

No 4.

ing, or refusing to depone ; and therefore, an oath in an exhibition is *litis decisorium quoad* the deponent. And though the pursuer could not be hindered afterwards to produce the writ formerly called for in the exhibition, notwithstanding the defender's oath ; yet he could never oblige the defender to depone again upon his having thereof, nor fix the same against him by any other probation. Another of the Lords thought, that an exhibition approached to the nature of a probation by witnesses : And therefore, Peers called therein should depone in common form, seeing by the law of England they depone so as witnesses.

*Fol. Dic. v. 2. p. 53. Forbes, p. 555.*

\* \* \* Fountainhall reports this case :

The Duke of Montrose, pursuing a reduction and declarator against M'Auley of Ardincaple's right to the heritable bailiary of the regality of Lennox, and craving certification ; it was *alleged* by the defender, the writs instructing my right are in your own hands ; and refers the having to the Duke's oath. *Answered*, I will search my writs, and on my word of honour shall declare, If I can find any thing can prove your allegiance. *Replied*, Though the privilege of the English Peers be communicated to the Scots, yet *non constat* this is one of them ; for whatever they may plead in what we call oaths of calumny, yet not where it is decisive of the point referred thereto. And it is certain, before the Union, our Peers enjoyed no such privilege ; and it must be instructed that the English have it ; and there being application made to know their customs, no satisfactory answer can be obtained. And the point has been several times tabled, and debated before the LORDS, and now it can be no longer delayed. And the LORDS found in this case the Duke behoved to give his oath, being an exhibition on the matter. If the House of Peers in England shall declare otherwise, the LORDS will readily follow their determination, after they come to know it, but till then they cannot be blamed to follow their former laws and customs.

*Fountainhall, v. 2. p. 689.*

1716. December 13.

ELIZABETH YOUNG and her HUSBAND *against* The EARL of BUTE.

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Second diligence against a peer, how executed.

THE pursuer's grandfather being creditor to Stewart of Kilkattan, he assigns the debt in trust to the deceased Kelburn upon his backbond ; and accordingly, he did adjudge, in *anno* 1681, for the accumulate sum of L. 13,300 Scots ; and, after his decease, the Earl of Glasgow, his son, corroborates the bonds, but thereafter consents to a disposition of the lands of Kilkattan, made by the laird thereof, in favour of the Earl of Bute ; whereupon the pursuer, as having right

from her grandfather, did insist against the Earl of Glasgow, in respect he contravened the obligations in his said back-bond; and in this process a diligence being granted against the Earl of Bute for exhibiting the said disposition, and the first diligence being returned, and the second granted, this being in effect a caption, which could not be put in execution against the Earl of Bute, being a Peer, a petition is given in for the pursuer, craving that the LORDS would adhibit a remedy, and founding on a late practice against the Earl of Kincardine, where the LORDS assigned a certain day to exhibit the writs called under a penalty equal to the damage that the pursuers incur through the failure in exhibiting; and, there being no answer to the petition,

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'THE LORDS grant diligence to the petitioner to cite the Earl to compare within three weeks, or thereby, to exhibit the writs called for, under the penalty of L. 50 Sterling; but prejudice of the petitioner's claim of further damages, as accords of the law.'

Act. *John Dundass.*Alt. *Dun. Forbes.*Clerk, *ut supra.**Bruce, v. 2. No 43. p. 58.*

1756. July 29.

M'DONALD *against* a WIDOW of a PEER.

THE widow of a Peer being debtor to M'Donald in a certain sum of money, due by bill, he raised and executed a horning against her, and afterwards applied for letters of caption.

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The Lord Ordinary reported the bill to the LORDS; who were of opinion, that the widow of a Peer was intitled to all the privileges of a Peer, and therefore,

"They refused the bill."

*Fac. Col. No 212. p. 309.*

\*\*\* See the case of Campbell against Countess and Earl of Fife, No. 211. p. 9404. *voce* OATH OF PARTY.

See APPENDIX.