

1673. *July 17.*KINCAID *against* DICKSON.

MR JOHN KINCAID having pursued Mr Alexander Dickson, for payment of a sum promised to the pursuer's wife, when she was wife to the defender's nephew, and having deponed, that he did declare his purpose to give such a sum to his nephew's wife, and such a sum to his children, if he behaved well in his affairs; and being interrogated whether by any missive letters he had engaged for the same, he deponed that he knew of no missive letters, in which he had done any more than declared his purpose as aforesaid, and if all his letters were laid together, he believed it would make it appear so.

THE LORDS found, That this oath imported no obligation or promise, but only the expression of a resolution, and refused to reserve to the pursuer to prove the promise by the defender's missives, albeit he was not positive that they bare no such promise, but that he knew not they bore the same, because the pursuer having chosen his probation by the defender's oath, wherein he was positive that he made no promise, they would admit of no other probation.

Fol. Dic. v. 2. p. 201. Stair, v. 2. p. 181.

No 274.

Oath of a party, as to a promise, being positive, denying it, but bearing, that being interrogated, if he had written any letters concerning a promise, he deponed he remembered none that bore then a resolution, the letter was not admitted thereafter to prove the promise.

1676. *June 22.*IRVINE *against* IRVINE.

THE quantities and prices in a decret being proved by witnesses, it was not found relevant in a suspension to prove by the charger's oath, that the quantities and prices mentioned in the proof were exorbitant, because this tended to infer perjury of the witnesses.

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

No 275.

* * * This case is No 218. p. 12112.

1677. *January 27.*THOMSON *against* CURRIE.

IN a pursuit at the instance of Sir Henry Thomson against Provost Currie, liti-contestation being made, wherein it was referred to Thomson's oath, that a ship in question was delivered back in as good condition as she was received; and he having deponed that another person, one of the owners of the ship told him, that she was not in as good condition; which oath being to be advised, it was *alleged* for Thomson, That his oath proved not the allegiance, and therefore he was liberated from the point to be proved by his oath, seeing our law allows not probation, both by oath and witnesses, as to the same point, and that probation by oath was here chosen by Currie, and not proving. It was *answered*, That where the oath is not positive, but leaves the matter where it

No 276.

After probation by oath, if not positive, but *ex auditu*, another probation may be admitted *ex officio*.

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.