*** Fountainhall reports this case:

No 2.

THE Duke of Athol being pursued by a merchant in Perth, for an accompt referred to his oath, he *alleged*, by the articles of the Union, he had all the privileges due to the English Peers, whereof this was one, not to he obliged to depone, but only to declare upon their honour. This point was fully debated in the case of Arnbath against the Duke of Gordon, where it was argued, that, by the English law, they had not that method of proving by oath, as in the common law and customs of other nations; and when they give in their articles upon oath, it is no more than an oath of calumny upon the matter, that they think they have reason to believe it to be true. THE LORDS were very cautious ere they proceeded to determine this, and wrote to the Chancellor and Judges of England by the President, to get some light and directions therein; but they shunning to give any opinion in so nice and delicate a point, the LORDS found this day, that Peers were bound to depone where the oath was final and decisive of the cause, whatever they might plead in oaths of calumny or credulity, as oaths *in litem*, or on the verity of debts, or the like.

Fountainhall, v. 2. *p.* 564.

1711. *February* 9. The EARE of WINTON's Case.

No 3.

THE LORDS, upon report of the Lord Bowhill, found that Peers ought to give their word of honour only instead of an oath of calumny; but that they should depone in common form, where things are referred to their oaths of verity; because no probation by oaths of verity takes place in England, where a Peer's word of honour doth pass for an oath.

Fol. Dic. v. 2. *p.* 53. *Forbes, p.* 494.

1711. *December* 19.

JAMES DUKE of MONTROSE *against* M'AULEY of Ardincaple.

No 4.
A peer called upon an incident diligence as a haver of writs ought to depone in common form as to the having.

IN the reduction and declarator at the instance of the Duke of Montrose against Ardincaple, about the right to the heritable bailiary of the regality of Lennox, the pursuer being cited upon an incident diligence, as haver of the defender's rights;—the LORDS found, That the Duke in this case of exhibition, ought to depone in common form; the oath demanded in an exhibition, not being an oath of calumny. In the reasoning of the LORDS upon this point, one said, that the defender in an exhibition might be held as confest for not appear-

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 allegeance. *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.

No 5. 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