

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.