

1709. November 24.

A. against B.

Upon report of the Lord Cullen, an objection against John Mitchell, servant to my Lord Elphingston, his being a witness, that he was not worth the Queen's unlaw, being referred to his oath, and he deponing that he could not tell, because he had some debts, albeit he had effects to the value of £10 Scots; and it being suggested from the Bar, that he had £5 Sterling of fee; the Lords desired the Lord Ordinary to interrogate him, If he had a fee or a trade? for they were of opinion, That if the witness had a fee or a trade, though he had not a sixpence of real effects, he might be sustained; and if he had neither fee nor trade, the Lords desired him to be interrogated, If he believed that he was worth £10. ? and if he should say, That he did not believe it, the Lords were clear not to believe it neither, because men commonly *sperant plus esse in bonis*; but the objection must be instantly verified.

Forbes, p. 355.

* * See the first part of Fountainhall's report of No. 138. *supra*.

1709: December 7.

KILMAHEW and KILMARONOCK *against* CUNINGHAM and HOUSTON.

Robert Cuningham, late factor on the estate of Newark, being found debtor by his intromissions in £20,000 Scots after count and reckoning, and Sir John Houston being his cautioner, they, to compensate this great balance, founded upon a bond granted by Sir George Maxwell of Newark for 17,800 merks blank in the creditor's name, and now in Robert Cuningham's hands, and so presumed his. This startling Kilmahew and Kilmaronock, they raised a reduction and improbation of it upon sundry presumptions, that it is dated *in anno* 1670, and so within a year of prescription, and never heard it till now; that Houston of Park, the first haver of it, was a very poor man, and Newark the debtor, then and long after both solvent and able, and yet never demanded; that it is blank to this hour, and has been signed on some design that never took effect; and is written on a single leaf of paper, which a bond of that importance never used to be; and is quoted on the back by a recent hand; and Robert Cuningham being factor to that estate of Newark had easy and frequent access to the papers and charter-chest where it was lying, and might get the bond that way. Kilmaronock, after raising of his summons, applied to the Lords for examining sundry old persons on his indirect articles and presumptions to redargue the bond, to lie in retentis, it being in *retam antiqua et post tanti temporis intervallum*; which the Lords granted; but his probation not coming up to a full discovery, he applies for a second diligence against new witnesses, to put his presumptions against this bond in a full light. Against which it was objected by Robert Cunningham and Houston, That they

No. 139.

A witness being under fee, or having a trade, may be sustained, although he have nothing in real effects. But if he have neither fee nor trade to trust to, and being interrogated, If he believes himself to be worth the King's unlaw? shall say that he does not believe it; such a one ought not to be admitted a witness.

No. 140.

Servants to relations found not receivable as witnesses.

The Lords refused to re-examine a witness upon special interrogatories, he having already deponed *negative* to the general.