

No 10. be bound by that assertion of that clerk, being a clerk of a base court, who had not the power of any common notary; and that any notary's assertion would not bind a party in such a sum; 3<sup>to</sup>, That the pursuit being criminal, should have been determined by an assize, and could not have proceeded upon any other probation; 4<sup>to</sup>, That thereby no satisfaction was appointed to the party hurt. All which reasons and allegiances the LORDS repelled, and sustained the decret given by the King's vassal; but they modified ilk one of the two unlaws to twenty-seven pounds.

Act. *Bglber.*

Alt. *Henderson.*

Clerk, *Hay.*

*Fol. Dic. v. 1. p. 493. Durie, p. 12.*

1634. February 13. TAIT against DARLING.

No 11.  
Found in conformity with  
the above.

ONE Darling being convened before the Bailie of the regality of Melrose, at the instance of John Tait and the Procurator Fiscal, for wounding of the said John Tait, to the effusion of his blood; and the fact of blood and blood-wyte being referred to the defender's oath, Andrew Darling being then present in court, and refusing to give his oath thereupon, decret was given against him, convicting him, and therefore unlawing him in a particular sum, for blood and blood-wyte; which decret being suspended on this reason, that the same is a null sentence, seeing that the party is not in law holden to swear upon a criminal fact, and the Judge ought not to put it to his oath, but only ought to have tried the same by an assize, and neither by oath, nor yet by witnesses; for witnesses might have been produced before the inquest to inform them, but the judge could not try it by witnesses; and the most that the judge could do in such a case, was to unlaw for contumacy, and not for the fact;—THE LORDS sustained the decret, notwithstanding of this reason, and found, it might be tried by the party's oath, (or by witnesses, as some thought,) seeing the party was personally present; and for refusing to give his oath, they found the sentence well given; for he was not pursued for life or member, to incur any criminal censure therefor, but only for a pecunial unlaw; which being to that end, might be tried by his oath; and in facts clandestinely done in the night, or where there are few or none to qualify the same, trial by the parties oath, with no reason ought to be refused, as is usually done before the Lords of Secret Council.

Act. *Trotter.*

Alt. ———.

*Fol. Dic. v. 1. p. 493. Durie, p. 704.*