

No 8. *in litem* is competent, whether it were a spuilzie or a breach of trust, *actione depositi*.—It was *answered*, That the oath *in litem* being granted, mainly because parties injured by breach of such trusts, cannot be put to prove by witnesses, that which is taken from them, none being obliged to make patent his pack, or other private goods to witnesses; yet, where there is another clear way to prove the quantities, viz. the oaths of the four persons who opened the pack, there is no reason to put it to the pursuer's oath, especially seeing their inventory is not the eight part of what he claims.

THE LORDS admitted the pursuer's oath, *in litem*, reserving their own modification, with liberty to the defender, if he thought fit, to produce what of the ware he had; and to produce these four persons, that the packman may depone in their presence. See OATH IN LITEM.

Fol. Dic. v. 1. p. 116. Stair, v. 1. p. 423.

1667. June 22. HAY of Strowy against FEUERS.

No 9.
A miln once set a-going for 48 hours, cannot be demolished *brevi manu*. A proprietor may hinder the building of a miln-dam on his ground, without necessity to allege detriment.

HAY of Strowy being infest in the miln of Strowy, and having lately built a waulk-miln, and made a new dam-head therefor over that burn, which is the march betwixt him and the feuers; thereupon the feuers demolished the miln and the dam. He now pursues the feuers to hear and see it found and declared, that he has right to enjoy the waulk-miln and dam, and that they did wrong at their own hand to demolish the same. It was *alleged* for the feuers, and the Laird of Keir their superior, absolvitor; because the building of this miln being *novum opus*, they might lawfully stop the same, and might demolish the dam, the end thereof being fixed upon their ground, without their consent. The pursuer *answered*, *1st*, Albeit the defenders might have impeded while the work was doing, yet they could not, after the waulk-miln was a going miln, demolish the miln, or dam thereof, *via facti*, albeit they might have used civil interruption, and stopped it, *via juris*; because it is a known and competent custom, that a going miln cannot be stopt summarily, being an instrument of service for common good. *2dly*, The defenders could have no detriment by putting over the dam, because it was a precipice at their side to which the dam was joined, so that they had no detriment, either as to the inundation of their ground, or watering. The defenders *answered*, That *cui-libet licet uti re sua ad libitum*, and they were not obliged to dispute whether they had damage or not, but might cast down the dam built on their ground unless their consent had been obtained; and that there is no law nor decision for such a privilege of milns, neither was it ever extended to waulk-milns.

THE LORDS found the defenders might hinder the building of a dam upon their ground, without necessity to allege detriment; but they found, if the waulk-miln was a going miln forty-eight hours, that the defenders could not *brevi manu*, without the authority of a judge, demolish the dam or miln.

Fol. Dic. v. 1. p. 116. Stair, v. 1. p. 464.

* * Lord Dirleton reports the same case :

It was found, That a miln-dam could not be drawn from one side of a burn to another, without a servitude or consent of the heritor having lands on the other side ; and that the heritor is not obliged to debate, whether he had prejudice or not ; the lands on the other side being his, and the burn *medio-tenus*. *2do*, It was also found, That he might lawfully demolish the dam ; unless it were, *alleged*, that the miln had gone the space of forty-eight hours ; so that it might have come to his knowledge that it was a going miln.

Clerk, *Haystown*.

Dirleton, No 87. p. 36.

1671. July 7.

STRAGHAN *against* GORDONS.

STRAGHAN pursues Gordons for a spuilzie of four oxen taken away from them by violence, being then in their plough, by George and William Gordons and others. The defenders *alleged* absolvitor, because they offered them to prove, that the oxen were their proper goods, and were stolen from them ; and that thereafter they were found straying upon the pursuer's ground ; and that they were proclaimed as waith-goods by the Sheriff ; and that by the Sheriff's order direct to his Majors, the defenders intromitted with them, and so did no wrong. The pursuer *replied*, That, no way granting the verity of the defence, the same ought to be repelled, because they having the oxen in question, in their peaceable possession four months, they ought not to have been disturbed in their peaceable possession, in this order, without the citation or sentence of a judge. So that the defenders having unwarrantably and violently dispossessed them, *spoliatus ante omnia restituendus*, and they may pursue for restitution as accords ; but the pursuers are not now obliged to dispute the point of right. *2dly*, If need be, they offer to prove that they acquired the goods from the Laird of Glenkindy their master, so that being possessors *bona fide cum titulo*, they could not be summarily spuilzied, or dispossessed : For albeit stolen or strayed goods may be summarily recovered, *de recenti*, or from the thieves ; yet cannot so be taken from a lawful possessor acquiring *bona fide*.

THE LORDS found the defence relevant, and admitted the same to the defender's probation ; and found also that part of the reply, that the pursuer did possess *bona fide*, by an onerous title, relevant to elide the defence though it were proven, as to the restitution of the oxen to the pursuer, and the ordinary profits thereof, but not the violent profits ; for they found the Sheriff's warrant being instructed, would excuse from the violent profits ; but they found that the defender's naked possession, though for four months, by having the

No 9.

No 10.
Stolen and strayed goods may be recovered summarily without process, or sentence, even from possessors *bona fide*, who have paid an onerous price.