SECT. VII.

Where the Oath *in litem* ought to be taxed.

1579. *May* 10. GORDON *against* ———.

No 19.

IN the action of spuilzie betwixt one Gordon of B. on the one part, and ——— on the other part, the spuilzie being proved, it was found by the LORDS, that albeit conform to the practice of long time used of before, the quantity should be referred to the parties' oath, yet the LORDS thought they would alter the same, and follow the common law, both civil and canon, *C. Unde vi L. 9. et tit. D. De in litem jurando, sed scire oportet*, that the oath should be taken *cum taxatione judicis*, and that the LORDS might, if it were in victual and profits, modify the prices.

Fol. Dic. v. 2. p. 10. Colvil, MS. p. 269.

1581. *February.* BALFOUR *against* COMMENDATOR of Cambuskenneth.

No 20.
A spuilzie being proved, the Lords found, that they might refer to oath of party the quantity and quality of the thing spuilzied, and only reserve to themselves the modification of the prices.

DAVID BALFOUR of the Powis pursued Adam, Commendator of Cambuskenneth, for ejecting him forth of ane barn, and for the spoliation of certain goods and gear, as writings, gold, silver, rings, and chains, which were contained in a bonnet-case, hid in a bing of chaff within the said barn, by the said David; and among the rest of the writings specially an obligation made by the said Abbot to the said David's father, and to himself, together, binding him to set in tack and assedation to them, all and hail the teind sheaves of ———, as appertaining to the patrimony of Cambuskenneth. The summons being found relevant, and admitted to the said David's probation, and being thereafter found proved, he desired the quantity to be referred to his oath, according to the daily practice, and thereafter being ordained by the LORDS, gave in writ a declaration which he would depone upon. It was *reasoned* among the LORDS, and after the examination of the said David, upon his quantity given in writ, that the same ought not to be referred to his oath, because the same was not like to be of truth, *et quod nihil veri simile deponebat*, that he would leave in a barn, hid among a bing of chaff, a bonnet-case, having into it his most precious jewels and gear, such as writings, gold, silver, rings, and chains, *et sic non fuit apperienda via perjuriis*, but rather *sequendum est jus commune*, as the LORDS have done the like in many sundry other cases, taking the oath of party *præmissa judicis taxatione, prout in L. 9. C. Unde vi.* To this was *answered*, That al-

No 20. beit the common law was so that the Judge should modify, yet the same was but of the prices and estimation of the same *prout cavebat text. in prædictis legibus*; and here where there were certain special things taken away, the Judge could not make any taxation or modification of the same, otherwise than by oath of the party's self, as was practised between the Dean of Murray and the Laird of Coxton, No 9. p. 9360., where both the quantity of jewels and writings was referred to the oath of the party. The Lords, after long reasoning and advising, pronounced by sentence *definitive*, he should have the quantity and quality, both of his writings and jewels, to his oath; and that they could not make any taxation therein, because he had libelled certain things *per capita*, wherein no modification of prices could be followed. *Nonnulli dominorum, &c.* that in respect *nihil verisimile fuit* that such obligations were, as they were fairly persuaded by sundry great presumptions, the contrary to be of truth, that the hail things contained in the libel should have been modified by the Lords, and no occasion to have been given to the pursuer to have prejudged himself and tyne his soul, *quia mors peccatoribus non fuit obtanda, sed potius ut viveret et ad Dominum converteretur.*

Fol. Dic. v. 2. p. 10. Colvil, MS. p. 324.

1684. *February.* Dougal *against* Murdoch.

No 21.

One having got a disposition of some goods and furniture, and the disposition being borrowed up out of a process by the disponer's relict, and she pretending that it was lost, the party pursued for damages, and craved he might be allowed to prove the quantity and kinds of goods contained in the disposition, by his oath *in litem*, seeing they consisted of many particulars, which he could not otherwise prove.

The Lords allowed the *juramentum in litem* as to the quantities, reserving to the defender his defences competent against the deposition, and against the value and price of the goods libelled.

Fol. Dic. v. 2. p. 10. Harcarse, (Oaths.) *No* 740. *p.* 210.

No 22. 1688. *February.* M'Pherson *against* Auchlossin.

A trunk being proved to have been stolen, the owner was allowed *juramentum in litem*, but was not allowed to swear as to bonds and writs he alleged were in the trunk.

Fol. Dic. v. 2. p. 10. Harcarse, (Oaths.) *No* 744. *p.* 211.