

unknown person committed this spuilie ; and that Gordon of Davidstoun, having followed the goods, found one of the horses in the possession of William Menzies, and marked the horse in the lug. Whereupon the question arose,—how far this probation could reach, the defender being absent ; and, especially, whether the spuilie being committed in the night-time, where there was no witnesses and the spuiliers were not known, that a part of the spuilied goods being found in the possession of William Menzies, did not infer a presumptive probation that he was actor or resetter of the spuilied goods, and so liable to the whole spuilie.

The Lords found, That it did not so infer a presumptive probation ; but that the said presumption might be taken off, if Menzies could instruct that he came warrantably to this horse : but, because Menzies was absent, and probably upon design, because it could not be proven who the spuiliers were, the Lords ordained a second citation to be used against Menzies, with this special certification,—that if he did not appear, and instruct that he came warrantably to the possession of this horse, that he should be decerned in the whole spuilie, as actor, resetter, or accessory thereto.

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1680. *June 30.* The PROCURATOR-FISCAL of PEARTH *against* DUNBARNIE and JOHNSTON.

THE PROCURATOR-fiscal of Pearth having pursued Dunbarnie and Johnston for blood-wits, they raised advocacy upon this reason,—that the sheriff had unjustly repelled their defence, *viz.* That the bloods in question had been judged in Dunbarnie's bailie-court, before they were attached by the sheriff ; Dunbarnie holding of the King *cum bloodwitis*.

It was ANSWERED, That this was but collusion to prevent the sheriff and the King of his casualty of blood, by bringing the cause before Dunbarnie's own bailie, constituted by himself, where he was both judge and party ; and Johnston committed the blood out of Dunbarnie's bounds.

It was REPLIED, That Dunbarnie, being pursued by the party injured, had no just defence to exclude process, because that was his own court ; though, if he had been pursuer in some cases, the cause might have been advocated from him upon the influence of his bailie : for, though he has power to constitute a bailie, yet the bailie is the sole judge, and may determine either for or against his constituent. And as for Johnston, though he committed the blood without Dunbarnie's jurisdiction, and thereby became convenable *ratione loci delicti* ; yet he remained also convenable *ratione domicilii*, at the option of the party injured ; who having convened him before Dunbarnie's court, he was not convenable again before the sheriff.

The Lords found the sheriff committed iniquity in repelling either of these defences ; and therefore did advocate the cause.

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