

1737. *November 18.*MACBRAIR of Netherwood *against* JOHN ROBERTSON and JAMES VERE.

No 293.

A pursuer cannot recur to the defender's oath, after having made his election, and examined witnesses.

NETHERWOOD brought a process against Robertson, &c. on several acts of Parliament, for fishing in forbidden times, which he offered to prove by their oaths,

To this it was *objected*; That the acts being penal, they could not be obliged to depone.

Answered for the pursuer; That these statutes were only penal as to the third attachment or crime, but that this being the first, he restricted his action to the pecuniary mulcts and damages therein enacted for the first fault. With this debate, *avisandum* was made; after which, Netherwood offered to prove his libel, *prout de jure*; whereupon, before answer, an act and commission was granted, in consequence whereof several witnesses were adduced, but upon finding the proof not sufficient, the pursuer thereafter referred his libel to the defenders' oaths. To which they *objected*, That the same was not now competent, seeing, by the extracted act, the pursuer had betaken himself to a proof by witnesses, and accordingly had led the same; which must hold more particularly in this case, as the reference to oath at first was strongly opposed, and *avisandum* made with the debate thereon.

Answered; The probation *prout de jure*, being before answer, and including all manner of probation the pursuer thought fit to make use of, can no ways debar him from the defenders' oaths.

THE LORDS found, that the pursuer having made his election, and examined witnesses, he cannot now recur to the oath of party.

C. Home, No 75. p. 126.

1744. *July 7.*BEG *against* RIG.

No 294.

A NULLITY in an execution may be supplied by producing another, even after the Process is given out, and defences returned.

Fol. Dic. v. 4. p. 150. C. Home.

*** This case is No 24. p. 8345. *voce* LITIGIOUS.

1744. *November 28.*MACLAUHLANS *against* MACDOUAL.

No 295.

AFTER a defender has proponed peremptory defences, he may still offer an improbation of the execution of the summons.

Fol. Dic. v. 4. p. 150. D. Falconer. Kilkerran.

*** This case is No 218. p. 6783. *voce* IMPROBATION.