

1676. February 3.

MASTER OF RAE *against* the LAIRD OF DUNBEATH, &c.

No 268.

Prescription of spuilzie, by not pursuing for three years, not interrupted by a criminal pursuit for the same fact.

THE Master of Rae, as assignee by his father and his tenants, pursues Dunbeath and others for a spuilzie committed by them *in anno* 1668, having entered Sutherland with a great number of men, and committed a great many depredations. The defender *alleged*, That the spuilzie ought to be restricted to wrongous intromission, because it was not intended within three years of the fact, and therefore doth prescribe as to the privilege of spuilzie, the oath *in litem*, and violent profits. It was *answered*, That for the same fact there was a criminal pursuit within the three years. It was *replied* for the defender, *Non relevat*, because upon the fact many distinct and different actions may arise, as spuilzie and contravention; yet the insisting in a contravention will not hinder the prescription of the spuilzie; so upon this fact there is an action criminal, which is public, for punishing of the offenders, wherein there was no conclusion as to restitution or damages of the party injured; and there was another distinct action of spuilzie, both which might have been consistent and intended together; and the passing from the one, whether tacitly or expressly by forberance three years, did not pass from the other; and it were a dangerous matter to give an oath *in litem* to instruct a libel, wherein there is 300,000 merks libelled.

THE LORDS found, That the action could only be sustained for restitution, and that the criminal pursuit did not interrupt the prescription as to the civil pursuit, they being wholly distinct; but declared they would take consideration to extend the ordinary profits, in regard of the odiousness of the depredation.

Fol. Dic. v. 2. p. 119. Stair, p. 411.

* * Dirleton reports this case :

IN a spuilzie at the instance of the Master of Rae against Dunbeath, it was *alleged*, The pursuer was prescribed, because not intended within 3 years; so that it could not be sustained to give the pusuer *juramentum in litem* and violent profits. It was *replied* for the pursuer, That long within the 3 years, a pursuit for depredation had been intended before the the Justice; which being of a higher nature, and including virtually and in consequence, the conclusion of restitution and profits, was a sufficient interruption as to this pursuit.

THE LORDS, notwithstanding, found the pursuit prescribed.

Reporter, *Newbyth.*

Clerk, *Mr Thomas Hay.*

Dirleton, No 322. p. 156.

* * * Gosford also reports this case :

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IN an action of spuilzie pursued at the instance of the Master of Rae against Dunbeath, Sandsyde, and others, bearing for violent profits; and it being *urged*, That the pursuer should have *juramentum in litem*; it was *alleged* for the defenders, That they could only be liable for wrongous intromission, to be proved either by witnesses or the defenders oath; because the said action of spuilzie and violence was prescribed by act of Parliament of King James VI. not being pursued within three years after the alleged spuilzie. It was *replied*, That the said action was wakened within the years of the prescription, in so far as there was a criminal pursuit intended against the defenders for these spuilzies before the Justice; and albeit it took no effect, becaues of a demission obtained by the defenders, and produced in judgment, yet it ought to be sustained as a legal interruption of the prescription, seeing the act of Parliament is founded upon that same principle of the common law, *Injuria seu verbalis seu realis ad certum tempus suppressa dissimulatione præsumitur sopita*; which cannot be said here, the resentment and complaint being made so public within a short time after committing of the violence, and in which criminal action the Justices might have given sufficient reparation; and accordingly it is statute in the 9th act of the 2d Parliament King Charles II. It was *duplied*, That it is clear, by the act of King James VI., that all spuilzies and depredations not being pursued within three years prescribe; and the late act of Parliament was made after the alleged spuilzie libelled. THE LORDS did restrict the pursuit to wrongous intromission, and denied to give the pursuer *juramentum in litem*, reserving to themselves to modify the process after probation, upon that reason, that these criminal pursuits are only *ad vindictam publicam*, nor probation led either for worth or damage.

Gosford, MS. No 848. p. 537.

1715. February 1.

Sir ARCHIBALD SINCLAIR and his Lady *against* the Marquis of ANNANDALE and Others.

THE Marquis of Annandale having two expired apprisings and a decreet of preference and mails and duties against the Lady Stapleton and the Tenants; yet the Lady continuing in the natural possession till her death, and having in her lifetime disponed her right of fee to Dame Margaret Irvine her neice, the Marquis's chamberlain, after her death, came, and so far took possession in name of the Marquis that he set a new tack to the tenant; notwithstanding whereof, Irvine of Stank, Sir Archibald's factor, came and took possession of the house, whereupon he and others who had concurred, being convened in a

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A summary complaint being insisted in before the Lords, upon a fact of intrusion, as in contempt of their authority, found not to interrupt the tri.