

1580. July 24.

DEAN of MURRAY *against* COXTON.

No 9.

A party libelled gold, silver, &c. to have been taken out of his coffer. It was proved that the coffer had been broken open, but that only some powder and arms had been taken away. The Lords admitted the rest to the pursuer's oath *simpliciter*.

THE Dean of Murray pursued James Coxtton for the spoliation of certain gear and certain jewels, such as chains of gold and rings, and also of certain pieces and quantities of gold and silver. The summons was qualified, and the matter of spoliation, in so far as James came to a coffer, whereinto there was a coffer pertaining to the Dean, and there brake up the coffer. The libel being admitted to probation, it was proven the breaking up of the coffer, and intermitting with certain gear, such as powder, halberts and Jedwart stanes; but it was not proved the taking away of any gold and silver, or that there was any such gear in the coffer. The question was among the Lords, after advising the process, if the Dean should have the quantities of gold and silver libelled by him to his oath, seeing he had not proved any gold and silver to be taken away. It was *reasoned* by some of the Lords, that he ought not to have the same to his oath, by reason his oath should be taken of the quantity of such things as were proved, and that it could not stand that he should swear upon gold and silver taken away, where there was only proved powder and weapons taken away et quod non est aperienda via perjuriis. It was *reasoned* on the contrary part, quod in odium spoliantis datur juramentum in litem, and that when any man's chest and coffer is broken up, it were a great absurdity to restrict him to any other probation than to his own conscience; because when men put gold and silver in their coffers to be kept, they use not to take witnesses before, but do the same secretly, and in a quiet manner; and so through default of probation of witnesses, they would not get their gear again; and it would give occasion to wicked persons to make invasion of men's gear that was most precious and put in surest keeping, and in lockfast rooms. To all this was *answered*, That the circumstance would be observed before, if *prædo* or any other evil disposed persons came to a man's house to break up chests or coffers, and especially if such a man that were known to be rich, and to have gold, jewels, and silver, tum præsumptio esset pro eo, that he should have the quantity to his oath, without any probation of the same; but here presumptio non fuit pro decano, that he being a man holden to be providus rei suæ, that he would send his precious jewels, his gold, or his silver, over the fields in a boat, with certain powder and weapons. THE LORDS (the breaking up of the coffer being known and proved,) admitted the quantity of all contained in his libel, as well gold, silver, and jewels, as other gear, for the Dean's oath.—*See* SPUIZIE.

Fol. Dic. v. 2. p. 10. Colvil, MS. p. 289.