

No. 148.

In August, 1749, about a month after this process was ended, Russel brought a new process for the damages in having been ejected out of his farm, and for which he alleged no reparation had been given him in the former action of spuilzie. The defence pleaded before the Ordinary was, That he was dispossessed in consequence of a decree of removing. And it being answered, that he had been dispossessed *via facti*, two years before the decree, the Ordinary “ allowed either party a proof before answer upon that point.”

When this proof came to be advised, it did appear, that the tenant had been turned out of the possession by the spuilzie, and that the decree of removing was not obtained till two years thereafter; nevertheless, the Lords “ found no foundation for the process, and assoilzied.”

It was observed, that the defender had paid well for the spuilzie, whereby the case came to be the same as if he had lawfully poinded; and as thereby the pursuer would have been rendered incapable to possess, What was the master to do? Was he to let his land lie waste? That was said to be what no heritor would do, or could be obliged to do, merely because of a possibility that the tenant might thereafter be in a condition to possess, and which, in fact, never happened.

Mean time, although this reasoning for the power of the heritor, in the case where the tenant's goods are all swept off the ground, even by the master himself, or his other creditors, by lawful poinding, may be just, yet this cannot well be pleaded as a decision on that point; because as the damage for the want of the possession for the years to run of the tack had been libelled in the process of spuilzie, though the decree may not have specially bore the sum therein decerned to have been on that account, it may have been considered as a sum decerned in full of the whole damage libelled; and in that view some of the Lords took it, and who thought, that, had the defenders been well advised, the act before answer might have been prevented.

Kilkerran, No. 8. p. 536.

1768. June 21. SMITH *against* THOMAS HAMILTON MACGILL of Falla.

No. 149.

Heritor may
put down
sinks for coal
in lands let in
tack.

In this case it was found, “ That the heritor has right to search and put down sinks for coal in lands set in tack, upon satisfying the tenant for the damage which may be thereby incurred.”

The tenant admitted, that the right to the minerals remained in the heritor; but contended, that he was not entitled to break up the ground during the currency of the lease, in respect there was no stipulation for that purpose.

Act. *Rae.*

Alt. *Blair.*

Fol. Dic. v. 4. p. 326. Fac. Coll. No. 67. p. 307.