

No 5.

surname, or any relative designation of parent, husband, or the like, that could demonstrate the party, but only designed Mrs Ross, indweller in Edinburgh, and others fell under that general designation; the pursuer insisted in her conclusion of spuilzie, which she offered to prove, and craved her oath *in litem* might be taken as to the quantities and prices of the goods spuilzied.

THE LORDS allowed to the pursuer the benefit of her oath *in litem*, not so much for violent profits, the goods taken away by their nature yielding no product, as for damages in her employment of affording entertainment and stabling to strangers, which was prejudged by the spuilzie of her household furniture.

Fol. Dic. v. 2. p. 9. Forbes, p. 107.

* * * Fountainhall reports this case :

1706. February 22.—ELIZABETH HENDERSON, relict of James Ross, stabler in Edinburgh, pursues Dunbar of Thundertoun in a spuilzie, in so far as he, as tacksman of the Excise, having obtained a decret against John Ross, brewer in Edinburgh, for L. 1000; he arrests in the hands of one Mrs Ross, as his debtor, and takes out a decret against her, under that general designation, and then sends to the house of this Mrs Ross, and poinds her pewter vessels, and other goods; who not being the person in whose hands the arrestment was laid, raises a reduction and spuilzie; and he offering to prove by her oath, that she was the same individual person, she deponed negative, and then insisted in her spuilzie, which the LORDS sustained, and gave her the benefit of her oath *in litem*, not so much for violent profits, these sort of goods having no product, as for her damages.

Fountainhall, v. 2. p. 331.

S E C T. III.

If sustained against the Delinquent's Cautioners.

1683. November 6.

MR GIDEON SCHAW, Bookseller, *against* MR JOHN WANSE, Keeper of the Tolbooth of Edinburgh.

No 6.
A thief having declared under his hand, that he

LORD BLAIR, probationer, reported the case pursued by Gideon Schaw, bookseller, *contra* Mr John Wanse, keeper of the tolbooth of Edinburgh, and the

Magistrates thereof, for suffering Duncan Campbell, his apprentice, to escape, whom he had incarcerated for stealing many books out of his shop, and which he had confessed by a declaration under his hand. It was *alleged* Mr John Wanse was not liable, because Gideon the inputter, now pursuer, had neglected to book him, and to pay for it as he ought to have done, according to usual custom; which booking bears the day of the entry in prison, at whose instance, and for what cause; *2do*, That the declaration produced is not a legal probation of the debt, or what books he stole; because he being minor, and having given it without his curator's consent, he now revokes it; yet theft being a crime, he cannot so revoke it as to free himself either from the penalty, or restitution far less. Vid. Tit. Cod. Si adversus delict. restitutio a minor. pet. ibiq. Perez. *3tio*, As to the rest of the books alleged stolen, more than is expressed in his declaration, there is nothing produced to verify the libel *quoad* them. It was *answered* to this, That this action being of the nature of a spuilzie, Gideon the pursuer was content to give his *juramentum in litem* that he truly took away the rest also. THE LORDS repelled the first and second defences on the not-booking, and on the minority, and reserve action of relief to Mr John Wanse, against his servants under him, for their neglecting to book him, he being liable for their omissions; and sustain the declaration *quoad* all the books which he confesses he had abstracted and stolen; and as to the *third*, refuse to take the pursuer's oath *in litem*, as to the rest of the books not expressed in the declaration; but allow the pursuer to prove them as he thinks fit; and find Wanse liable for the whole damage Schaw sustained by his apprentice's embezzlements, and for which he had imprisoned him.—See PRISONER. PROOF.

Fol. Dic. v. 2. p. 9. Fountainball, v. 1. p. 240.

* * * P. Falconer reports this case:

GIDEON SCHAW having pursued Mr John Vanse, keeper of the tolbooth of Edinburgh, for payment of the price of certain books stolen by Duncan Campbell from him, upon the account that the said Duncan Campbell, by a subscribed declaration under his hand, had acknowledged that he had stolen the particular books mentioned in the declaration, and several others in general, for which he declared he deserved to be hanged; and being thereupon, by order of the Bailies, incarcerated in the tolbooth of Edinburgh, he was suffered to escape; it was *alleged* for Mr John Vanse, the defender, That he could not be liable for the price of the said books, because there was no record of the imprisonment, neither was the cause of the imprisonment intimated to him or his clerk, either by word or writ; *2do*, That the foresaid declaration did not prove against him, in regard it was extrajudicial, and done in Campbell's minority, and that he had raised a reduction thereof upon minority and lesion, which he repeated; *3tio*, That although the foresaid declaration were sustained, yet it could only prove against the defender, as to the particulars therein mentioned; but the

No 6.

had stolen some particular books, besides others in general, in an action against the gaoler, who had allowed him to escape, the pursuer's oath *in litem* was not taken as to the general clause.

No 6.

pursuer could not have *juramentum in litem* against him upon the general clause. THE LORDS found in this case, Campbell being imprisoned for theft, there was no necessity that the pursuer should prove that the cause of the imprisonment was recorded in the clerk of the tolbooth's books, or that there was an intimation to the keeper of the tolbooth thereof; but found, That Campbell being incarcerated by the order of the Bailie, the defender ought to have detained his person in firmance; and therefore having suffered him to escape without any warrant, he was liable to the pursuer for the damage. THE LORDS repelled the reduction upon minority and lesion, and found the confession probative as to a civil effect for restitution of the books, therefore decerned for the particulars mentioned in the declaration; but refused to take the pursuer's oath *in litem* in relation to the general clause contained in the declaration, as to what other books were stolen from him.—See PROOF.

P. Falconer, No 65. p. 43.

* * * This case is also reported by Harcarse:

In a pursuit at the instance of Gideon Schaw, against the Magistrates of Edinburgh and Mr John Vanse, master and keeper of the tolbooth, for L. 300 Sterling of damage and interest, which a person that had escaped out of prison was liable in to the pursuer, for stealing of several of his books, for which he had been sent to prison by a Bailie's summary warrant, without a process, upon his extrajudicial confession of the theft, subscribed by him before witnesses;

Alleged for the defenders; *1mo*, The prisoner was not booked in the clerk of the tolbooth's books; *2do*, The person who had acknowledged the theft was minor, and had raised reduction of the subscribed confession *quoad* the civil interest.

THE LORDS repelled the allegiances, and would not sustain reduction of the confession upon minority, in regard it was the confession of a crime.

Harcarse, (MAGISTRATES.) No 677. p. 192.

* * * Sir P. Home also reports this case:

1683. *December*.—DUNCAN CAMPBELL, servant to James Glen, bookseller, being imprisoned in the tolbooth of Edinburgh, by an order from the Bailies, for stealing of certain books from Gideon Schaw, another bookseller; Mr John Vanse, keeper of the tolbooth, having suffered him to escape out of prison, Gideon Schaw pursues him for payment of the price of the books, to the value of L. 300. *Alleged* for the defender, That he could not be liable, because the occasion of the said Duncan Campbell's imprisonment was not booked and recorded in the books of the tolbooth; so that the defender did not know upon what account he was imprisoned; and the value of the books was not liquidated against the party himself, there being nothing produced but a declaration by the said

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