

1669. *January 5.*WILLIAM YEOMAN *against* MR. OLIPHANT and DAME GIELS MONCREIF.

No. 29.

Another instance of the maxim *spoliatus, &c.*

IN a compt and reckoning betwixt these parties, anent the satisfaction of an apprizing, the auditor, in respect that Mr. Patrick Oliphant and Dame Giels Moncreif, were contumacious and compeared not, did decern conform to William Yeoman's summons, finding the sum satisfied, and ordained them to remove; whereupon William Yeoman obtained possession, and having been several years in possession, Mr. Patrick Oliphant obtained himself and the said Dame Giels to be reponed against the said decret for his contumacy; and a Writer to the Signet past letters of possession in his favours, against William Yeoman, but without a warrant from the Lords, which were found null, and this writer deposed; but Mr. Patrick having attained possession by these letters, William Yeoman insists against him as an intruder to quit the possession. It was alleged for Mr. Patrick, that William having obtained possession unwarrantably by decret, upon his pretended contumacy, and he being now restored thereagainst, he is *in statu quo prius*, before that decret, at which time he was in lawful peaceable possession, which only should stand, and neither of the unwarrantable possessions be regarded. It was answered, that William Yeoman's possession was by virtue of a decret then standing, *auctore Prætoris*, and so was not vitious, but Mr. Patrick's was without warrant of the Lords, and so was most vitious. It was answered, that Mr. Patrick was instantly content to debate his right, *et frustra petitur quod mox est restituendum*. It was answered, that *spoliatus ante omnia est restituendus*, and is not obliged to dispute any right, till first he be restored;

Which the Lords sustained, and ordained William Yeoman instantly to be restored to the possession.

*Fol. Dic. v. 2. p. 390. Stair, v. 2. p. 578.*

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 SECT. V.

 Goods offered back DE RECENTI.
 

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1532. *July 16.* HUMPHRY ROLLOCK *against* JOHN STRIVILING of Keir.

No. 30.

IF any man be pursued for spoliation and away-taking of any goods and gear, he ought and should be assoilzied therefrom, if he or any in his name, restored really, and with effect, after the committing of the spuilzie, and before the intend-