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. 395.

*** 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.

No 17.

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 proces 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.

No 18.
The pursuer of a furthcoming, 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,

merchant-burgess of Edinburgh, and Helen Wishart, his spouse, and the longest liver of them two, their heirs and assignees, and assigned to the charger by her, as the survivor; the said David Hardie suspended upon this reason, That James Arbuckles, merchant in Edinburgh, having arrested in his hands, all sums he was owing to the charger's cedent, and having in a furthcoming before the Bailies of Edinburgh, where the cedent, the arrester's debtor, was called for her interest, referred the debt to the suspender's oath, who deponed, that at the time of the arrestment, he was only owing to the cedent, L. 171 : 17 : 8, which, by decreet of the said Bailies, was paid to the arrester, he could be no further liable, the matter being *res judicata et jurata*. So the defender, in a furthcoming, who had deponed at an arrester's instance, was assoilzied from a pursuit afterwards for the same debt;—February 13. 1664, Russel *contra* Cuningham, No 13. p. 14028.

No 18.
debtor was called for his interest, having referred to the defender's oath what he was owing to the pursuer's debtor, and he having deponed, that oath was not found to hinder the pursuer's debtor to seek payment of what more the deponent truly owed him than was acknowledged in the oath.

Answered for the charger; The foresaid decreet of furthcoming was *res inter alios acta*; and the arrester's referring the verity of the debt to the suspender's oath, could not prejudice the creditor in the bond, who was only called for her interest to object against the arrester's debt, and was not obliged to furnish him with instructions that David Hardie was her debtor. The cited decision is not to the purpose; for there the creditor had no other mean of probation to instruct his debt but the debtor's oath, who had deponed *negative*, and therefore was not obliged to swear over again.

Replied for the suspender; The charger's cedent being cited in the furthcoming for her interest, it was certainly her interest to furnish the arrester with all the instructions she could for proving the debt, and to notice the manner of probation he made use of, as much as if she had been pursuing herself. For payment to the arrester was equivalent to payment made to herself; seeing she was thereby exonered of so much of what she owed to him; and the defender's oath in the furthcoming must hinder her to recur to any other probation, as well as if she had assigned to the arrester for his security what was due to her by the suspender, and he the arrester had in an action for payment at his instance against the suspender (wherein she was called for her interest) referred to his oath what he was owing; a furthcoming upon an arrestment being a legal assignation.

THE LORDS repelled the reasons of suspension.

Fol. Dic. v. 2. *p.* 347. *Forbes, p.* 191.

1708. *January* 2.

MARTHA WRIGHT, and Ensign DAVID KINLOCH her Husband, *against* ALEXANDER LINDSAY, Merchant in Edinburgh.

No 19.
An oath emitted before arbiters chosen by the de-

IN a process at the instance of Martha Wright and her husband, against Alexander Lindsay, for payment of L. 813 Scots, contained in a bond granted