

SECT. VII.

Where the Oath *in litem* ought to be taxed.

1579. May 10.

GORDON against ———.

No 19.

IN the action of spuilzie betwixt one Gordon of B. on the one part, and ——— on the other part, the spuilzie being proved, it was found by the LORDS, that albeit conform to the practice of long time used of before, the quantity should be referred to the parties' oath, yet the LORDS thought they would alter the same, and follow the common law, both civil and canon, *C. Unde vi L. 9. et tit. D. De in litem jurando, sed scire oportet*, that the oath should be taken *cum taxatione judicis*, and that the LORDS might, if it were in victual and profits, modify the prices.

Fol. Dic. v. 2. p. 10. Colvil, MS. p. 269.

1581, February. BALFOUR against COMMENDATOR of Cambuskenneth.

No 20.

DAVID BALFOUR of the Powis pursued Adam, Commendator of Cambuskenneth, for ejection him forth of ane barn, and for the spoliation of certain goods and gear, as writings, gold, silver, rings, and chains, which were contained in a bonnet-case, hid in a bing of chaff within the said barn, by the said David; and among the rest of the writings specially an obligation made by the said Abbot to the said David's father, and to himself, together, binding him to set in tack and assedation to them, all and hail the teind sheaves of ———, as appertaining to the patrimony of Cambuskenneth. The summons being found relevant, and admitted to the said David's probation, and being thereafter found proved, he desired the quantity to be referred to his oath, according to the daily practice, and thereafter being ordained by the LORDS, gave in writ a declaration which he would depone upon. It was *reasoned* among the LORDS, and after the examination of the said David, upon his quantity given in writ, that the same ought not to be referred to his oath, because the same was not like to be of truth, *et quod nihil veri simile deponebat*, that he would leave in a barn, hid among a bing of chaff, a bonnet-case, having into it his most precious jewels and gear, such as writings, gold, silver, rings, and chains, *et sic non fuit apperienda via perjuriis*, but rather *sequendum est jus commune*, as the LORDS have done the like in many sundry other cases, taking the oath of party *premissa judicis taxatione*, prout in *L. 9. C. Unde vi*. To this was *answered*, That al-

A spuilzie being proved, the Lords found, that they might refer to oath of party the quantity and quality of the thing spuilzied, and only reserve to themselves the modification of the prices.