

No 1.

sons, not to urge their formal deponing, but it would be *pessimi exempli* to authorise it by a decision. THE LORDS wished the pursuer might dispense with the formality of his oath, but, by plurality, found they could not do it; and therefore held him as confessed, if he refused to depone in the legal manner introduced by the laws and customs of this nation. I find, Bouritius De officio judicis, cap. 9. of the same opinion in the case of the Anabaptists, and that the form by which the Jews swear is, by laying their hand on Moses's Decalogue, and repeating the third commandment, non assumes nomen Domini in vanum. Grotius De jure belli et pacis, lib. 2. cap. 13. § 12. De jurejurando, reproves Duarenus for allowing Christian Judges to take the oaths of Pagans and Mahometans in their superstitious manner. But Zieglerus, in his notes and animadversions on Grotius, excuses Duaren, and shews cases where the public good of discovering some actions may plead for that dispensation. See a parallel case, apud Anneæum Robert. Rer. judicat. lib. 1. c. 11.

*Fol. Dic. v. 2. p. 294. Fountainhall, v. 1. p. 813.*

1707. *March 20.*

Mr EDGERT and ABRAHAM EDINS Merchants in Rotterdam, and PATRICK HOME Writer to the Signet their factor *against* ROBERT HUNTER Merchant in Edinburgh.

No 2.

A declaration upon faith and honesty, given in Holland, by Anabaptists, (whose religion does not allow them to take an oath) sustained as equivalent to an oath.

Mr ABRAHAM and Edgert Edins and their factor having pursued before the Sheriffs of Edinburgh Robert Hunter merchant there, for payment of 430 gilders as the balance resting for some goods sent to him in the year 1696, he offered to prove by the pursuers' oaths, that the foresaid goods were sent to him to be sold and disposed of on their risk, which he had done, and a part of the price could not be recovered, by the buyer's proving insolvent; which ought to be allowed, Upon which a commission being granted to Alexander Carstairs, factor at Rotterdam, to take the oaths of Messrs Edins, who are Anabaptists; they first made faith before the Skepin in Rotterdam, and then before Mr Carstairs, declaring upon faith and honesty (their religion not permitting them to take an oath) that they gave no orders to the defender to sell the goods. Which commission being reported to the Sheriffs, and advised, they found it not proved that the defender was authorised to dispose of the goods, and therefore decerned. Mr Hunter, when charged on the Sheriffs' decret, suspended for this reason, that the Sheriffs had committed iniquity in sustaining the chargers' declarations upon faith and honesty in place of depositions upon a point referred by the suspender to their oaths; because, *1mo*, This is inconsistent with the commission, which only gave warrant to report the chargers' oath; *2do*, It is expressly contrary to the laws of this nation, which dispense not with the oaths of any person, whatever opinion they may be of;

360. The power of dispensing with the terms of an oath is magis imperii quam jurisdictionis, at least falls not under the power of an inferior judge; and if such reports were allowed, all foreigners would plead exemption from taking the oaths.

No 2.

*Answered* for the chargers; It is not the question what way Quakers or Anabaptists must depone by our law; for the chargers live in Holland, and by the law there such declarations are sustained. And they who refer any thing to the oaths of Jews, Mahometans, Persians, Papists, Quakers, Anabaptists, Indians, and Heathens, must take it in the form their religion allows; otherwise there could be no trading or commerce maintained with them.

THE LORDS sustained the declaration upon faith and honesty as equivalent to an oath, and found the letters orderly proceeded.

*Fol. Dic. v. 2. p. 295. Forbes, p. 157.*

1707. November 20.

POOR BARBARA HODGE *against* BARTHOLOMEW GIBSON, and WILLIAM MILLER,  
Gardeners in the Abbey of Holyroodhouse.

No 3.

THE said Barbara being served heir in general to one Margaret Hunter, her aunt, whom she alleges to have been heritor of a tenement of land in the Westport, now belonging in property to the society of Quakers, and used by them for their meeting-house; she pursues a reduction against the said Bartholomew Gibson and William Miller of their right to these lands; and they having produced a sixty years progress in Horner and Kincaid, their authors' persons, to exclude her, she *replied*, That Horner was denuded in favour of Hunter, her predecessor, and offered to prove it by Miller's oath, that he had the writs instructing it in his hands; and he refusing to depone, in respect of his profession, the LORDS first allowed search to be made in the town's register of sasines, if there were any vestige of infinement in the said Hunter's person; and a testificate being returned that there was no such thing to be found in their books, it was *alleged* for Hodge, the pursuer, That the act of Parliament ordaining royal burghs to keep a register of sasines was late, only in 1681, and Hunter's right was long before that time, and therefore craved, that Miller might be holden as confessed for not deponing. For whom it was *alleged*, That this was nothing but a plain draught and contrivance to ruin them of that principle and persuasion, who had no freedom to swear in the common form now received, as being prohibited by our Saviour in the 5th of St Matthew; for, as it was evident she had no shadow of right to their house, her allegiance was only calumnious, purely taking advantage of their tender conscientiousness to oaths; and though she offers to give her oath of calumny, that what she alleges she believes to be true, yet small weight is to be laid thereon, in one of

A Quaker declaring solemnly, as in the presence of God, and as he should answer to God at the great day, without adding the words, 'By God himself,' sustained as equivalent to an oath in common form.