

tamentary witnesses being appointed to be examined, David Stuart, town-clerk of Rothesay in Bute, as writer thereof, and also one of the witnesses to it, being cited by the said James, it is objected against him by Helen the pursuer, that he cannot be admitted, because he is a legatar in the testament. Answered, He is most necessary and habile, being adhibited both as writer and witness, and his legacy is mean, being only fifty merks, after all the other legacies are paid, and the defunct's stile-book. Replied, law considers only whether a witness may tine or win in the cause, and has not deferred the quantity; and it is probable he will be concerned to support the testament, whereas, if it fall, he gets nothing. The Lords found the party could not adduce him; but if they saw necessity *ad informandam iudicis animam*, they reserved power to themselves *ex officio* to examine him. By the Roman law a legatary might be a witness in the testament where his legacy was left, and consequently might be examined thereupon, § 11. Institut. De testam. ordinand. For they considered the affair was *cum hærede et non cum legatariis*; but Vinnius thinks it a better reason, that there being seven witnesses requisite to a testament *jure civili*, there could be small ground of suspicion though one of them was a legatar, for there were six beside; which reason will not hold now, where, by custom imitating the canon law, a testament before two witnesses is sufficient, and a valid probative writ by law, which makes it now reasonable that a legatar should not be a habile witness, *testis in causa propria nemo idoneus*.

Fountainhall, v. 2. p. 67.

No. 117.

1700. July 23.

ERSKINE against SMITH.

No. 118.

Erskine of Pittodry pursues a declarator of thirlage and abstractions against Smith of Inverramsay; and being allowed to prove the quota of the multures and other duties, he cites Anna Elphinston, spouse to the said Smith, as she who, *tanquam præposita negotiis mariti*, paid the same, and knew the quantity best. She and her husband, by a bill, reclaimed, 1<sup>mo</sup>, That it is against the natural tie and reverence to adduce a wife as witness against her husband, the near relation exeeming her therefrom; 2<sup>do</sup>, A wife, by her oath, can fix nor constitute no debt against her husband, The Lords inclined to think she could not be adduced a witness, if her husband reclaimed.

Fountainhall, v. 2. p. 105.

1700. July 23.

DRUMMOND against ALEXANDER.

No. 119.

Mary Drummond, pursuing her father Doctor Alexander, for an aliment, on the account of his severity in beating her; and she having cited the Doctor's son to witness against his father, it being *in crimine privato et domestico*, which could not be otherwise proved; yet the Lords declined to receive him, because parents and children, and such near relations, are not so much rejected *à testimonio*, as excused from bearing witnesses *ob reverentiam personarum et metum perjurii* following thereon, as appears from L. 3. § 5. et L. 9. D. De testibus.

Fountainhall, v. 2. p. 105.