

\* \* \* Lord Dirleton reports the same case :

It was found, That a miln-dam could not be drawn from one side of a burn to another, without a servitude or consent of the heritor having lands on the other side ; and that the heritor is not obliged to debate, whether he had prejudice or not ; the lands on the other side being his, and the burn *medio-tenus*. *2do*, It was also found, That he might lawfully demolish the dam ; unless it were, *alleged*, that the miln had gone the space of forty-eight hours ; so that it might have come to his knowledge that it was a going miln.

Clerk, *Haystown*.

*Dirleton, No 87. p. 36.*

No 9.

1671. July 7.

STRAGHAN *against* GORDONS.

STRAGHAN pursues Gordons for a spuilzie of four oxen taken away from them by violence, being then in their plough, by George and William Gordons and others. The defenders *alleged* absolvitor, because they offered them to prove, that the oxen were their proper goods, and were stolen from them ; and that thereafter they were found straying upon the pursuer's ground ; and that they were proclaimed as waith-goods by the Sheriff ; and that by the Sheriff's order direct to his Majors, the defenders intromitted with them, and so did no wrong. The pursuer *replied*, That, no way granting the verity of the defence, the same ought to be repelled, because they having the oxen in question, in their peaceable possession four months, they ought not to have been disturbed in their peaceable possession, in this order, without the citation or sentence of a judge. So that the defenders having unwarrantably and violently dispossessed them, *spoliatus ante omnia restituendus*, and they may pursue for restitution as accords ; but the pursuers are not now obliged to dispute the point of right. *2dly*, If need be, they offer to prove that they acquired the goods from the Laird of Glenkindy their master, so that being possessors *bona fide cum titulo*, they could not be summarily spuilzied, or dispossessed : For albeit stolen or strayed goods may be summarily recovered, *de recenti*, or from the thieves ; yet cannot so be taken from a lawful possessor acquiring *bona fide*.

THE LORDS found the defence relevant, and admitted the same to the defender's probation ; and found also that part of the reply, that the pursuer did possess *bona fide*, by an onerous title, relevant to elide the defence though it were proven, as to the restitution of the oxen to the pursuer, and the ordinary profits thereof, but not the violent profits ; for they found the Sheriff's warrant being instructed, would excuse from the violent profits ; but they found that the defender's naked possession, though for four months, by having the

No 10.  
Stolen and strayed goods may be recovered summarily without process, or sentence, even from possessors *bona fide*, who have paid an onerous price.

No 10. goods in the plough, would not infer restitution or spuilzie, but that the goods being stolen or strayed, might be recovered summarily.

*Fol. Dic. v. 1. p. 115. Stair, v. 2. p. 750.*

1672. December 6.

MR JOHN INNES *against* JOHN DOW.

No 11.  
Lords, and  
Baillies of re-  
gality, having  
right to the  
escheat of  
transgressors,  
without being  
accountable  
to the King,  
may *brevi  
manu* intromit  
with the es-  
cheat goods  
without a de-  
clarator.

JOHN DOW having obtained a decret of spuilzie against Mr John Innes in absence, Mr John pursues reduction on this reason, that the decret was in absence upon a false or clandestine citation; and if he had compeared, he would have *alleged*, and now *alleges*, that the goods were lawfully pointed upon a decret of the regality of Spynie; whereby John Dow being accused of theft, was declared fugitive, and his goods ordained to be intromitted with, as belonging to the Lord or Bailie of the regality. It was *answered*, That the said decret could be no warrant for a summary intromission; for, when a party is declared fugitive before the Justices, there cannot be a summary intromission, neither doth the party's escheat fall till he be denounced, and a declarator of escheat be pursued thereupon, which ought to have been done in this case. It was *replied*, That the Lords and Baillies of regalities having right to the escheats of transgressors for their own behoof, without being countable to the King; their constant custom is, where a thief is declared fugitive, to intromit with his goods, as was done in this case.

THE LORDS found the reason relevant, and reduced the decret.

*Fol. Dic. v. 1. p. 115. Stair, v. 2. p. 129.*

1683. December 1.

THIN *against* SCOT.

No 12.  
A miller was  
found entitled  
to seize corn  
abstracted,  
but not the  
horse which  
carried it.  
See No 5.  
p. 1815.

IN the action of spuilzie, Thin *contra* Scot, it being *alleged* for the defender, That he could not be liable for a spuilzie, either of the corns or horse libelled, because the pursuer was carrying away to another miln the said corns, which was a part of the thirle of his miln; and by a statute of King William,\* and by several acts in the abbey court of Melrose, of whom this miln was holden, it was declared, That it should be lawful to seize upon the corns abstracted, or horse: THE LORDS sustained the defence as to the sacks of corn, and assoilzied the defender from restitution thereof; but as to the horse, restricted the same to wrongous intromission, and found them only liable for restitution of the price of the horse.

*Fol. Dic. v. 1. p. 116. President Falconer, No 72. p. 48.*

\* See No 5. p. 1815.