

absence was not in his default, but that he necessarily withdrew, because his master had neither work as a goldsmith, nor did he give the apprentice entertainment, and that he caused the apprentice oversee masons for twenty weeks together. *2do.* Neither he nor his cautioner can be liable for a merk *per diem*, or any other damage, for his absence; because, by the indenture, the damage by absence is liquidated to two day's service for one; which the apprentice offered, by instrument, to perform. The pursuer answered, That he offered him to prove, that he had both work, and gave sufficient entertainment to his apprentice; and, for his attendance on the masons, it was to a public work belonging to the calling, which every master was appointed to oversee week about. And, for the damage of absence, it is in favour of the master; and he may choose whether to make use of it, or of the true damage. The Lords preferred the master's probation of the sufficiency of his entertainment: but found that he ought not to have employed the apprentice in any other work than his calling; and allowed the time that he was employed to oversee the masons to compensate as many of his absent days; and found, that the damage by absence being liquidated by the indenture [to] two days' service for one, that he could pursue for nothing else; and that the offer to make out the service was sufficient, the apprentice now performing the same.

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1673. *February 3.* HUGH M'LEOD *against* RORIE DINGWALL.

HUGH M'Leod having obtained decret against Rorie Dingwall, for the profits of a ferry-boat and fishing, *in anno* 1657, the decret is now craved to be reduced, on this reason, as being null for want of probation, in so far as the quantities were not proven. It was answered, That, the duties being specially libelled, and defences proponed, without denying the quantities, the pursuer was thereby liberated of probation; and yet he is willing, in fortification of his decret, to instruct the same. It was replied, That the decret being null, all defences *in causa* might now be propounded; the decret, at best, being but to be sustained as a libel. And it was offered to be proven, that the defender was then seven years in possession, by virtue of an infetment, and so would exclude the pursuer *in judicio possessorio*; which cannot be repelled as competent and omitted, seeing the decret is null. It was duplied, That this defence, being *dolose* omitted, cannot now be received after sixteen years' time, that the means of probation of interruption hath failed. The Lords found that the decret might be astructed as to the quantities, without admitting this defence upon the possessory judgment, after so long time; seeing the defence related more to the point of possession than to the point of right.

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1673. *February 27.* ———— *against* MOWAT.

A FRENCHMAN having arrested certain sums belonging to ——— Mowat,