

No 16.

was used. And likewise, the LORDS found, That seeing this was not now a concluded cause, that the defence formerly repelled, in regard of the state of the process, should be received when the defender insisted therein.

Fol. Dic. v. 2. p. 346. Stair, v. 2. p. 305.

* * * Dirleton reports this case :

WILLIAM GLENDINNING having pursued the now Earl of Nithsdale, as heir to Robert the late Earl of Nithsdale, his father, for fulfilling a minute betwixt the said Robert Earl of Nithsdale and William Glendinning of Lagan, from whom the pursuer had right ; and for payment of the half of the duty of the lands of Dolphington, conform to the said minute ; and litiscontestation was made in the cause ; and, for proving the rent of the said lands of Dolphington, it was craved, that the depositions of witnesses that had been adduced in the like process, intented against the said Earl, as representing his father, for implement of the said minute, should be received in this process ; but the LORDS having considered, that the said Earl did not represent his father *active*, but was pursued only upon the passive titles ; and that this process against the now Earl, is not against him as representing the last Earl ; neither was it alleged, that he represents him ; Therefore they found, that the said depositions could not be repeated in this process, seeing *res was inter alios acta*, and *acta in una judicio non probant in alio, nisi inter easdem personas*, or those who represent them.

Dirleton, No 219. p. 102.

A. against B.

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IN a reduction upon the head of death-bed, the pursuer repeting a probation of death-bed led in another process, because the witnesses were now dead, and could not be adduced in this ; the LORDS found, That the depositions transmitted from the one process to the other could not be used as probative here, because *res inter alios acta, et testibus non testimoniis credendum est*. See APPENDIX.

Fol. Dic. v. 2. p. 346. Fountainhall, MS.

1707. July 23.

JAMES KIDZEW, Taylor in Edinburgh, *against* DAVID HARDIE, Cordiner there.

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The pursuer
of a furth-
coming,
wherein the

DAVID HARDIE being charged at the instance of James Kidzew, to make payment of the sum of L. 732 : 2 : 10 of principal, with a certain penalty and annualrent contained in a bond, granted by him to umquhile James Smeiton,