

that he had power as he pleased to use and Execute the Commission granted in his favour, or to Defend it, or to keep it up after it was Executed; and the other party might take the advantage thereby as if there had been no Commission. Which the Lords were Repetted, in Answer that the Commission was granted in favour of the party, the Matter Contrasted for Informing the Lords 13 January 1631 Barclay contra E. Baskin. If the Commission be Rejected, such Execution and Delivered at the Bar to the Clerk, as if it were made with the Depositions, in the same Manner as if it had been taken in the Session. But before such Affidavit be put up in the Minute Book, the Under Clerk must get payment of the half or three ordinary ones for the like oaths taken before the Lords, Act of Seder. 17 November. 1633.

Where a point was allowed to be proved pro et contra, the party tender taking to prove, the he hath served his notice against witnesses and husband of writs, will be allowed at Calling the Act in terminis, to Refer the same to the other parties out of Party: which hinders Circumvention of the terms, or granting of Certification till that other party Depone. And where the pursuer or Defender hath brought in witnesses or husbands of writs, for proving a point admitted to his proof; the other party may, upon a petition to the Court referring the Matter to the pursuer's or Defenders oath, hinder such witnesses or husbands of writs to be Examined, spots wood Stat. 4to. Provisions Provided all ways that the person to whose oath the point in Controversie is Referred in such a case, he present or was Pled to Depone at the term in the Act: For a New term cannot be assigned to take his oath 22 June 1671 Griffith wood contra Walwood. And if such a practice were allowed, the Defender would ever procure delay where any point is to be proved by him pro et contra, by letting the term pass, and then offering to prove by the pursuers oath. But after any Matter of proof hath been given the following Rule is to be observed. A Bill word be first produced in Evidence, the Defect of which proof may be supplied by the parties oath. Where witnesses depone only, that they know not, or Remember not, would not be used to prove the point, and oath of party, in so far as the writ doth not prove. But if witnesses have once depone positively, parties are not allowed to alter their ground of proof, and after a parties oath of Positivity is taken

taken, there is no place for Evidence by writ or witnesses (stat. 4to. 42. 51). Oath of party as to a promise being positive, denying the same, and bearing that he Remembers not of it: Having writ any letters importing more than a Resolution to give what was alleged to have been promised by him; the letters were not admitted thereafter to prove the promise, as if the oath had been simply in the case of non memini. Because the pursuer having Chosen his proof by the Defenders oath, where in he was positive that he made no promise, the Lord would allow no other proof 27 Feb. 1673. ^{upon the Depositions of James Graham} Dickson. But if a party be not positive, another kind of proof may be received as official Noble 27 January 1677 Thomson contra Burrie 20 Feb. 1672 Fisher contra Pittgorn. If there be two Actions of the same kind betwixt the same parties, de Eadem Re, or de Personis to one another, or Actions of the same kind at the instance of Different persons against the same Defendant, as Actions upon the promise filled and other general suits; the pursuer may Repeat the proof out of one process into another spots wood ibid. 323 & 324. And a warrant for transmitting letters will be granted in any steps of the process, if the Depositions be in the Custody of the Clerk of Session: But if they be in an inferior court, a Diligence should be sought & pronounced, the Act, and Executed against the Clerk of Court for production thereof; or the pursuer may file the same witnesses of alive, to be Examined before the Lords.

Proof it is, upon Acts before Answer in the same way as upon ordinary Acts of latter contestation. And if at Calling such Acts before Answer, no thing in Evidence be produced by either party, the term will be Circumvented for not proving, but the Decree of Circumvention cannot be extracted, because the Relevancy wants to be Determined. In order to the finding whereof by the Lords in presence, Affidavit is made with the Relevancy, and also with the proof if any be led.

Affidavit made with proof in a cause is called a great Affidavit: Because thereby the cause is Continued, and regularly no more Judges or tried by a single ordinary, but only by the Lords in a Collegiate Body. Upon this Affidavit made by the Clerk upon the Act and signed by the Ordinary, a warrant is given by the Clerk for entering thereof in the respective Inner House Roll it belongs to; the Clerk dues being first paid to the Collector conform to the Regulations. Upon production of which Warrant the Clerk or any other