

bentur pro convictis, and being infamous they were not to be credited ; for to extenuate their own guilt they might load innocent men, and say they did it by their instigation and order. Replied, This was only in order to discover the falsehood of the writ, but not to punish Barclay the principal forger. The Lords demurred on this objection, considering the witnesses had acknowledged their own guilt, and so, if remitted to the Lords of Justiciary, could not but be condemned, and being under the terror, impression, and fear of death, were not habile witnesses, unless the same were removed by a remission, as was practised in Salton's forfeiture. Upon which scruple of the Lords, the King's Advocate superseded to insist for some time. Mascardus thinks, that *socii criminis* are habile in criminibus occultis ubi est penuria testium. As to the degrees of accession in falsehood, and that where the *pena* is *infra mortem*, the Lords inflict it themselves, without remitting to the criminal court, see 14th July 1638, Dunbar, No. 132. p. 7416.

Fountainhall, v. 2. pp. 735, & 744.

1698. June 15. DUCHESS of GORDON against The DUKE.

No. 113.

In a process of aliment at the instance of a wife against her husband, she having separated on alleged maltreatment, women were found habile witnesses in such cases.

Fountainhall.

* * This case is No. . p. . voce HUSBAND AND WIFE.

1698. November 23. FLETCHER against KENNEDY.

No. 114.

Rankeilor reported an objection against a woman-witnesses, adduced in the process pursued by Fletcher of Aberlady against Hugh Kennedy of Beltersan, for repayment of 13,000 merks as the price of his wife's liferent in the lands of Aberlady, on this ground, that he *dolose* induced the curators to the bargain, by concealing his wife's condition, who had then a cancer in her breast, whereof she died in nine or ten months after the transaction : And the Lords having allowed a probation, before answer, as to her condition, the Lady Kilshire was adduced as a witness ; and they objecting, that women were inhabile in law, except in some special circumstantiate cases, and are expressly rejected by the statute of King Robert, and there is no *penuria testium* here, the whole town of Ayr, where she died, seeing her during that ten months ordinarily at kirk and market ; answered, This was a latent fraud and concealment of a cancer in her breast, that could not be so well known to any as to women ; and lately, in domestic cases, women have been admitted, as between the Duke and Dutchess of Gordon, and between Tolquhoun and Lentush, and in acts before answer, all witnesses use to be received. Some were for taking her *cum nota* ; but the Lords admitted her simply without any exception.

Women receiveable as witnesses *ubi est penuria.*

Fountainhall, v. 2. p. 17.