

Duncan Campbell, whereby he acknowledges the taking away of certain books, whereof the price will not amount to above L. 100 Scots, albeit he confesses he took away several other books, whereof he did not remember their names, which was not sufficient, unless the price were liquidated; as also, the declaration was granted by the said Duncan Campbell, when he was minor, and to his lesion, and upon that ground, the defender had raised a reduction. *Answered*, That the said Duncan Campbell, being imprisoned by the Bailies' order, the keeper of that tolbooth was not concerned in the cause of his imprisonment, and he ought not to have suffered him to escape before he had been set at liberty by a warrant; and that there was no necessity that the pursuer should constitute the price of the books against Duncan Campbell himself, the declaration being sufficient, against which he cannot be reponed upon minority, seeing minors cannot be restored against crimes; as also it was offered to be proven by witnesses, that the said Duncan Campbell did steal books from the pursuer, and therefore he ought to have *juramentum in litem* as to the value, as in the case of a spuilzie. THE LORDS repelled the reason of reduction, founded upon minority and lesion, and found the confession probative as to a civil effect, for restitution of the books, and decerned for the particulars mentioned in the declaration; but refused to allow the pursuer oath *in litem* in relation to the general clause contained in the declaration, as to what other books were stolen from him.

Sir P. Home, MS. v. 1. No 511.

1684. November 7. ANDREW FORRESTER against MERSTOUN and KER.

ANDREW FORRESTER, bow-maker, having pursued Merstoun and Ker, as cautioners, in an indenture for Merstoun, apprentice to the said Andrew, for damage sustained by him, the said apprentice having embezzled his bows and other goods, and disposed of them without his master's knowledge; and the libel being admitted to probation; the pursuer proved, that the boy did steal several particulars, viz. bows, guns, &c. and also did prove several extrinsic thefts from other persons, and he craved, That he might have *juramentum in litem*, as to the quantities and prices, in regard it being a domestic theft, it was impossible for him to prove all the particulars otherwise than by his own oath. THE LORDS, finding there was a traet of thieving and embezzling of his master's goods by the apprentice proved, they allowed Forrester, the master, to condescend upon the particular species, quantities, and prices, and to give his oath *in litem*; reserving to the Lords modification after his deposition.

Eol. Dic. v. 2. p. 9. P. Falconer, No 92. p. 63.

* * * This case is reported by Sir P. Home:

1685. March.—ANDREW FORRESTER, bow-maker in Edinburgh, having pursued Merstoun and Ker, as cautioners in an indenture for Merstoun, his

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apprentice, for damages sustained, by the apprentice stealing and embezzling the pursuer's bows and goods, and disposing upon them and without his knowledge; and the libel being admitted to his probation, the pursuer, to prove that the apprentice did steal from him several particulars, as bows, guns, and others; and also to prove, that he did steal several other things from other persons; and at the advising of the probation, the pursuer having craved that he might have *juramentum in litem* as to the quantities and prices, in regard it being a domestic theft, it was impossible for him to prove all the particulars stolen, otherwise than by his own oath; the LORDS find, That there was a tract of thieving and embezzling of the master's goods by the apprentice proved, the pursuer ought to condescend upon the particular species, quantities, and prices; and allowed him to give his oath *in litem*, reserving the modification to the Lords.

Sir P. Home, MS. v. 2. No 716. p. 234.

* * * This case is also reported by Fountainhall :

1684. November 7.—IN the case of Andrew Forrester, bower, *contra* Mers-toun, his apprentice, it was *alleged*, from l. 5. and 6. D. Ad Leg. Aquil., That though *nimia sævitia præceptoris vel magistri erga discipulum culpæ annumeratur*, yet *modica castigatio permittitur*, and that his taking the apprentice back was not a passing from his prior damages; for though *dissimulatione tollitur injuria*, yet that is only of verbal injuries, and not of our pecuniary interests. THE LORDS having this day advised the probation by witnesses led by both parties, found the apprentice's embezzling and taking away his master's goods without his consent, proved; and therefore ordained Captain Forrester to condescend and depone *in litem* upon the quantities and prices, reserving to the Lords, at the advising of his oath, to modify; as also, they suspended the letters against the Captain as to his obligations in the indentures, viz. as to the taking back the boy, or giving back the apprentice-fee, in regard the boy is proved to be vicious, so that the master could not safely receive him; they likewise assoilzied the cautioners in the indentures, as to the boy's absenting himself the times bypast, and the re-entry to his service for the years to come, in regard of the offer, and the Captain's refusal, but not as to such damage as the Lords shall modify. This interlocutor seems to dissolve the indentures, as to the three years thereof yet to run; and the reasons moving the Lords to assoilzie the cautioners were, because they had proved that Andrew Forrester had refused to take him back to his service, but declared he had nothing to say to his apprentice.

Thereafter Captain Forrester having given in a bill, craving his oath *in litem* might be taken, not only as to his apprentice's embezzlements, but also as to any other damages he had sustained by his absence and want of his service, his own expense at law, diversion from his employment, and loss of time, and gave

in a general condescence of his *damnum emergens et lucrum cessans* each of these ways ; and they having given in an answer to this bill, and both being advised on the 15th of November 1684, the LORDS ordained Andrew Fofrester to condescend in special on the quantities, species, and value of the goods taken from him by his apprentice, how many golf balls, how many clubs, staffs, musket barrels, &c. and to depone anent the same ; and refused to sustain the remanent articles of his condescence.

And the LORDS having advised his oath, extending to L. 700 Scots, modified L. 150 Scots for the damage he sustained by his apprentice. And they having given in a bill, craving he might be ordained to declare why he was more positive on twelve dozen of clubs than on a lesser or greater number, and *quæ ratio credulitatis* ; and though he said the boy had lifted money from Collington, yet that Collington declared the boy never came to him to lift his master's money ; the LORDS adhered, on the 17th January 1685, *quia juratum est*.

Fountainhall, v. 1. p. 103.

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S E C T. IV.

Oath *in litem* in Spuilzies.

1573. March 20.

JARDINE against LADY MELGUM.

ROBERT JARDINE of Badderdy pursued the Lady Melgum for spoliation of certain corns from him by her, which were referred to his probation ; but in the advising, the LORDS found, That the witnesses had proved spoliation of oats only, and of no other corns, albeit there were other corns libelled, such as bear, wheat, pease ; yet notwithstanding, the LORDS found a part of the libel sufficiently proved ; being proved, to give the whole libel to the pursuer's oath ; albeit others thought that *absolutor* should have been given from the rest of the corns ; for it is sufficient if any part of the libel be proved, to give the whole libel to the pursuer's oath, as said is, and *condemnator* pronounced upon the hail libel, conform to the pursuer's oath.

Fol. Dic. v. 2. p. 10. Colvil, MS. p. 236.

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