

were not allowed to a defender, except in singular cases, much less to a suspender, but here it is the charger who resiles.

This being represented to the Lords, as if it had been to the suspender, who craved a new term to prove his allegiance, they would not grant a term, but declared they would grant warrant to a macer summarily to cite the witnesses being in Edinburgh or Leith.

*Stair, v. 2. p. 455.*

No. 77.

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1676. November 30. DRUMELLIER against EARL TWEEDDALE.

It was objected against a witness, That he was *testis domesticus*, being servant to the defender; at least having been his servant the time of the citation: Whereunto it was answered, That he was not presently his servant; and though he was his servant the time of the citation, he might now be a habile witness: The reason, why servants cannot be witnesses in behalf of their masters, ceasing in this case, viz. That their masters might have influence upon them; and that they may declare in their favours, out of fear, to be put out of their service: And as to the pretence, that it is presumed, that the defender put the witness out of his service, of purpose that he might be used as a witness, the same doth amount only to *præsumptio hominis*, which *cedit veritati*: And *animus* and design not being proveable, but by the oath of the party, the defender and the witness were free to declare, that he was not removed out of the defender's service upon the design foresaid; and it was more strongly to be presumed, that neither the defender, being a person of quality, nor the witness, would perjure themselves.

It was farther urged, that the witness was to be used upon a paper that had been produced after the intending of the cause, and for improving the date of the same; and that he was removed out of the defender's service before the production of the said paper; so that he could not have that prospect and design to use him as a witness, and that he was removed upon the account foresaid.

The Lords, before answer, ordained, that the time of the production of the said paper might be tried.

Reporter, *Redford.*

Clerk, *Gibson.*

*Dirleton, No. 391. p. 191.*

No. 78.  
*Testis domesticus.*

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1677. January 24. DRUMELLIER against E. TWEEDDALE.

It being objected against Major Bunting being led as a witness for Drumellier against the Earl of Tweeddale, that he had given partial counsel, at least had concerned himself as a party for Drumellier, in so far as he had been at consultations with him in relation to the process;

No. 79.

No. 79. The Lords found, That he could not be a witness, though he was a person of integrity above exception ; and that he was free to declare that, at the said consultations, the point whereupon he was to be used as a witness was not in consideration.

Clerk, *Gibson*.

*Dirleton, No. 441. p. 215.*

1677. *February 8.*

LUDOVICK STEWART and Others, *against* THEODORE MONTGOMERY.

No. 80.  
A witness renouncing his interest in the cause may be received.

In an action for proving the tenor against Theodore Montgomery, there being one George Montgomery cited as a witness, it was alleged, that he could not be received because he might tyne and win in the cause, in so far as he had a right of wadset of a part of these same lands of Auchenhead, granted to him by the Earl of Eglintoun. It was answered, That his right was only a wadset, and besides his infetment, he had sufficient caution in case of requisition, and so was in no hazard to win or tyne in the cause. The Lords did find, that unless he would renounce his right of wadset, and take him to his security by cautioners, he could not be received a witness, seeing without his renunciation he kept it still in his option to make use of his infetment, or to require and pursue the cautioner.

*Gosford MS. p. 634. and No. 956.*

1678. *July 18.* CALDWELL *against* CALDWELL, and A. *against* ROLLO.

No. 81.

Being queried, If a curator, after expiration of his office, might be witness where it tended to his exoneration, since he never intromitted, and was alike sib to both ; the Lords resolved he might.

In another query, If a tutor could be admitted to prove the passive titles against the Lord Rollo, whose pupil had the like action on the passive titles ; the Lords determined negative, except *in penuria testium*, and then to be received *cum nota*.

*Fountainhall MS.*

1678. *November 27.*

TAIT and His WIFE *against* FORREST and His CAUTIONER.

No. 82.

A cautioner for a taverner being pursued for what she was wanting in her account of wine, alleged that her mistress by a back-door had at several times drawn off the wine ; which being found relevant, witnesses were adduced, and amongst