

because he did not know then that the bill was paid, Forbes not having given him advice thereanent till afterwards, and such letters cannot be now obtruded when falsehood is proponed, for that is omnium exceptionum ultima; and though Forbes was then insolvent, yet he might pay this bill by compensing it with a balance of trade that had been betwixt Alison and him; and Forbes's denying his subscription is of no moment; for, *1mo*, He is ultroneous, there being no warrant nor commission for his deponing; next, it is easy to get a knight of the post at London to personate any man; so that *non constat*, that it is this Forbes who deponed; *3tio*, His own letter sent down with the bill cancels it; and Waterton, his own brother, depones on the verisimilitude of his subscription; and there can be nothing more lubric and conjectural, than to find a writ false on the mathematical points of the longitudes and angles of letters and subscriptions, seeing, in uncontroverted ones, there occurs evident diversity every day, according to the pen or situation of the hand or the ink, and the like circumstances; et in pari casu absolvendus reus, et tutius est decem nocentes dimittere quam unum innocentem damnare. The Lords thought there were presumptions here to infer suspicion, and farther enquiry; but, by an unanimous vote, found they did not amount to prove the bill false, or Gordon the falsarius; but allowed the parties to be farther heard, how far the qualifications will infer the bill not to be a probative writ, so as to be the ground of an action either for payment, or to found a compensation.

No. 123.

Fountainhall, v. 2. pp. 129. and 147.

1703. July 13.

COCHRAN against CUNNINGHAM.

Mr. William Cochran of Kilmarnock pursuing Robert Cunningham, the factor of Newark, for count and reckoning, and adducing one James Sclater to be a witness of his intromission with a wood, and some grass; it was objected, That he was his bowman and moveable servant; and the Lords, the last winter session, found him not receivable: Since that time, Kilmarnock resolving not to continue his bowery, he dismisses him from his service, and brings him in of new to depon. It was objected against him, *1mo*, He was ultroneous, and showed too much willingness and concern to depon in this cause. Answered, The witness being brought in upon a caption, no fault could be imputed to him. Replied, Being once cast, he could not be adduced in that cause without a new special warrant from the Lords. Duplied, The cause of his inability ceasing, viz. his being bowman, his capacity reconvalesced, and so he might be lawfully adduced. The Lords found the caption purged his being ultroneous, but thought he could not be adduced without a new warrant; but the material difficulty lay in this, that a master had no more ado but to put away his servant where he had been rejected on that head; and then seek to have him received; and who knows, but after his deponing he may take him back again? so the preparative is *pessimi exempli*. Answered, *1mo*, However this might be dangerous in servants or tenants, yet.

No. 124.

A hired servant found admissible after being dismissed.

No. 124. there was no hazard in a bowman, who is less exposed to influence than other menial domestic servants ; 2do, Kilmarnock, the adducer, was willing to give his oath, that he had not put him away *eo animo* to capacitate him, but because he had no more use for him, and that he was a necessary witness ; and Sclater, the witness, was ready to deponè there was neither design nor concert betwixt his master and him. The Lords, in this special case, allowed him to be received, but appointed him to be called on a new citation. Some were only for taking him *cum nota*, because they thought it near to the case of a moveable tenant rejected from witnessing on that head, and his master giving him a tack with design to habilitate him ; which would not be sustained.

Fountainhall, v. 2. p. 186.

1704. July 11.

STIRLING *against* HAMILTON.

No. 125.

A cause was advocated from the Commissaries, who had admitted a father, brothers, and sisters as witnesses, in proof of a private marriage.

Fountainhall.

* * * This case is No. 15. p. 372. *voce* ADVOCATION.

1705. January 5.

ANNE CHALMERS *against* ALEXANDER BROWN, Servant to the DUKE of QUEENSBERRY.

No. 126.
Women witnesses in matters regarding marriage.

Anne alleging she was lawfully married to the said Alexander, he raises a process of scandal and defamation (called by the English lawyers a libel of jactitation) before the Commissaries of Edinburgh, to hear herself discharged from claiming him to be her husband, and a declarator, that he was a free man, and at liberty to marry whom he pleased. To obviate this, she raised a counter-process of adherence, and offered to prove their marriage, and that he owned her for his wife since ; and that she bore him a child, which he caused baptize by the curate at St. Martin's in London, and registrated as lawfully begotten ; and produced a testificate under the hand of Mr. James Cruickshank, Minister, bearing that he had married them in August, 1700 ; and craved he might be examined on the verity of what he attested ; and likewise she adduced one Christian Godskirk who was present at the celebration of the marriage, and craved that both she and the minister might be examined thereupon. Answered, As for Mr. Cruickshank, he has taken such latitudes in-giving antedated testificates in sundry cases of marriage, that no trust can be given to his testimony ; and for canvelling the faith of this produced by Mrs. Chalmers, they produce a bond subscribed a year posterior to the testificate