

No 12. compearance, and therefore ought not to be respected, except the sasine mentioned therein were now produced, which when it shall be, the defender will offer to improve it; otherwise it were hard to make a decret obtained upon the production of a false sasine perhaps, to work ever after against the defender. *Replied*, That ought to be repelled in respect of the decret standing, given upon lawful probation. "THE LORDS repelled the allegiance.

*Spottiswood, (HEIRS.) p. 142.*

No 13.

Found, that a debtor's deposition in a furthcoming to which his creditor was called, was conclusive in all processes about that debt.

1664. February 13. RUSSEL against CUNINGHAME.

LAWRENCE RUSSEL pursues George Cuninghame, for making a debt forthcoming as arrested in his hands, whereof he was debtor to Harry Moffat; and being referred to the defender's oath, he swears and is assoilzied. Moffat being called in the process thereafter, there is a new process pursued before the Lords at Moffat's instance against Cuninghame, who *alleges*, That *res est bactenus judicata* upon his oath, Moffat being called. It was *answered*, That Moffat was not compearing, nor pursuer of that process. *Replied*, His creditor arrester was pursuer compearing, and he himself called, whom the defender could not force to compear, and he himself forced to give his oath, otherwise to be holden as confest, and oaths so taken end the controversy without recovery.

THE LORDS assoilzied, yet they inclined to cause re-examine Cuningham, if it could be made appear, that there was any unclerness in the oath.

*Fol. Dic. v. 2. p. 347. Gilmour, No 96. p. 73.*

1665. February 1.

BROOMHALL against The MARQUIS of DOUGLAS, and EARL of LAUDERDALE.

No 14.

Altho' in an action of proving of the tenor of a bond, against one of two obligants the *casus amissionis* has been proved in another proving of the tenor against the other obligant, a new proof must be brought.

THE umquhile Marquis of Douglas and umquhile Earl of Lauderdale being addebted to Broomhall by bond, conjunctly and severally, with a mutual clause of relief; and this bond having been burnt in the Lady Brand's house at Edinburgh; Broomhall raised a summons for proving the tenor against the Marquis of Douglas, wherein having libelled *casum amissiones*, and adduced many other adminicles, he obtained decret against the said Marquis. Thereafter he raises summons against the Earl of Lauderdale, for proving likewise the tenor against him, wherein he having only produced the decret recovered against the Marquis of Douglas, for instructing his *casum amissionis*, and the other adminicles; the LORDS would not suffer the pursuer to repete the decret recovered against the Marquis in this process, but found, that he behoved to lead the same witnesses for proving his summons, without prejudice to the Earl of Lauderdale,

to propone all his other defences when he should be pursued, as representing his father granter of the bond, the tenor whereof is craved to be proved.

No 14.

*Fol. Dic. v. 2. p. 346. Newbyth, MS. p. 24.*

1675. January 9.

TOWN of EDINBURGH *against* The EARL of LOTHIAN.

THE Lady Yester having mortified L. 5000 for the use of the poor in some parishes about Jedburgh, the same was put in the hands of the Town of Edinburgh, who gave bond therefor; which being lost, there was process at the instance of the minister and poor of these parishes, and at the instance of the Earl of Lothian, as now become patron of these parishes, at whose advice the sum was to be employed, against the Town, proving the tenor of the contract of mortification; wherein the Town proponed a defence, that they had made payment of the sum to the Earl of Lothian; and it being alleged, that the Earl alone had not power to uplift the sum;

No 15.

A defender had been held as confessed. In a subsequent action, about the same matter, this was received as evidence.

THE LORDS, before answer to the relevancy, ordained the Earl of Lothian to depone, whether he received the money or not, with certification if he deponed not, to be held as confessed; whereupon, the Earl was held as confessed, and gave in a bill desiring to be reponed, and was thereupon reponed, and a new term assigned, and then was again held as confessed. The poor obtained decreet; and now the Town pursues the Earl of Lothian for relief, to pay the sum, to be employed according to the first destination; and for proving his receipt of the sum, make use of the decreet of tenor, in which he is held as confessed. It was *alleged* for the Earl, *imo*, That his being held as confessed could operate nothing, except in the process wherein he was held as confessed; neither was it equivalent as if he had deponed and confessed, which might have proved against him at the instance of any other party. *2do*, Though it could operate, yet he craves to be reponed. It was *answered*, That being held as confessed, proves as effectually as the acknowledgement itself, as to the effect for which the oath was to be adhibited; and seeing the Earl was a pursuer in the process, and a debate did arise upon the relevancy what his oath would import; the LORDS did not determine the relevancy, but that the matter of fact might first appear, ordained him to depone, whether he received the money, declaring, that if he deponed not, he should be held and presumed as if he had deponed and confessed. Whatever could be relevantly founded upon his real confession, may also be presumed upon his presumptive confession; and therefore the Town might either crave to be free upon his receipt of the money, or at least the Earl, upon his confession, should be decerned to relieve them; and though they have raised a new summons, it is but a continuation for the same cause; neither can the Earl be reponed, having been twice held as confessed.