

No 42.

grew at any time upon the lands libelled; and therefore the charger should be holden, either to take the suspender's oath yet upon the quantity, notwithstanding of his sentence, or else he should prove the quantity, otherwise take it to his own oath *de credulitate*; and the other party opposing his decret, the LORDS found it not reasonable to allow the quantity contained in the sentence, which was notour to be exorbitant, neither would they astrict the charger to refer the same again to the suspenders' oaths, nor take their oaths now after sentence upon their own contumacy, and so that he could not be compelled to prove the quantity, he having chosen probation of before by their oaths, and they not compearing as said is; but, if the party had been present, they thought it reasonable that he should give his own oath *super credulitate*, and as he might learn by true information what the quantity was; as was done before in the action of the like nature, betwixt Mr Robert Lumsdale and _____, where the obtainer of the sentence, being present at the bar, was ordained to give his oath; but because the charger had obtained a sentence of spuilzie of teinds of the same lands, against the same parties, for other years besides those controverted, which was recovered upon probation, whereby the quantity was proven by witnesses; and because the Laird of Drum was not present to give his oath *super credulitate*, as was in the other case where the party was present; therefore the LORDS restricted the quantity of this sentence to the like quantity, which was contained in the said former decret obtained upon probation, and found the letters orderly proceeded therefore, and no more.

Act. Mowat.

Alt. Davidson.

Clerk, Gibson.

Fol. Dic. v. 2. p. 13. Durie, p. 331.

No 43.

1628. February 29. A FRENCHMAN against Sir LEWIS LAUDER.

A PARTY being summoned to give his oath *de calumnia* at a certain day, may be holden *pro confesso*. If he compear at the next term of probation assigned to the pursuer, he shall be reponed. This favour was shown to a poor Frenchman, against Sir Lewis Lauder of Matton. However orderly, it is sufficient if a party give his oath *de calumnia* at any time before the probation be renounced.

Auchinleck, MS. p. 144.

1629. January 31. HUNTER against LINDSAY.

No 44.

THE refusing to give an oath *de calumnia*, is esteemed to be but *semiplena probatio*, but if, by the deposition of a witness, the action be proven against