

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 unclearness 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,