which, in strict law, they would debate; and arbiters take a greater latitude *secnndum bonum et æquum* to terminate pleas, than they legally do *more judiciario* in process; and therefore, if no decreet-arbitral follow, whatever steps or advances were made towards the agreeing of the parties, all evanish into smoke and air with the submission; 2*do*, If it were otherwise, many absurdities would follow: What if one of the parties' claims were determined, but nothing done in the objections or discharge, shall that stand as binding, and the other party be sent to a tedious and expensive process: This were to discourage persons from entering into submissions, though a most excellent and useful medium for sopiting of pleas; and litiscontestation in such cases bears a resolutive condition, that, unless the arbiters agree and pronounce a decreet-arbitral, the whole falls to the ground, even as gifts *spe futurarum nuptiarum* return, *hinc inde*, if marriage follow not; and the Emperor Justinian in L. 5. C. De Recept. Arbit. determines, That in arbitrations, by mutual concessions, *nihil sit inde prejudicii*, unless there be a liquid *professum et attestatum*. (*Professum* is acknowledgments of matters of fact in writ under the party's hand. *Attestatum* is the depositions of witnesses taken before arbiters, for both these are probative before the Judge-ordinary.) But there is no mention, that party's oaths taken in arbitrations can be used elsewhere. *Answered*, That oaths are as authentic proofs when given *parte deferente*, as either subscribed acknowledgments, or testimonies of witnesses; if this oath had been in favours of him who deferred it, no question it would have militated against him; why should there be such an inequality as to reject it when it proves for him; since, by your delation and election of his oath, you intended the benefit of it, you must not divide it, but take it precisely as it stands; and the LORDS found so, on 2d January 1708, Wright *contra* Lindsay, No 19. p. 14033.; and if any writ contrary to this oath could be produced, would not that subject him to the pains of perjury? And it is a received maxim, that *acta et deducta in uno judicio probant in alio*, and the testimonies taken before the Sheriff, or other inferior courts, will prove before the Lords. See 16th Jan. 1628, Finlayson *contra* Lookup, No 7. p. 14024. THE LORDS having balanced all the inconveniencies, they sustained Sochan's oath in this case as probative, though it was assoilzieing him from an article charged on him, and so in his own favours; though some doubted if this will determine the general case of oaths emitted *parte deferente* in arbitrations, where no decreet-arbitral has followed.

Fountainhall, v. 2. p. 532.

No 20.

No 21.
An oath taken not in a formal process, but in the course of an

1710. *January* 13.

JOHN RUSSEL of Braidshaw *against* JAMES BAIRD of CHESTERHALL.

LORD Prestonhall reported John Russel of Braidshaw *contra* James Baird of Chesterhall. Russel being a creditor to the deceased Bailie Baird, he pursues

No 21. attempt to discover the effects of a deceast, found not to be *res jurata*, so as to assoilzie the deponent, in an action against him.

James Baird, for payment of L. 35 Sterling contained in a ticket, and L. 60 Sterling in another granted by him to the said Bailie. *Alleged*, The first sum of 35 Stirling is included in the latter and larger ticket of L. 60 Sterling, upon which I have sworn, you Russel having both deferred it to my oath, and interrogated me upon what I was owing to the deceased Bailie Baird, and I deponed that I owed him nothing but the last L. 60, the L. 35 being then allowed and included. And it being both *te deferente et interrogante*, it is *res jurata*, after which there is no further inquiry but singly *an juratum sit?* *Answered*, That Bailie Baird having died in considerable debt, and particularly to Mr Russel, now pursuer, and several indirect methods having been used to smother, conceal, and embezzle his means and effects, application was made to the Lords to grant diligence for expiscating and trying where they were, and amongst others this defender was one, who, upon examination, acknowledged he was debtor to the defunct in these two sums, but that the first was comprehend in the last, and it was by mere omission he got not up the first ticket. Now, this can never be *res jurata*, it being on no process nor act of litiscontestation, nor had Russel then any right to these debts, his confirmation *qua* executor being long posterior to his deponing; and *hoc non agebatur* to pursue him for payment of them, but only to find out Bailie Baird's smuggled effects. Besides, the quality is purely extrinsic, and he could never exoner himself by his own oath, both the tickets being extant and found in the creditor's possession uncancelled. *Replied*, There is nothing more clear than that he has deponed *parte deferente*, and this same pursuer specially interrogated him what he owed the defunct; and by the laws of the world an oath is the end of strife; and the Romans, who understood the interest of mankind best, have said no less, Gaius, L. 1. D. DeJurejur. makes an unexceptionable defence, "maximum expediendarum litium remedium in usum venit jurisjurandi religio;" and Paulus, L. 2. "Eod. Juramentum speciem transactionis continet, majoremque habet authoritatem quam res judicata;" and L. 27. "Eod. loco solutionis cedit." And the quality adjected is certainly intrinsic, the diagnostic of that being, if it answer the interrogatory *affirmando et negando*, as this precisely does. Being asked what he was owing, he answers, I owe him only the last sum of L. 60 Sterling, and it does not alter the case that both tickets are now produced; for L. 29. C. De Transact. says, "Sub prætextu novorum instrumentorum repertorum quæ generali transactionis finita sunt rescindi prohibent jura." So careful has law been to preserve this exception unquarrellable, that an oath once deferred, no supervenient nor emergent instruction can diminish its authority; and in the case between Sochan and Balbarton, No 20. p. 14034, the LORDS found an oath probative though taken in a deserted arbitration; and there be many cases in law where a party may have another's obligation lying beside him, and yet not one sixpence due, as Grotius says, "Ad debitum constituendum non sufficit obligatio nisi etiam et nondum sit dissoluta." THE LORDS considered his oath was taken

in no formal process, but in an extraordinary trial; and that Russel, the pursuer now, had then no tile to these debts; therefore they found it was not *res jurata* so as to assoilzie Mr Baird; for though what he swore might be true, yet the law did not authorise the judges to believe it, but he must prove the quality of his oath some other way. No 21.

Fol. Dic. v. 2. *p.* 347. *Fountainhall, v.* 2. *p.* 553.

1711. *January* 19.

Sir DAVID DALRYMPLE of Hailes, Baronet, Her Majesty's Advocate, *against* Sir GEORGE HUME of Kello, and WILLIAM BLACKWOOD, Merchant in Edinburgh.

No 22.
A party in a process acknowledging on oath that the writ he was using had never been a delivered evident, but lying by the granter at the time of his death. This oath was found probative against him, in a separate process at a third party's instance.

THE deceased Sir James Stamfield having, for onerous causes, assigned to the deceased James Scot of Bristo, the stock and bygone profits of his share in the Newmills Manufactory; James Scot tranferred the stock (which was heritable by destination to heirs, secluding executors) in favour of Sir George Hume and William Blackwood for onerous causes, reserving the profits to himself. After Sir James's death, two of his executors creditors pursued the managers of the manufactory before the Commissaries of Edinburgh, *in anno* 1689, for payment of these profits. James Scot compearing for his interest, craved to be preferred upon his assignation. The pursuers *replied*, That no regard could be had to the assignation in competition with them; because they offered to prove by his oath, that it was never delivered, but lying by Sir James at his death, and the cause happening to be advocated, in the year 1691, James Scot deponed that the assignation was not delivered before Sir James's death. Thereafter my Lord Advocate, as having right by progress to an adjudication of the stock of Sir James Stamfield's share in the manufactory aforesaid, pursued Sir George Hume and William Blackwood, as intromitters therewith, who defended themselves with the anterior translation made to them by James Scot.

Alleged for the pursuer; It being proved by James Scot's oath, that the assignation to him was never a delivered evident, and so null, the translation to the defenders falls in consequence; which oath doth militate against them, in respect their author's rights was rendered litigious by the process before the Commissaries advocated to the Lords, wherein the oath was craved two years before the translation, and emitted before intimation thereof.

Answered for the defenders; Nothing is litigious but what is *deductum in judicium*, and the process before the Commissaries concerned only what fell under Sir James Stamfield's executry, in relation to which only they could judge upon the validity of the assignation, and could not consider it with respect to the stock and heritable part of the subject assigned belonging to the defenders, which, not being then under debate, cannot be understood to have been ren-