

No 276. was, as if the party deponed *non memini*, or deponed *ex auditu*, as in this case, the LORDS who *ex nobili officio* may and do ordinarily supply the defects of the ordinary form of probation, and if there be *semiplena probatio*, will after probation renounced, even at the advising, take the oaths of either parties, or other adminicles in supplement; so their noble office is implored in this case, seeing the point to be proved of the condition of a ship, is probable by witnesses, and that one diligence is executed against witnesses, they will yet grant a second term for a second diligence against the same witnesses, for proving the condition of the ship, seeing the oath clears that the deponent knew nothing of proper knowledge, but *ex auditu*;
Which desire the LORDS granted.

Fol. Dic. v. 2. p. 201. Stair, v. 2. p. 500.

1677. November 15. THOMSON against ROSS.

No 277. A PARTY'S oath was sustained, though after an election of a proof by witnesses who had proved nothing.

Fol. Dic. v. 2. p. 201. Fountainhall.

* * * This case is No 15. p. 9397, *voce* OATH OF PARTY.

1678. June 22. WALWOOD against WALWOOD.

No 278.
Found in conformity to Auchmoutie against Main, No 237. p. 32126.

IN a process betwixt Walwood and Walwood, the defender having proponed a defence, which being remitted to his probation *prout de jure*, and a term assigned for that effect, which being past, the pursuer craved the term to be circumduced. The defender *alleged*, The term could not be circumduced, because he was content to refer his defence to the pursuer's oath. It was *answered*, That the pursuer was neither present, nor cited to give his oath, so that no diligence being done, the term ought to be circumduced, otherwise this would prove an ordinary delay in processes, wherein any point were to be proved *prout de jure*, for the defender would ever procure delay, by letting the term pass, and then offer to prove by the pursuer's oath.

THE LORDS found, That in probations *prout de jure*, the party who was to prove, might cite the other party to depone, and yet might resile from the oath, and use any other probation ready at the term, by writ or witnesses, and might cite the other party, if he were present, *apud acta*, or if he were present the time that the act were called, might require his oath, being an instant verification, but otherwise there could not be a new term assigned to take the pursuer's oath.

Fol. Dic. v. 2. p. 200. Stair, v. 2. p. 624.

****** Fountainhall reports this case :

No 278.

THE LORDS in a case betwixt Walwood and Walwood, declared, by an act where a pursuer is to prove his libel, or reply, *prout de jure*, and when the term is circumducing against him for not proving thereof, and then he offers to refer it to the defender's oath, that they would not oblige the defender to swear thereon, unless he were present within the town of Edinburgh, because if he was absent, it made two litiscontations in one cause. It may be doubted, if the same should be where the defender so refers his allegiances to the pursuer's oath, who is ever presumed to be present and ready to insist, whereas the defender, by the Emperor Justinian's laws is called *ὁ φευγών* (*fugiens*). I think both of them ought to elect their manner of probation at the time of the act. What if a party refer any allegiance or exception to the oath of the other party, whether pursuer or defender, and when he comes to depone, he resiles, and offers to prove by witnesses; that makes two litiscontestations, and yet is permitted; only I think the party's expenses should be paid to him by the resiler.

Fountainhall, v. 1. p. 5.

1680. *January 23.* PATON *against* STIRLING of Ardoch.

No 279.

THE LORDS found he might adduce writ to prove an article of a rental, if the witnesses he had led, had proved nothing of it, but otherwise, he might not, if they had proved in part.

Fol. Dic. v. 2. p. 201. Fountainhall, MS.

1685. *December 22.* LORD PITMEDDEN *against* REID of Bara.

No 280.

THE case of Lord Pitmedden, and Reid of Bara, is reported by Lord Carse, viz. If the backbond given by my Lord Winton, which declared he had taken the gift of the ward and marriage of Seton of Pitmedden, to the behoof of the apparent heir, with this express condition, providing he followed his advice, was null; because the heir, Pitmedden's elder brother, contravened the quality, in putting out Winton's Chamberlain, uplifting the rents himself, and chusing other curators; and when he was major, in selling his lands very cheap to this Reid of Bara's father, who was his Writer and Procurator in Aberdeen? The intent of this declarator is, that the backbond being put out of the way as forfeited and contravened, the lands which Pitmedden's brother sold to Bara, may be burdened with a proportional part of the ward and avail of the marriage, as being *onus reale et debitum fundi*, only to this effect, that this liquida-

Where a cause had been remitted by the Lords to some of their number, to settle between the parties, the pursuer was found at liberty to pass from the instance *simpliciter*.