OATH OF PARTY.

SECT. I.

In what Cases admitted.

1609. *March* 3. ELPHINSTON *against* ELPHINSTON.

No 1.

AN arbiter forced to give his oath, upon a promise made, not to decern in prejudice of one of the submitters.

Fol. Dic. v. 2. *p.* 13. *Kerse, MS. fol.* 181.

1624. *February* 25. JOHN DUFF *against* KEITH and BOYD.

No 2.

JOHN DUFF, donatar to Andrew Kelly's escheat, pursued a declarator thereof. Compeared one Keith, and Stephen Boyd, two of Kelly's creditors; and *alleged*, No declarator; because they offered to prove, that thr gift was taken to the behoof of the rebel. Boyd having recovered an incident for proving of his exception, Keith not being so wary in time was forced to refer his to the pnrsuer's oath of verity; who *alleged*, He could not give his oath; because the other had an incident running for proving of the same, wherethrough he might be brought in danger of perjury.—THE LORDS thought the probation might divide, the parties being diverse, though they were about to prove one and the self-same thing; and, therefore, ordained his oath to be taken.

Fol. Dic. v. 2. *p.* 13. *Spottiswood*, (PROBATION.) *p.* 241.

*** Haddington reports this case.

No 2.

DUFF pursued declarator of Kellie's escheat. Compeared Stephen Boyd, for himself, and Robert Keith, for himself, as having interest, because Kellie was owing just debts to them; and *alleged*, That the gift was taken to the rebel their debtor's behoof, and qualified their allegeance relevantly; which being admitted to probation, Boyd used diligence to prove by writ, and Keith not having used diligence, referred it to Duff's oath. He *alleged*, That the two probations could not be permitted, lest the probation by writ, being contrary to his oath, might bring upon him the danger and infamy of perjury: And it was farther *reasoned*, That if any one of the defenders allegeances was proved, it would elide the whole pursuit; and, therefore, desired the oath to be delayed, while the other parties' probation by writ were concluded and advised. To this was *answered*, That, in the mean time, the party might die, and so the probation by writ might perish, and that the defenders being several parties for several interests, their probations would not be confounded, nor any thing proved or not proved by the one would concern the other. In respect whereof, the LORDS found, that both the probations might proceed.

Haddington, MS. No 3034.

1626. *December* 5. SHAW *against* BALFOUR.

No 3.
A suspender exhibited a discharge, in which the charger alleged there had been clauses inserted by the suspender, who had written it, without the knowledge of the subscriber. The suspender was found obliged to depone as to this upon reference.

IN a suspension at the instance of Shaw of Knockhill against Balfour, wherein a reason being founded upon a discharge, the charger *alleged*, That the said discharge could not be respected, nor could make faith to prove the reason; because that clause therein inserted, and whereon the reason was founded, was never communed upon, nor spoken to the party subscriber, neither at the time of the subscription of the discharge, nor at any time before, but was cautiously inserted therein by the suspender, the time of the writing thereof, being all written by himself, and omitted to be read by him, he having read all the rest of the clauses thereof to the defender, and the defender being then overtaken with drink before he subscribed it, and that clause reserved unread, which he referred to the suspender's oath. This was found relevant in this same order of suspension, to be proved, as said is; albeit the LORDS thought that this was a matter of improbation, and that it ought to be quarrelled as false, by particularly proponing the allegeance of improbation; likeas others thought it of a dangerous preparative to take away writs, albeit clauses were inserted therein which were not read at the subscribing thereof, nor then communed; because he who subscribed the writ should have read and considered the contents