

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

him that was holden *pro confesso* for not giving his oath *de calumnia*, the same was thought a sufficient probation *ad victoriam causæ*.

No 44.

*Auchinleck, MS. p. 150.*

1629. July 7.

MR JAMES BAIRD, Procurator for the Laird Balquhan, *against* LAIRD LESLIE.

A PROCURATOR, or an advocate, compelled to give his oath *de calumnia*, that he is truly informed by the party, and that he hath not devised the allegiances himself *animo deferendi litem*.

No 45.

*Fol. Dic. v. 2. p. 12. Auchinleck, MS. p. 151.*

1629. December 16. EARL OF GALLOWAY *against* MAXWELL.

IN a reduction and improbation in one summons, as use is, the defender craving the pursuer's oath, if he had just cause to pursue improbation of the writs called for, without which he alleged he could not be compelled to produce to satisfy the reduction, seeing he was content the same should be reduced for non-production; but, if he could give his oath that he had just cause to improve, he was content that his production should remain,—the LORDS found, that the pursuer could not be compelled to give his oath particularly upon that part of the summons, if he had just cause to pursue, the improbation and reduction being both in one summons, and that he ought only to give his oath *de calumnia* upon the whole summons, as it stands, if he had just cause to pursue the same.

No 46.

Act. *Stuart & Nielson.*

Alt. *Cunningham.*

Clerk, *Scot.*

*Fol. Dic. v. 2. p. 12. Durie, p. 475.*

\* \* \* Auchinleck reports this case :

IN an action of reduction and improbation, both contained in one summons; the defender craved the pursuer's oath *de calumnia*, if he had just cause both to pursue the improbation and reduction, and the pursuer was content to give his oath concerning the reduction.—THE LORDS ordained him to give his oath upon the whole libel, because it was found that such libels could not divide.

*Auchinleck, MS. p. 151.*

1683. February. KILKERRAN *against* The LORD BARGENY.

No 47.

IN a pursuit at the instance of Kilkerran against the Lord Bargeny, witnesses being adduced upon commission, for proving that my Lord set lands