No 2. did not determine, this pack of lint being within the value; but it seems agreeable to the civil law and sound reason, that they should be liable as effectually for the master of the ship's fault, as he himself is liable, without all question; and there is par ratio, where exercitores per se vel alium exercent, the skipper being but in effect a servant, and oftentimes of no fortune.

Gosford, MS. No 538. *p.* 285.

1734. *December* 21. Campbell *against* M'Laren.

No 3. Some goods having been alleged stolen out of lock-fast places in a country house, the master's oath *in litem* was sustained as a proof of the quantities and values, against the servant to whom the key of the outer door was entrusted, and who was not alleged to have any accession to the theft, but who was found liable, upon this single circumstance, that he had been *versans in illicito* in lodging a travelling packman one night in his master's house; though the packman was not the thief, and the goods must have been stolen some time thereafter. It was *argued* for the servant, That the oath *in litem* can only be admitted where it is *aliunde* certain a theft is committed; and supposing this proved, can only be admitted against the person who has been principal or accessory to the theft; and yet here there is no other proof, save the pursuer's oath, that any theft was committed at all, neither is the defender alleged to be accessory; and the circumstance of lodging the travelling packman, when no damage happened, cannot be qualified more penal than neglect; which was repelled, in respect it was *answered*, That supposing the servant liable, there scarcely can be any other proof, in the nature of the thing, than the master's oath.——See Stair, L. 4. T. 44. § 4. *See* Appendix.

Fol. Dic. v. 2. *p.* 9.

*** See No 8. p. 1817.

SECT. II.

Where there is *probabilis ignorantia.*

No 4. Spuilzie of teinds was not allowed to be proved by

1662. *December* 18. Lord Balmerino *against* The Town of Edinburgh.

The Lord Balmerino pursues the Town of Edinburgh, for spoilation of the teinds of the acres of Restalrig, whereof the Town's Hospital had a tack; which being expired, inhibition was used yearly, for several years. The defender *al-*

No 4.
oath *in litem*; see acts 15th and 17th Par. 1633.

leged absolvitor, from any spuilzie of teinds, because, since the King's decreet-arbitral, and the fifteenth and seventeenth acts of Parliament 1633, spuilzie of teinds is taken away, especially by the said 15th act, the Parliament ratifies a former deed of the King's, declaring every heritor shall have the drawing of his own teind, and the benefit of a valuation; and, in the mean time, so long as the teinds are not valued, the heritors are only liable for the fifth of the rents in name of teind; 2*dly*, By a contract betwixt the Town and the pursuer's father, the acres of Restalrig, lying runrig with these, are set for half a boll beer the acre, which is, by the contract, declared to be the just and true rate and value thereof, which, by necessary consequence, declares the value of the teinds now in question, being runrig with the other. The pursuer *answered* to the *first*, That the foresaid act of Parliament was only meant in relation to the King's annuity; and albeit the foresaid clause therein be general, yet it is clear by the 17th act, which is posterior, that the first part shall be the teind, after the valuation duly led, which hath been constantly allowed, by custom of the Commission of Plantations, which gave only warrant to heritors to lead their own teind during the dependence of a valuation, and therefore spuilzies of teinds have been frequently sustained since the said acts. As to the *second*, Whatever be the way of conception of the tack, for the other acres not in question, though it did acknowledge the same to be the just value thereof, yet it cannot extend to other teinds; seeing where the parties agree in the matter, they are not solicitous for the conception of the words, which cannot be drawn in consequence to any other matter.

THE LORDS repelled both these defences, but declared they would not sustain spuilzie, as to the oath *in litem*, but admitted the value of the teind to the pursuer's probation; reserving to themselves the modification of the prices, if they should be exorbitantly proved, but not of the quantities.

Fol. Dic. v. 2. *p.* 9. *Stair, v.* 1. *p.* 150.

1706. *February* 21.

ELIZABETH HENDERSON, Relict of JAMES ROSS, Stabler in Edinburgh, *against* MR ARCHIBALD DUNBAR of Thundertoun.

No 5.
Oath *in litem* allowed to the pursuer of a spuilzie of kitchen furniture, which had been poinded by mistake for the goods of another person of the same name.

MR ARCHIBALD DUNBAR of Thundertoun having obtained a decreet of forthcoming before the Sheriffs of Edinburgh, against a person under the general designation of Mrs Ross, indweller in Edinburgh, and thereupon having poinded from Elizabeth Henderson, relict of James Ross, stabler there, as being a Mrs Ross, her pewter vessel, and other kitchen furniture; she raised a summons of reduction of the said decreet, containing a conclusion of spuilzie and damages against Thundertoun; and the decreet being reduced as null upon this head, that it was pronounced against a person not particularly designed by name o