

1676. November 24.

GRANT against FRAZERS.

John Grant having obtained a decret of spuilzie of a Sheriff, for three horse, with great prices, and 10s. a-day for violent profits, amounting to £.1000, against two William Frazers, they suspend and raise reduction, on this reason, That they offer them to prove, by the charger's oath, that the horses did belong to, and were in the proper possession of, the principal party, alleged spuilzier, to whom they were servants; *2do*, That the spuilzie was proved by inhabile witnesses, viz. the pursuer's moveable tenants. It was answered, That the decret was *in foro*, the one compearing personally, and the other by his procurator; and seeing it proceeded upon the oaths of witnesses, *ad evitandam perjuriam*, contrary probation should not be admitted, even by the oath of the party; and for the inhability of the witnesses, it is only competent when *reprobator* is protested for; otherwise the parties' acquiescence excludes the same. The suspender replied, That though the decret bear compearance, there is no debate; and the one is only compearing by a procurator; and the decret bears no warrant, or the production of any writs, or proponing of any circumstantial allegiance that might import a warrant; neither will this infer any clashing of oaths, because the witnesses deponing according to their knowledge, the parties' own oath, that they were mistaken, cannot be refused.

The Lords found, That the compearance of the procurator, without any evidence of his warrant, did not exclude his defences; and sustained both the reasons to be proved by the charger's oath, and *propter continentiam causæ*, sustained the same to the other person who compeared.

*Stair, v. 2. p. 467.*

Spuilzie after three years restricted to wrongous intromission; See PRESCRIPTION.

Violent Profits of a Spuilzie; See VIOLENT PROFITS.

See APPENDIX.

No. 76.

Must a procurator compearing in defence against an action of spuilzie produce evidence of his warrant?