

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 re-tentis* could not be made up by an advocate's oath. *Vol. I. Page 115.*

See 23d Dec. 1680, page 384.

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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 kept 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.*

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

IN Sir David Carnegie 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