passed at the time, and all that led to it, be able, in a great measure, to diminish the criminality, perhaps entirely to exculpate himself.

No 271.

Lord Ordinary, *Cullen*. Act. *Clerk, Gillies, Maconochie*. Agent, *W. Inglis*, W. S.
Alt. *Campbell, Baird*. Agent, *Party*. Clerk, *Menzies*.

F. *Fac. Col.* No 138. *p.* 309.

*** This case is under appeal. (1805.) See APPENDIX.

SECT. XV.

Other allegeances, how relevant to be proved.

1565. *December* 12. N. RAMSAY *against* The Laird of CRAIGIE.

No 272.
Where two processes regarded the same matter, proof taken in the one was received in the other.

N. RAMSAY pursued an action of ejection against the Laird of Craigie Ross's Heirs of Line, wherein he obtained decreet after three years dependence; and because in the principal cause, he could seek no more than the by-run profits before intenting of the action of ejection, he moved a new action for the by-run profits of the three years of the dependence of the principal action; and for proving of the said profits, he repeated *deducta in primo processu*, renouncing all further probation. *Alleged*, That no testimony in one cause, might be a probation in another by law. THE LORDS found, That in respect that the two actions were inter easdem personas, de eadem re, et eodem modo agendi, or at least that the second was accessory to the first, that he might repeat the probation out of the one process into the other.

Spottiswood, (PROBATION.) *p.* 242.

1556. *December* 5. JANET STRIVILING *against* WILLIAM MENTEITH.

No 273.
The fact, that instruments were taken in a notary's hand, was allowed to be proved by witnesses.

GIF the clame, libel, exceptioun, or ony uther alledgeance, be admittit to probatioun, the quhilk sould be provin be writ, and the partie alledgeand that the instrument, necessar for preiving of his intent, was takin in the handis of ane Notar, and as zit not extractit nor deliverit be the said Notar, he aucht and sould have letteris be deliverance of the Lordis, charging the Notar to de-

No 273.

liver the said instrument: And gif the Notar denyis him to have bene Notar thairto, it may be provin be sufficient witnessis that the samin was takin in his handis: And gif it happinis, in the time of the samin proces of probation dependand aganis him, to cum to the partie's knawledge, that ane uther man was Notar in the said matter, and that instrument was takin in his handis thairupon, the partie makand faith that the samin of new is cum to his knawledge, aucht and sould have the like diligence as is befoir expremit aganis the secund Notar beand on life; utherwayis, gif he be deid, the partie may call and persew for transuming of the prothocal.

Fol. Dic. v. 2. p. 234. Balfour, (Of Probatioun be Writ.) *No 29. p. 367.*

1584. A. *against* B.

No 274.

In an action of ejection, it was *excepted* by the defender, That he entered to the lands libelled by virtue of a decreet pronounced between him and the pursuer by certain friends, unto whom they had both referred themselves; and this he offered to prove by the same parties communers. *Replied,* That the allegeance in effect was founded upon a submission and compromit, which could only be proved *per scripta.* And so the Lords found.

Spottiswood, (Probation by Writ.) *p. 247.*

1593. *January* 22. Seaton *against* Cant.

No 275.

In an action pursued by Captain Seaton against Cant, relict of Cromwell Balfour, it was found, That it could not be proved by witnesses that Wotherspoon, alleged notary to the obligation whereupon the pursuit was founded, was witness *habilis et reputatus,* a famous and legal notary to whom recourse was had, &c.; but that the same behoved to be proved by three unsuspected instruments at the least to which he was notary, which behoved to be produced.

Fol. Dic. v. 2. p. 234. Haddington, MS. No 310.

1611. *January* 16. A. *against* B.

No 276.

Albeit a man pursuing a notary for extracting and delivering to him of an instrument, alleged concerning the pursuer, and taken in that notary's hand, can have no other probation than the notary's oath and his book; yet, if an act or instrument be taken in Court, the Lords inclined to think that it might be proved *per membra curiæ,* as the Judges, remanent clerks, and procurators, who were also famous, and more famous than the clerks.

Fol. Dic. v. 2. p. 234. Haddington, MS. No 2091.