

same came this day to be advised; and it appeared, that he had disposed on some solder and meltings in the bottom of the pot, and on some stamps, and a pair of buckles, and some other things of no great value; and that he had left his service in the third year of his apprenticeship; and the hiring of journeymen would cost about ten or twelve shillings a-week; and no maltreatment was proven against the master, but that he had given him a box on the ear when he sticked his work, or staid out late.

Against this probation, it was OBJECTED, for the apprentice and his father,—That the damage could extend no farther than the particulars proven embezzled, which were but small; and it was not proven they were the master's; and what hindered but they might be the apprentice's own? And, though he ought not to carry on a covered trade, to his master's prejudice, yet nobody would call that theft. And the master was the occasion of his being debauched, by keeping another profligate rake in the house, who seduced him; and the father, being only cautioner, cannot be liable till the son be first discussed. And he was at small loss by his running away, for it made room for his taking home another apprentice; so he had no need to hire journeymen.

ANSWERED,—That, in these clandestine domestic thefts, it was impossible for him to prove every particular he had abstracted. But the Lords' practice was, where some were pointed at and condescended upon in the probation, to give the master his oath *in litem* for the rest of the kinds and species he wanted, in supplement of the probation; as was found, 7th November 1684, *Foster against his Apprentice*, observed by President Newton. And his getting a new apprentice did not make up his loss; for they are incapable to do any effectual service for the first year or two. And the father was bound as surety and full debtor; neither had the son any estate to discuss.

Some of the Lords were for the master's giving in a more special condescendence of the damage. But, at last, they agreed to modify a sum in gross for the whole, and decerned for £500 Scots in all, including the £40 of penalty in the indentures.

*Vol. II. Page 447.*

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1708. July 9. ANNE PATON *against* ALEXANDER LEITH of BALSCHIRY.

ANNE Paton, relict of Andrew Logie of Lonehead, and Alexander Leith of Balschiry, having pursued mutual riots before the late Privy Council; and it being remitted to a committee to hear the parties; and finding that the best way to settle all their differences, was, that Mr Leith should buy her liferent; and both parties having submitted to the Lords of the said committee, they, after hearing, decerned her to convey her jointure to him, with absolute warrandice, on his paying her 2700 merks, as its value at seven years' purchase. Thereafter, on a representation that it was hard to oblige her in absolute warrandice, there is a second decreet-arbitral drawn up, obliging her only to give warrandice from fact and deed; and she having charged on this second decreet-arbitral, he suspends on this ground, That the committee, as arbitrators, were *functi* and ex-auctorate by the first decreet emitted by them; and had no power to alter the same by pronouncing a second; and he was willing to obtemper the first. Besides, the second was, *ipso jure*, null, not being signed by the major part; in so

far as the committee consisted of eight persons, and it is only subscribed by four of them ; for, though the committee first named was only seven, yet, at the next diet of Privy Council, my Lord Forbes was superadded and adjoined ; and this made them eight. Likeas, it was *ultra vires compromissi*, there being nothing tabled before the Council but the riots, and not the purchasing her jointure ; which he has neither inclination to, nor benefit by it, but is merely *in damno vitando*.

ANSWERED,---That first draught, which Balschiry calls a decret, was nothing but a rude scroll or minute to be shown to the parties, that, after adjustment, it might be extended *in mundo* ; and therefore it is not subscribed by the whole committee as arbitrators, but only by the Earl of Buchan, as their preses at the time, which shows it was never designed for a final decret. And, though no more but the riots were at first before the Council, yet, to make a full understanding betwixt the parties, all their differences were submitted ; which may very well comprehend the jointure : and, though my Lord Forbes was added to the committee, yet the first nomination was only of seven, and the submission was made to them before his assumption ; and so four, subscribing the decret, make the major part of the whole. And, for the right, she and her husband have possessed these lands these twenty years, and none has ever appeared to quarrel their right ; so the warrandice is in no hazard.

The Lords found, that my Lord Buchan's subscribing the decret, as preses, was not sufficient, unless all the rest of the arbiters had subscribed it as well as he ; and so annulled the first decret as illegal. And, as to the nullity objected against the second, found it wholly depended on this single point of fact,—If my Lord Forbes was named and adjoined before the parties submitted : for then it is certainly null, as not signed by the plurality of the arbitrators ; but, if he was added after the submission was entered into, the decret was good, as signed by the major part ; and ordained that matter of fact to be tried.

*Vol. II. Page 450.*

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1708. July 16. THOMSON *against* WILLIAMSON of CARDRONA.

THOMAS Williamson in Peebles disposes a tenement lying there to one Thomson, bearing love and favour ; but afterwards he makes another disposition of it, for onerous causes, to Williamson of Cardrona ; and, in regard he was only apparent heir, he gives a procuratory to serve him, which the first disposition wanted ; and on this Cardrona entered to the possession ; and the house being burnt down, he rebuilt it. Thomson, resolving to perfect his right, applies to John Frier, one of the bailies, to cognosce his author heir, and then to infest them both ; which he refusing, as seeing no warrant, Thomson protests against him, and that his offer may be equivalent to an infestment. Some time thereafter, Cardrona produces to the same bailie his disposition, containing not only a procuratory of resignation, but also to serve his author heir ; which the bailie obeys, and infests him. Upon this follow mutual reductions of one another's rights ; and Thomson claims preference to Cardrona, though first infest, because he had done all that law required of him, viz. to instrument the bailie on his refusal, for his partial gratification, in preferring one before another.