

retrievably forfeited of the benefit of that evidence, to which they were legally and justly entitled. The Earl is now gone; his papers are dispersed; his succession is divided. The defender, his daughter, can know nothing of the matter; and it cannot be supposed, that any witnesses now living can have access to know this rental, near so far back as the 1706, far less for ten or twelve years before that period.

“THE LORDS adhered to the Lord Ordinary’s interlocutor, and refused the desire of the petition; without prejudice to the defender’s still proving that the rental is less than that upon which he (i. e. Lord Caithness) is held as confessed; reserving to the parties to be heard, if any expenses are incurred by his refusing to depone.

Act. Rae.

Alt. *Ilay Campbell.*

Clerk, *Kirkpatrick.*

Fol. Dic. v. 4. p. 22. Fac. Col. No 27. p. 70.

1792. February 4.

MARGARET DALZIEL *against* JOHN RICHMOND.

MARGARET DALZIEL having raised a declarator of marriage against Richmond, several witnesses adduced by her in support of her libel were examined. The Commissaries, however, found this evidence insufficient, and assolizied the defender.

She afterwards preferred a petition, praying that the libel might be referred to his oath. This the Commissaries refused; and she, having brought the point under review of the Court,

Pleaded; It is indeed reasonable, that before reference to oath, the party referring should renounce all other evidence; because if such oath be not necessary as a means of proof, his only object must be to ensnare his adversary into perjury. But, on the other hand, when all farther proof has been relinquished, the reference is competent and right, notwithstanding that some evidence may have been already brought; the adversary as to this being put on his guard; Voet, lib. 12. tit. 2. § 11.

By certain old decisions, it is true, a reference in these circumstances was denied; for which it is the more difficult to account, as it was always admitted in cases where proof by writing had been attempted; Ersk. b. 4. tit 2. § 3. But the point was unalterably fixed 24th June 1747, in the case of *Law contra Lundin*, *voce* PROCESS, in which it was found, “That a libel might be referred to the party’s oath, notwithstanding the depositions of the witnesses.”

Answered; He who makes a reference to the oath of his adversary ought to be actuated by an expectation that the truth will thereby be declared, having confidence that the adverse party is not disposed to commit the crime of perjury. Were a person impressed with the opposite sentiments, to insist on his

No 21.

No 22.

Oath on reference competent, after the adducing of parole proof.

No 22. adversary's oath, his conduct would be immoral in a high degree; nor in a legal sense, upon the crime's being afterwards perpetrated, could he be viewed in any other light than that of an accessory. But if he has already made his election of a different mean of proof, especially that by witnesses, he betrays his distrust in the veracity of his opponent, to whose oath the law will no longer leave him at liberty to recur; l. 11. Cod. De reb. cred. et jur.

Besides, it is an observation of Lord Stair's, that 'allowing the oath of party then would infer perjury and defamation of witnesses;' Irvine *contra* Ross, *inf. cit.* And, on the other hand, the preceding testimonies might create an unjust suspicion of the truth of what the party deponed.

It may be remarked, that there is in this respect a just distinction between written and parole evidence; the former being something which already exists, and which therefore it is natural to make use of, before the creating of new evidence by the latter.

Accordingly there occurs a singularly uniform series of decisions respecting references after parole proof had been attempted. Thus, Colvil, 1st July 1574, Earl of Sutherland, *voce* PROCESS; Colvil, 20th January 1575, Lord Glenbervy, *Ibidem*; Durie, 15th June 1622, L. Roslin, *Ibidem*; 29th January 1639, L. Westmuirland, *Ibidem*; Spottiswood, 26th January 1630, Duke of Lennox, *Ibidem*; Hope, 5th July 1617, Finlayson, *Ibidem*; Fountainhall, 26th February 1686, Horn, *Ibidem*; Stair, 22d June 1676, Irvine, *Ibidem*; Clerk Home, 18th November 1737, Macbrair, *Ibidem*; to all which, the case quoted on the other side is alone to be opposed.

THE LORD ORDINARY "remitted to the Commissaries, with this instruction, to ordain the defender to depone on the pursuer's reference." And,

On advising a reclaiming petition and answers,

THE LORDS adhered to the Lord Ordinary's interlocutor.

Lord Ordinary, *Justice-Clerk.*
Clerk, *Colquhoun.*

For M. Dalziel, *Fraser Tytler.*

Alt. *Stewart.*

S.

Fol. Dic. v. 4. p. 23. Fac. Col. No 204. p. 429.