
right to pursue
a spuilzie
against the
granter of the
disposition
who carried
off her peats.

SECT. III.

To whom the Action is Competent.

1549. February 19. LAIRD of DURIE against STEPHEN DUDDINGSTON.

No. 22.

If a tenant or possessor of any room set to him with steelbow goods being ejected or spuilzied of his possession or goods, the action of spuilzie concerning the possession and restitution thereof pertains to the said tenant's master, but the action of spuilzie concerning the steelbow goods pertains to the said tenant allenary,