No 296. when they had raised and were insisting in one; and in the mean time, the interlocutor ought to stand, that there was no necessity for determining in the complaint.

No reduction was now competent, but barred by both these acts; by the 16th Geo. II. the limitation introduced by which would be of no effect if confined to summary complaints, while the same cause could be brought in by summons. An election made by those who had no power, was certainly a wrong done at an election, though, if the electors were unanimous, as it could only be complained of by some other burgess, it behoved to be by ordinary action, yet still subject to the prescription of time; but more expressly was a reduction barred by the act 7mo Geo. II. limiting ordinary actions within eight weeks.

The Lords found, that they might proceed to determine the election made in the year 1745, notwithstanding there was no reduction subsisting of the election made in the 1746.

Act. *H. Home.* Alt. *W. Grant.* Clerk, *Gibson.*

Fol. Dic. v. 4. p. 150. D. Falconer, v. 1. No 175. p. 234.

*** See No 8. p. 1842, *voce* Burgh Royal.

No 297. 1747. *February* 28. Mason *against* The Magistrates of St Andrews.

The like determination to that in the preceding case was given on a complaint against the election for St Andrews made at Michaelmas 1745, though there was no complaint or reduction yet raised against that made 1746.

Act. *Ferguson.* Alt. *W. Grant.* Clerk, *Kirkpatrick.*

Fol. Dic. v. 4. p. 150. D. Falconer, v. 1. No 176. p. 235.

*** See No 20. p. 1871, *voce* Burgh Royal.

No 298. Whether after witnesses have deponed, the pursuer may recur to the defender's oath?

1747. *June* 24. Law *against* Lundin and Lumsden.

Jean Law, as executrix-dative of David Bayers her husband, brought an action against Lundin of Lundin and Lumsden of Innergelly, for payment of two different accounts, as due to her deceased husband, consisting of dales, timber, iron, &c. furnished; in which there was an act pronounced, finding the libel and accounts therein referred to relevant to be proved *prout de jure*, and granting diligence.

In consequence of this, the pursuer adduced two witnesses, one on Lundin's account, who knew nothing of the matter, another on Innergelly's, who proved the account, so far as the testimony of one witness could go. And when the act came to be called, in order to a second diligence, the pursuer passed from

the proof by witnesses, and offered to refer the verity of the two accounts to the defenders' oaths. But the Ordinary "found they were not bound to depone, seeing the pursuer had undertaken to prove the accounts by witnesses, and had accordingly adduced witnesses thereon;" and, upon a representation having advised with the Lords, "adhered to his former interlocutor." No 298.

Against which the pursuer having reclaimed, the LORDS "found that the libel might be referred to the party's oath, notwithstanding the depositions of the witnesses."

The old practice would appear to have been, that wherever the election was made to prove by witnesses, and witnesses were examined, the pursuer could not recur to the party's oath, although the witnesses had proved nothing. By later practice, where the witnesses had proved nothing, the party's oath was still competent. But this is believed to be the first instance wherein the pursuer has been allowed to recur to the party's oath, after a witness has deponed *positive*, it having hitherto been thought, that, in such case, the pursuer is not to recur to the defender's oath, and that *ob metum perjurii*; and some of the Lords differed from the judgment now given, on that very ground. At best, the party is exposed to a suspicion of perjury, if, after the deposition of one witness to the verity of the libel, he should depone *negative* in his own favour, which they thought to be a sufficient reason for adhering to the form hitherto known. And indeed, if the judgment now given is to be followed, it must be admitted, that in all cases, after a pursuer has gone half way in his proof by witnesses, he may recur to the party's oath.

Fol. Dic. v. 4. *p.* 150. *Kilkerran*, (PROCESS.) *No* 8. *p.* 435.

*** D. Falconer reports this case:

JEAN LAW, Relict and Executrix of David Byres, merchant in Ely, pursued James Lundin of Lundin and Robert Lumsden of Innergelly, for goods furnished to them by her husband, and examined one witness on each accompt, who deponed, viz. James Webster, "That he had oftener than once received for accompt of Lundin, from Mr Byres, deals and trees, and at one time iron, but could not be positive, either with respect to the time, price, or quantity; but that he was in use, after receiving either of any such goods, to give in a note thereof to Lundin's doers, which he believed contained the quantities and prices, and that he kept no copies thereof himself; and which notes were of the hand-writing of David Byres; *causa scientiæ*, he was sometimes employed as Lundin's wright." And William Oliphant, wright, deponed, "That Innergelly and he went to Ely to view the deals which the defunct had, as the deponent heard, commissioned for Innergelly: That after they had seen the deals, Mr Byres demanded at the rate of L. 11 per hundred, which Innergelly refused to give, as being too high a price: That he then understood Innergelly was to take none of them; whereupon Mr Byres said that he would refer the price to

No 297. the deponent, and that Mr Byres was to send them from the Ely to Anstruther by sea: That he was not present at any other bargain or communing betwixt the parties: That he knew the deals were sent by Mr Byres to Anstruther, and there received by Innergelly's servant, who told the deponent that he had numbered them on the shore of Anstruther, as they were put on the wains, and that they then fell short betwixt 30 and 40, or 40 and 50 of the number sent afterwards in a note by Mr Byres to Innergelly. Further deponed, That the quantity Innergelly was to have got, was 300. And further deponed, as to the battons charged in the accompt, he knew Innergelly had received battons at sundry times from Mr Byres, though he did not mind the number or prices. Deponed as to the article of double trees, he knew that Innergelly had got from Byres such trees, though he was not positive as to the time, quantity, or number. And being interrogated on the part of Innergelly, what he remembered was the price of double trees before the commencement of the war with France? Deponed, That he would have bought a quantity of the picked trees for 22d. the piece."

After leading these witnesses, the pursuer referred the libel to the defenders' oaths, and the Lord Ordinary, 23d January 1749, "found the pursuer having adduced witnesses to prove the accompt to Lundin, she could not now recur to his oath." And 25th, "found that Innergelly was not bound to depone in this cause, seeing the pursuer had undertaken a proof by witnesses, and had accordingly adduced a proof thereon, and 25th February, adhered."

Cited in a reclaiming bill, Voet de jurejurando, par. 4. l. 11. Cod. h. t. Stair, Tit. Probation by writ.

In the answers, these decisions, 1st July 1574, Earl of Sutherland against the Earl of Caithness, No 231. p. 12123.; 20th January 1575, Glenbervy against Udney, No 232. p. 12123.; 15th June 1622, Lord Roslin against Lord Hatton, No 242. p. 12128.; 26th February 1686, Horn against Strachan, No 281. p. 12146.; 29th January 1639, Lady Westmoreland against Lady Home, No 268. p. 12139.

The Lords found that the parties, notwithstanding the examination of one witness against each of them, might yet be obliged to depone.

Act. *A. Hamilton.* Alt. *D. Grame.* Clerk, *Forbes.*

D. Falconer, v. 1. No 193. p. 258.

1751. *November 27.* John Graham *against* William Smith.

No 298.
A person appearing in an action of sale, tho' not

John Graham, purchaser of Crowdieknows at a judicial sale, pursued William Smith as a possessor to remove.

Answered, He is a wadsetter, and entitled to retain his possession till redeemed.