1634. *February* 13. EDGAR *against* DARLING.

No 10.
A person was held as confest for not deponing upon reference as to a battery.

ONE Edgar convened Andrew Darling before the Bailie of Melross, for blooding of him; the which Bailie having referred the doing of the deed to the defender's oath, being present; upon his refusing to swear, decerned him in L. 50 for the blood, and as much for the blood-wit. Edgar having raised letters and charged Andrew, he suspended on this reason, that the decreet was null, in so far as it was given against him as holden *pro confesso*; because all such deeds ought to be tried by an inquest, and not referred to the party's oath, being a criminal matter. *Answered*, Albeit it be the custom to try such deeds by an inquest, yet it is as lawful to refer the same to the party's oath, where the deed is clandestine, and nobody present at the doing of it, specially seeing it imports neither life nor limb.—THE LORDS found the letters orderly proceeded.

Fol. Dic. v. 2. *p.* 13. *Spottiswood*, (BARONY, *&c.*) *p.* 26.

*** See Durie's report of this case, No 11. p. 700. *voce* JURISDICTION.

1639. *March* 30. WEMYSS *against* MAITLAND.

No 11.
It was referred to a party's oath, whether he had, at subscribing a bond, affirmed himself to be major.
He deponed, that he did not remember.
Found, that he could not be called upon to depone again more particularly.

MR JAMES WEMYSS of Lathocker's son, seeking reduction of a bond, granted by him to Mr Richard Maitland, upon reason of his being then minor; and the defender *alleging*, That, at the subscribing of the bond, the pursuer affirmed, and protested, that he was major; which exception being found relevant, the defender referred the same to the pursuer's oath, who, by his oath, deponed, that he remembered not if he did then affirm or protest himself to be major or not; and further deponed, that he could not declare to his knowledge, so far as he could remember: At the advising of the process, it being contraverted by the defender, that, seeing the pursuer had not deponed upon the exception *positive*, and had not denied it expressly, being *in facto proprio et recenti*, which binds him in law to answer determinately, and not to say nakedly, that he remembers not; that, therefore, he ought yet either to depone *affirmative* or *negative*, or else the exception ought to be found proved. THE LORDS repelled the objection, and found the oath, as it was conceived, sufficient to condemn the defender, for the pursuer could not be compelled to depone further, than as he remembered; and having deponed so, the same was found enough, and was found not to prove the exception.

Act. *Stuart.* Alt. *Gilmor.* Clerk, *Gibson.*

Durie, p. 887.