

1737. November 19. MAN *against* CAMPBELL of Ledchary.

No 23.

In a spuilzie, the question being, how the quantity of goods spuilzied was to be proved, the defender *pleaded*, that though the oath *in litem* should be admitted instead of any other proof on the pursuer's part, yet he, the defender, ought to have a conjunct proof. *Answered*, Such conjunct proof is without precedent, the constant practice being *per modum pœnæ* to admit the pursuer's oath in place of all other proof. In our ancient practice, this oath was subject to no modification, though afterwards a practice was introduced of obliging the pursuer, before deponing, to give in a condescence of his damages, which the LORDS modified, and afterwards obliged the pursuer to give his oath *in litem* to be a further check, in case the modification were too high. THE LORDS refused a conjunct probation, but ordained the pursuer, before deponing, to give in a special condescence of the corns and straw spuilzied, and of the grounds of the estimate made by him. See APPENDIX.

*Fol. Dic. v. 2. p. II.*

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DIVISION. II.

Oath in Supplement.

1628. March 28.

CAIRNS *against* HUNTER.

No 24.

IN the spuilzie of a horse, Cairns against Hunter, an exception being admitted upon the re-delivery of the horse to the pursuer's probation, and therein at the advising the cause, a witness proving, that the pursuer's wife directed her son to receive the horse, and that according thereto, she caused her son put the horse in her husband's stable, and another proving, that he heard the husband say at another time, that he had received the horse, albeit none ever proved, that he saw the horse in his possession, nor no more was proved in the cause; the LORDS found, that although this probation was not enough to prove the exception, yet it was a presumptive probation to induce the Judge as *probatio semiplena*, to take the excipient's oath of verity upon the said exception, and therefore ordained his oath to be taken thereon.

Clerk, Hay.

*Fol. Dic. v. 2. p. II. Durie, p. 373.*