the oath *non constabat ex actis* and the clerk's minutes, (which is the only probation in such cases,) he having omitted to write the oath, which was taken at the side-bar. And they found an oath which was not extant *in scriptis seu retentis* could not be made up by an advocate's oath. *Vol. I. Page* 115.

See 23d Dec. 1680, page 384.

1680. *November* 13. HUGH BLAIR *against* ROBERTSON and CHAPMAN, her Husband.

IN Hugh Blair's pursuit against one Robertson, that was his taverner, and —— Chapman, now her husband, for his interest, the Lords having advised the probation which was led on an act before answer, anent the vitiation in the count-book keeped betwixt them, they decerned, conform to Hugh's count-book, which bore in the controverted article, that she had only paid him two pieces of wine such a day, whereas her book bore, that she had counted to him for four pieces, which could not prove in her own favours; especially seeing, the writer of both books being examined, he owned Hugh's book.

Yet she offering to prove, by Hugh's wife's oath, that her book was juster and righter in that particular than her master's; though it was alleged she was *vestita viro*,—yet the Lords ordained her to come in and depone without any new act, being in a concluded cause, because she was *præposita negotiis*, and in use to count weekly with her servants and taverner. And they received it *hoc loco*, though it was contended it should have been proponed in the first act, because it was instantly verified by the pursuer's wife's oath, who lived in town, and it was only an act before answer. Yet, by an Act of Sederunt, 23d July 1674, these acts are declared to be equivalent to acts of litiscontestation.

Then she having denied it, it was ALLEGED there could be no decreet, because the price of these two pieces of wine was not yet proven. This was repelled, in respect of the notoriety of the quantity a piece consists of, and that each pint was sold at twenty-pence, allowing so much to her for dreg and leakage.

Thereafter, on the 20th of November they referred to Hugh's oath, that he had charged her with a piece of wine which was returned to Gilchrist the merchant. He deponed, that piece was returned, but that he substituted and put another in the place of it. At advising, it was ALLEGED, that this quality of giving her another piece was extraneous, and behoved to be otherwise proven. The Lords refused to divide the oath, but found the quality competent and intrinsic, there being no other probation but his oath. *Vol. I. Page* 115.

1680. *November* 16. KATHERINE CARNEGY and THOMAS ALLAN, her Husband, *against* The EARL of SOUTHESK.

IN Sir David Carnegy of Pittarrow his double poinding against his sister Katherine and Thomas Allan her husband, on the one part, and the Earl of Southesk on the other; the Lords, *nem. con.* preferred the sister's right by bond to Southesk's precept which he had got from old Pittarrow upon Sir David

his son, ordering him to pay to the Earl (out of that money he owed him) what the Earl had advanced for his brother; and that because the precept wanted witnesses, and was not intimated before her bond; though they offered to prove it was holograph, by old Pittarrow's oath, and to prove it was intimated, by the oath of young Pittarrow. But the Lords would not admit of this manner of probation to her prejudice. *Vol. I. Page* 116.

1680. *February* 9. PETER DE BRUIS *against* The EARL OF WINTON.

PETER de Bruis, a Flandrian, gave in a complaint against the Earl of Winton, anent the building of a harbour at Cockenny, craving that the Lords of privy council would nominate some to visit it, and consider his pains, and modify against the Earl accordingly. The Lords at first named a committee, but thereafter they remitted it to the Session, the judge ordinary, to be summarily discussed by them. *Vol. I. Page* 84.

1680. *June* 29.—The Lords finding the grossness of the difference betwixt the reports of the arbiters, therefore renew the commission, and adjoin the Lord Justice-Clerk to my Lord Harcous; and ordain the two arbiters to be cited before them, and to be examined if they measured the harbour-work severally, or together. And, in regard that Fulton the Earl's arbiter measures by feet, and Baxter arbiter for Bruis measures by roods, ordain them to reduce the measure to one common denomination, whether of feet or roods, and to value what Bruis hath done conform to the scheme agreed upon betwixt the Earl and him; and what is unwrought of that scheme; and what additional work he hath wrought, not contained in that scheme; with special regard always to the quality, goodness, and sufficiency of the work; and allow the foresaid Lords to call other wrights and masons before them, and examine them upon oath anent the work, and value of the additional work, whether they think it more or less than what De Bruis was obliged to do by the scheme, and which is yet undone by him; and to report. *Vide infra,* 30th July 1680.
Vol. I. Page 105.

1680. *July* 30.—IN the action pursued by De Bruis against the Earl of Winton, (29th June 1680,) the Lords having considered the Justice-Clerk and Harcous their report, they modify about 1600 merks, as yet resting by the Earl to him for his work besides what he hath received; and reserve him action for his boats and plenishing alleged seized on by my Lord, as accords.—But the contract betwixt them appoints that the boats shall belong to my Lord. *Vide* 23d Nov. 1680. *Vol. I. Page* 111.

1680. *November* 23.—In this action, the Lords find that the decreet being *in foro,* and pronounced the penult day of the last Session, and a petition given in for the Earl the next day, and refused; that any defences, which were competent and omitted formerly, cannot now be received: but allowed the suspender to be heard upon any error which hath been in the calculation of the sums, and that before the Lord Justice-Clerk and Harcours, to whom they remit the consideration thereof: and sustain the price of the coals to be 100 pounds sterling, in respect of the submission produced, unless the charger offer to prove, by the Earl's oath, that the submission was blank as to the price and