

1682. *January.* HAY of Murie *against* Phinhaven.

No. 91.

The lands of Kinmonth being quarrelled as falling under recognition, and there being a joint probation, the defender, the heritor, adduced one ——— as witness; against whom it was objected, That he was creditor to Kinmonth, who had nothing to pay his debt if the lands fell under recognition; and consequently the witness would tine or win.

The Lords repelled the objection against the witness, his interest being but consequential; and it did not appear but that the debtor might have objections against the debt, which the witness had assigned to his own son, though after citation, and now Phinhaven was heritor and defender.

Harcarse, No. 783. p. 221.

1682. *February.* LADY CRUMSTANE *against* SIR JAMES COCKBURN.

No. 92.

It being objected against witnesses, That the adducer had called them to his chamber, and showed them an unsubscribed rental of the lands, whereof the quantity of the rent was to be proved; and so they were instructed what to depone; *2do*, One of the witnesses demurred to swear, that he was worth the King's unlaw.

Answered: The showing of a rental was no instructing, seeing they were to depone on their knowledge; *2do*, The witness did depone, that he was worth the King's unlaw.

The Lords repelled the witnesses as instructed.

It being objected against another witness, That he possessed an acre of grass without a tack.

Answered: He was a merchant of a greater stock and trading, and so could be under no influence upon the account of that acre of grass.

The Lords repelled the objection against this witness.

Harcarse, No. 784. p. 221.

1682. *February 24.* FLOCKART *against* LORD ROLLO.

No. 93.

It being objected against witnesses adduced in a process for proving the passive titles against the defender, that they were creditors to his father, and so must tine or win by the probation, in so far as the proving of the passive titles would make the defender represent his father, which would secure the debts due to the witnesses.

No. 93. Answered : The like objection was repelled, January, 1682, in the case of Hay of Murie against Phinhaven, No. 91. p. 16683. ; and here the witnesses are secured by wadsets from the defender's father, and they are the defender's own people, viz. his bailie, his grieve, and his clerk, who will not readily depone against their master in any thing that is not true ; besides, intromission with heirship is of difficult probation.

The Lords repelled the objection, February, 1682, and thereafter adhered to their interlocutor.

Harcarse, No. 785. p. 221.

1683 December 1. MONTEITH against MONTEITH.

No. 94.
Women ad-
missible as
witnesses in
the occult
crime of
adultery.

On a bill given in by the Lady Monteith against the Earl, who was pursuing a divorce against her before the Commissaries of Edinburgh for her adultery, and offering to prove it by women witnessees, and she complaining of this as illegal ; the Lords on the Register's report ordained this point to be heard in their own presence, if women could be received as habile witnesses *in causa matrimoniali, ad ejus dissolutionem?*

1684. January 1. & 2.—The bill of advocation presented by the Countess of Monteith against the Lord, in the case mentioned 1st December 1683, was this day debated in presence and decided against her ; and the Lords found that the Commissaries had done no wrong, and therefore allowed them to take women as witnesses to prove her adultery, providing they be of integrity and above all exception ; and remitted it back to the Commissaries.—Registers were sought, and about fifty processes of divorce were found recorded since the reformation of religion, (I believe none will doubt but there have been more adulteries than fifty committed since that time,) and in none of them were women adduced as witnesses ; which though a negative argument, yet concludes this much, that there can be little necessity urging us now to allow such a probation, which has not been used in 120 years space ; and though the edict *de testibus* be *permissorium*, admitting all except such as are secluded and prohibited, yet we can subsume that women are rejected a *testificando* with us, Cap. 34. statut. 1. Roberti I. And Craig, Lib. 3. feud. Dieg. ult. shows our masculine nation hath always reprobated the testimony of women witnesses, in this imitating the feudal law, Cap. 34. Lib. 2. feudor. where feminine testimonies are reprobated ; and it is remarkable that Gothofred in his notes there, says even women among the Romans were repelled *a testimonio dicendo in divortii*, which was *actus legitimus et sollemnis* with them ; and this comes precisely home to our case in hand. The Emperor Leo also, among his equitable laws, by Novel. 48. discharges women from witnessing. The canon law does also expressly debar them as inhabile witnesses. See also Mascard. de probat. voc. femina et matrimonium ; et Phil. Decius ad L. 2. D. De Reg. jur.