1701. *June* 24. ERSKINE *against* ERSKINE.

No. 120.
Effect of taking money from an unknown person, with a recomendation of one of the parties.

In an action pursued by John Erskine and his mother, liferentrix of some lands, against Erskine of Pittodry, his eldest brother, two witnesses being adduced to prove his possession, it was objected against them by Pittodry, that they could not be received, because they had got money in the cause; and they being interrogated thereupon, confessed, that when they were coming from home towards Edinburgh to be witnesses, in obedience to the citation they had got, there came a man unknown to them, and gave each of them half a dollar, and said he wished John Erskine, the pursuer, well, and hoped they would do the like; which was urged as sufficient to cast them from being witnesses. Answered, They were both tenants to Pittodry, the defender, and only knew best the point of possession to be proved; and this was done of purpose to deprive the pursuers of their sole mean of probation, and it is presumed the person who gave them the money has been sent of purpose by Pittodry to make them inhabile, *et suus dolus nemini debet prodesse*; and the tenants do so far collude with their master, that they are willing to be cast, that so their master may win the cause. Some urged, though this looked very like a contrivance, yet it could only be proved by Pittodry's oath, that he sent that person or knew of it. Others thought the witnesses not ingenuous in that part, that he was an unknown man, and that they should yet be more strictly examined anent him, and might be threatened with imprisonment if they would not tell, seeing their taking of money from one they knew not was a fault, not being given for their expenses, but to favour one of the parties: But the Lords considered, if such a practice, if past by, might lay a foundation to cast witnesses, and the party using this stratagem may gain the cause, therefore they appointed the Ordinary to make farther inquiry for discovering if there was any trick in the case, and then they would determine whether to reject them, or to receive them *cum nota* or simply; seeing the money given was but small and inconsiderable, and there might be a *penuria testium*, in the case.

At last the Lords received them *cum nota*; but in respect of their taking money from an unknown person, with a recomendation of one of the parties, and an insinuation how to depone, they put them both in prison.

Fountainhall, v. 2. *p.* 116.

1701. *June* 27. HOPE *against* GORDON.

No. 121.
Ultroneous witness.

In the process of sale of the estate of Balcolmy, and the mutual complaints of battery betwixt Sir William Hope and Mr. William Gordon; Sir William adducing a witness, it was objected, against him, that he as ultroneous, in so far as it was offered to be proved, that on a letter or message sent to hm by Sir William or his Lady, he came from Fife to Edinburgh, in order to receive a citation; and

therefore ought to be rejected. Answered, An ultroneous witness is he who compears before the Judge uncited, and offers himself ready to depone, or instigates the pursuer to insist, on the assurance he shall be a witness: But so it is, this party now adduced did not compear before the Lords till he was cited by a messenger to bear witness in the cause. The Lords found he had shewed too great earnestness in coming to Edinburgh on their call, without any legal citation till he came there, and for this cause rejected the witness. No. 121.

Fountainhall, v. 2. p. 116.

1701. *June* 16. SHARP *against* MURRAY.

No. 122.

George Irving being adduced a witness in the process Sharp of Hoddam against Murray of Brockelrig, and having deponed, he gives in a bill to the Lords, pretending some things had escaped him, which now burdened his conscience, and therefore craved to be re-examined for exonering thereof. The Lords refused the bill; for by his oath there is a *jus quæsitum* to the party which the witness cannot retract. If one has not been interrogated fully, or has not deponed distinctly, he may be re-examined, but it must be at the desire of the party adducer, and not upon the witness' own application, who may be suborned to retract what he has said, and so infer perjury.

Fountainhall, v. 2. p. 120.

1701. *December* 17. ALISON *against* GORDON.

No. 123.
Where the witness has a direct interest in the cause.

In a cause betwixt Alison and Peter Gordon merchant in Aberdeen, about a bill of exchange, improbation being proponed against it, and each party being allowed to improve or astruct, Mr. Gordon adduces one Wilson as a witness; against whom it was objected, That he was inhabile, being cautioner for Mr. Gordon in the suspension. Answered, *Non relevat*, because the principal is more than sufficient, and there is a posterior suspension wherein another cautioner is found, and so he is upon the matter exonered and relieved. The Lords sustained the objection, and repelled the witness. Then Gordon offered to consign the sum contained in the suspension, which gave him effectual relief, so he could no more lose or win in the cause, which reason did cast him formerly. Answered, This was a good deed or gratification, and a sort of corruption—I will relieve you providing you depone. Replied, Though such a paction between parties might be liable to suspicion, yet when it is done *palam et auctore prætore*, there can be no corruption, especially where one is cautioner for another that is uncontrovertedly responsal: If there were difficulty in recovery of his relief, there might be more ground of suspicion. The Lords found he might be simply received as to the producing of writs that *comparatione literarum* may serve in the improbation; but as to his giving his judgment and opinion upon the hand-writ and subscription, they admitted him only *cum nota*.