

No. 76.
bed by a
mother-in-
law to a
daughter-in-
law, who liv-
ed under the
same roof.

longing to the defunct, and his heirship falling to the defender as heir, which is worth 600 merks. Compearance was made for the pursuer's mother, who alleged that the bed belonged to her, and was lent by her to the defunct her good-son, who dwelled under the same roof with her, and had been only a short time in his possession, which she offered to prove by the oath of her daughter, the pursuer, and some women servants. It was answered, That in moveables possession presumeth property; and it is acknowledged that the defunct died in peaceable possession of this bed which was in his house, and not in his good-mother's family; and albeit the allegiance of lending the bed be relevant to exclude the presumptive right of property, yet it must be proved *habili modo*, by habile witnesses, and not by women. It was replied, That the matter was domestic, in which women witnesses are adhibited in important cases, as that a living child was born, and the property being only by presumptive probation, any positive probation to the contrary is sufficient. It was duplied, That albeit women be admitted witnesses at the bearing of a child, where men cannot be present, they were never admitted in any other civil process.

The Lords found the reply of lending the bed relevant to be proved by habile witnesses, but refused to admit women witnesses.

Stair, v. 2. p. 355.

1676. July 20.

LEITCHES *against* LOCH-HEADS.

No. 77.
Probation by
witnesses
being craved
by a suspen-
der resiling
from the
charger's
oath, warrant
was granted
for summon-
ing sum-
marily such
witnesses as
could be got.

There being a contract betwixt Leitches and Loch-heads, whereby the Leitches were to set up a work for weaving of ribbons, and to teach Loch-head's son that trade, and Loch-head was to furnish a house and materials, and the Leitches were to have the fourth part of the profit from their work; Leitches having charged upon the contract, insisted upon damage and interest, because Loch-head had not performed; which being referred to Loch-heads' oaths, they compeared to depone; but Leitches resiled from their oaths, and offered to prove by witnesses their damage. It was answered for Loch-heads, That having resiled, they behoved to instruct instantly, or otherwise every pursuer might vex the defenders by attending at two terms, the first being assigned to take their oaths, and when they appeared to depone, resiled, and taking a new term to prove; and therefore when any party resiles, they must instantly verify by writ, or by witnesses, to be called summarily by a macer. It was replied, That pursuers are not supposed to delay themselves, or to crave defender's oaths to vex them, but it were of advantage to justice, that pursuers might resile when they saw defenders ready to depone, who seldom compear to confess, but either suffer themselves to be holden as confessed, or at best to give a qualified oath, and would not be too ready to qualify the same if they knew the pursuer might resile, and take a time to prove; and though this

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.

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.

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.