

of 400 merks to the pursuer's children, did exist after the testator's death, and was unwarrantably destroyed by the said Francis Smith; and although the same cannot now be exhibited by him, find there is sufficient foundation for an action for payment of said legacy, without necessity farther of proving the tenor of said testament.

No 16.

Lord Ordinary, *Monboddo*.
Clerk, *Ross*.

For Fisher, *Jo. Douglas*.For Smith, *D. Grame*.

R. H.

Fac. Col. No III. p. 332.

SECT. VI.

Situations in which Oath *in litem* inadmissible.

1542. May 19.

KIRKALDY against PITCAIRN.

PATRICK KIRKALDY and Janet Ramsay his wife's cause against Mr David Pitcairn, Archdean of Lothian. The said Archdean referred to the said Patrick's oath *quanti sua intererat* the wanting of the charter and sasine of the forty pound land of annualrent of Carreston, given in keeping by the said Janet's father; and the said Patrick alleged *contra non exhibitum dolose, juramentum in litem deferendum actori, L. 4. Cod. Ad exhibendum, cum ibi non per Paulum*, and so asked his interest to be referred to his oath. The other party, on the contrary, *alleged*, That he should prove it *legitimis probationibus*, and not to have it to his oath, because he granted at the bar judicially, in presence of the Lords, that neither he nor his wife ever saw these evidents, nor yet wist what they contained; also *agebatur hic de facto alieno actori ignoto, et de jure veritati ignorantem juramentum non est deferendum etiamsi sit casus ubi de jure debet juramentum deferri actori, ut notat Jas. in L. 9. C. Unde vi, Paul. in L. Bar. et alii in leg. in bonæ fidei, et ibi glossa magna C. De reb. cred. Bar. Alex. et alii in L. 31. De jure jurand.; et interlocuti sunt domini consilii unanimiter juramentum in litem in hac premiss. causa non est deferendum, sed eum debere probare suum interesse aliter legitime.*

Fol. Dic. v. 2. p. 10. Sinclair, MS. p. 26.

No 17.
Juramentum in litem refused to a pursuer who verisimiliter veritatem ignorat.

1697. January 2.

FEA against ELPHISTON.

THE spuilzie pursued by Fea of Whitelaw, in the island of Stronza in Orkney, against Robert Elphiston of Lopness, was advised, and his defence of law-

No 18.
In an action of spuilzie, the Lords found that in

No 18.
 an oath *in li-*
tem, the party
 may depone
 also upon
 the quantity
 when the wit-
 nesses are not
 positive, how
 many of each
 kind were
 taken away;
 but if there
 be a concur-
 ring proba-
 tion agreeing
 on the quan-
 tity, the oath
in litem ceases.

fully poinded was repelled; in regard the poinding was within the term of law; for by the act of Parl. 1669, poinding cannot proceed upon decreets till the fifteen days of the charge be expired; yet the Admiralty Courts execute their sentences within three tides, especially if it be for a fine. But the LORDS considered here, the charge was given upon forty-eight hours, and the poinding was begun within that time; and therefore they repelled the defence of lawfully poinded, and found it a spuilzie. Then *alleged*, this poinding was not at all perfected at once, but was intermitted for several days, and then consummated; so however there might be a spuilzie *quoad* what was intromitted with before the time of the charge was elapsed, yet the poinding was warrantable, at least excusable, *quoad* what was poinded after the days of the charge were past; *et quivis titulus etiam coloratus excusat a spolio*. Answered, The *initium* of this *processus executivus* being illegal, it vitiated the whole; it being but *unicus actus individuus et continuatus*, though done in the interval of several days; for if a poinding were begun before sun-rising, and ended when the sun was up, or began before sun setting, but a part of it continued in the night time, the whole would be unlawful, even so here. THE LORDS having read the execution of poinding, found it proceeded on more precepts and sentences than one, and that the species of the goods poinded were different, and could not all be appraised in one day, some of them being bestial, others corn, which required some days to thresh out; and therefore found that part of the poinding, after the days of the charge, was so far lawful, as to infer only restitution, and the ordinary profits, but not to amount to a spuilzie, though they continued in the house with armed men for several days. In the same process, the LORDS found not only Lopness liable, but all who assisted him in executing this poinding, in so far as any of them was proved to have acted and concurred in meddling; but that their naked presence was not relevant to make them art and part, seeing he had a commission of lieutenantancy to convocate the country upon emergencies, and was Admiral.

January 16.—THE LORDS advised Fea of Whitelaw's oath in the spuilzie, mentioned 2d current, and decerned for the whole number of horse, nolt, and other goods he deponed on, and also for the prices he valued them at; for in an oath *in litem* the party may also depone anent the quantity when the witnesses are not positive how many of each kind were taken away; but if there be a concurring probation agreeing on the quantity, his oath in supplement ceases in that case; and instead of the violent profits, the LORDS modified annualrent of the sum, to which the price of the goods conform to his oath extends, from the time of the spuilzie, and that in name of damage. Some were for double interest. But in regard they had taxed it moderately, the LORDS declared it was for the whole goods, whether of their own nature or by law they produced violent profits, as kye, sheep, swine, &c. or had none due, as household plenishing, or the like.