

No. 43.
was proved
that they be-
longed to the
defunct, was
found liable
in spuilzie.

Richard's gear at the time of his decease, and therefore the defender did no wrong in intromitting with the gear libelled, but might have lawfully done the same by reason of his gift of escheat foresaid. The pursuer alleged, that after the decease of her husband, the defender should not have intromitted therewith at his own hand, until it had been proven before the Judges that the gear had appertained to the said Richard at the time of his decease, and a declarator past thereupon; which allegiance of the pursuer the Lords found relevant, and referred the libel to her probation, and repelled the allegiance of the defender.

Fol. Dic. v. 2. p. 391. Colvil MS. p. 249.

1576. *December 4.* KELWOOD *against* EARL of CASSILLIS.

No. 44.
The pursuer
ought to have
his oath *in*
litem in the
case of spuil-
zie of writs,
although the
defender may
have had a
colourable
title.

Anent the action pursued by the Laird of Kelwood against the Earl of Cassillis, it was alleged by the pursuer, that the said Earl entered by violence into his house, and not only spuilzied the goods and gear being there, but also took away his whole evidents and writings pertaining to him. It was alleged by the said defender, that he did neither wrong nor spuilzie in entering into the said pursuer's house, and intromitting with the gear being therein, because at the said time the pursuer was denounced the King's rebel, and put to his Highness's horn, and the said defender had obtained the escheat of the pursuer, and therefore did neither wrong nor spuilzie in intromitting with his gear; and if recklessly, among other gear, he intromitted with his evidents and writings, the pursuer could not call that spuilzie, but allenarly wrongous intromission; which allegiance of the defender was repelled by the Lords.

Fol. Dic. v. 2. p. 291. Colvil MS. p. 254.

1583. *July.* BALMAINS *against* BALVAIRD.

No. 45.
Found in
conformity
with the
above.

In the action pursued by the Laird of Balmain for spoliation of certain evidents, the libel being admitted to probation, and the process being advised, and the libel found proved, it was alleged by Balvaird, that the said Balmain ought not to have the quantity of the evidents and writs contained and expressed in his libel to his probation, because the Laird of Balvaird intromitted with the evidents *bona fide*, and by gift of Balmain's escheat being disposed unto him, he raised letters thereupon, and by virtue of the same did intromit with the evidents. It was answered, That the gift and disposition of the escheat takes in dispositions of sums of money, but heritable evidents and infeftments could not come under escheat conform to the daily practice and laws of this realm; and therefore, in so far as he did intromit with his heritable evidents and infeftments he committed spuilzie, and having

committed spuilzie, he was in dolo aut saltem in lata culpa quæ dolo equiparatur et contra talem juratur in litem L. 5. et 11 D. De in litem juran C. Ibid. And it was also lately practised betwixt] the Commendator of Cambuskenneth, and David Balfour, that having proved spoliation and ejection forth of a barn, got the contents contained in a bonnet case of gold, silver, and precious jewels, to his oath, de quo vide No. 20. p. 9369. *voce* OATH; for how could any man prove the possession and contents of his own evidents otherwise than by his oath, considering that men keep their evidents most secretly, et non patet eorum aspectus cuilibet de domo et familia. The Lords *una voce* found by interlocutor *quod rarum est*, that Balmains should have the contents of his evidents to his oath, and thereafter to pursue for the interest.

No. 45.

Fol. Dic. v. 2. p. 391. Colvil MS. p. 378.

1611. *January.* GORDON *against* LORD FORBES.

No. 46.

In an action of spuilzie pursued by Gordon of Abergeldie, as assignee to Patrick Mortimer against Arthur Lord Forbes, the Lords assoilzied from the profits of the goods spuilzied, in respect they were intromitted with *bona fide*, the horning standing and not reduced, albeit there was no declarator recovered upon the horning.

Kerse MS. Fol. 197.

1611. *January 10.* BAILIE *against* LORD TORPICHEN.

No. 47.

In an action of spuilzie pursued by John Bailie of Breadshaw against my Lord Torpichen, the Lords sustained an exception of pointing to elide the spuilzie, notwithstanding it was alleged that the spuilzie was committed upon the 12th of January, 1604, before the which day the decret whereupon the pointing was used was suspended, and the Bailies discharged; and that in respect the pointing was upon the 9th of January of before, which the Lords preferred to the libel being only founded upon probation of witnesses.

The like case before, James Stewart of _____ and William Anderson.

Kerse MS. Fol. 197.

1543. *February 12.* BASTARD'S EXECUTORS *against* DOUGLAS.

The Lords decerned a man in a spuilzie of a deceased bastard's goods, who was rehabilitated by the King, although he had a *titulus coloratus*, viz. a gift of bastardy from his Majesty, with a letter from him to the Sheriff to possess him.

No. 48.

Fol. Dic. v. 2. p. 391. Sinclair.

* * This case is No. 40. p. 14744.