1709. *November* 24. A. *against* B.

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.

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.

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.

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 compense 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 re tam 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 Houstoun, That they

No. 140. opponed their clear liquid bond, where the verity of the subscription was not so much as controverted, but only some light, frivolous, and empty suspicions, mustered up to elide and enervate the force and efficacy of it; for if witnesses cannot take away a bond of £100 Scots, nor instruct a debt above that sum, how shall a 17,800 merks bond be subjected to that uncertainty; and the keeping bonds blank was very frequent and useful at that time, for they passed from hand to had in commerce like bills and bank-notes, till they were prohibited; and the poverty of the creditor with the debtor's solvency import nothing, for there was no title as yet made to the bond, and Robert Cuningham had to do with the heirs, and durst not discover the sufficiency of the debt, lest they had stood too high in their demands when he came to transact with them for their shares in the bond; and its being on a single half sheet is of no moment: Where was ever a bond annulled for that? and that Robert Cuningham got it out of the charter chest of Newwark is a mere fiction and dream, and presupposes him a thief and villain without ground, for *nemo præsumitur malus* till it be proved; and it is both irregular and extraordinary to seek a second probation to lie *in retentis*, and was refused in Adolphus Durham's case against Fleming and the Earl of Eglinton; and now when the production is satisfied, and avisandum made, Kilmaronock may procure a warrant to discuss his reasons of reduction in the Outer-house, and so get the relevancy determined, and an act of litiscontestation made; and then his probation will come formally and legally in; and there is no room for extraordinary remedies *ubi extat et competit ordinarium*, as it does here: Yet the plurality of the Lords thought this cause of that intricacy, that it could not be discussed in the Outer-house, but behoved to be heard *in præsentia*, which would require a time ere it could come in by the course of the roll, and so Kilmahew's probation might perish; therefore they ordained him to give in a condescendence of the persons craved to be examined, and the points they were to be interrogated on, which being done, they allowed a second diligence, but with this caution, that it should only be for points whereupon the former witnesses had not deponed. Some thought this a great extension of the Lords' *officium nobile*. Another thing occurred in this process. Houston of Park's children took out an edict, before the Commissaries of Edinburgh, to serve themselves executors to him, to establish a right to the bond; and an advocation being obtained of that service, they took out another edict to confirm before the Commissaries of Glasgow, where Park once dwelt. Against which it was objected, 1*mo*, That it was wholly inconsistent and incongruous to confirm a bond blank in the creditor's name; 2*do*, He having died at our colony of Darien, his *forum competens* was only the commissariot of Edinburgh, which is the *communis patria* for all Scotsmen dying abroad.

December 27. 1710.—The case mentioned *supra*, 7th December 1709, Kilmahew and Kilmaronock, against Robert Cunningham and Sir John Houston, being resumed and advised, I shall only remark what was further alleged in this intricate affair. Kilmaronock insisted in his reduction of that blank bond of 17,000

merks granted by Sir Patrick Maxwell of Newark, *in anno* 1670, now produced by Robert Cuningham, as found by him amongst Agnes Montgomerie his mother-in-law's papers, after her decease in 1694; and repeated these reasons, 1*mo*, The antiquity of the bond, with its latency for 39 years, which silence and taciturnity loads it exceedingly; especially considering, 2*do*, The opulency of the debtor, and the straitened, poor, and miserable condition of the creditor; 3*tio*, The inconsistency betwixt Robert Cuningham's two oaths emitted in the exhibition, where he acknowledges he found the bond in 1694; and though all the other creditors went on in diligence by adjudging the estate of Newark, which he perfectly knew, yet he never stirred; yea, in the compt and reckoning where he was found debtor, and had a fair occasion to compense, he never founded on it; 4*to*, He was both factor and servant to the family of Newark, and so had more temptation and opportunity, than any mortal, of access to take what he pleased out of the charter chest; and there can be no probable account how he came by this bond, save only that way; 5*to*, It is wrote at Edinburgh on half a sheet of paper, without any quotation on the back; and who uses to write a bond of 17,800 merks in that manner? 6*to*, His clandestine way of transacting with his wife's sisters in Ireland, to purchase their shares of the bond; 7*mo*, When Sir Patrick, the debtor, dies in 1678, they neither seek annual-rent, nor a renewed security by a bond of corroboration, from Sir George the next heir, as every man endowed with common sense does in such cases; and though there be exact lists and inventories of the whole debts of Newark, yet there is a deep silence as to this—not a word of it in any of them; all which give us an idea and impression of any thing, rather than believe that this bond belonged to Agnes Montgomery, but rather determines an unbiassed mind, to think Robert Cunningham has come some other way by it than among her papers. Put the case, a poor man should sell a Knight of the Garter's George all set with rubies and diamonds, will any man conclude him to be the true proprietor, unless he document and instruct how he came by it? Even so here, it as is improbable that she would live in the utmost extreme of misery when she was mistress of such a good bond. And so the Lords found, on the 12th of December 1665, Ramsay, No. 5. p. 9113. where a poor man having a great quantity of jewels, and not being a jeweller to his trade, it was presumed he had them not as *dominus*, but only *in depositum* or custody, or by impignoration, unless he gave a rational account how he came by them. And our lawyers have always been jealous of blank writs as a fountain of fraud, even before they were prohibited by the Parliament in 1696. Vid. Stair's Institutions, Book 3. Tit. 1. Monteith, No. 20. p. 832; Gibson, No. 5. p. 9980. and the case stated in L. 26. D. De probat. that Procula craving allowance of a bond due to her by her brother, the Emperor Commodus, refused the compensation, because never craved while he was alive, and sundry countings had passed betwixt them, where this was never given up as an article; whereas, the presumptions against this bond are much stronger than in that case. And the learned Voet on that title *De probat.* assures us, that *præsumptionis juris* may be elided by more pregnant and convincing proofs, as here the presumption of a fair delivery of this bond is enervated by so violent presumptions to the contrary,

No. 140.

No. 140. that an unbiassed mind can never work himself up to believe Robert Cunningham's assertion how he got it; and the Lords have taken away many bonds on less grounds, as between Muirhead and the Duke of Hamilton; 27th February 1666, The Creditors of the Lord Gray, No. 75. p. 12311; 7th January 1675, The Laird of Luss against Earl of Nithsdale, *voce* WRIT; 18th July 1676, Cockburn against Viscount of Oxford, No. 159. p. 9028; 9th July 1678, Henderson against Monteith, No. 229. p. 11552; 15th Novemher 1681, Clavadge against Lady Aldie, and within this year or two, Martin of Harwood against Hamilton and Baxter. (See APPENDIX.) To all this it was answered for Robert Cunningham and Houston, as is marked *supra*, 7th December 1709, without resuming them here, that all these qualifications want the necessary midcouple to connect them, viz. That this bond was never delivered, only signed *spe numerandæ pecuniæ*, or on design of buying Houston of Park's lands, or was retired, and lying in the charter chest, and taken out by Robert Cunningham, or others, without which step all the presumptions, like Sampson's withs, fall asunder: And law having laid down this corner-stone, that writ must be dissolved eodem modo quo colligatur, it is a maxim non movendum non tangendum, and L. 1. C. De testib. says well, Contra scriptum testimonium non scriptum testimonium non admittitur, and L. ult. C. De probat. requires they be indicia indubitata et luce meridiana clariora: Now, in conscience, let any man say if they be such, or if they amount to any more than a bare suspicion and probability, whereas law requires them to be such, quæ ita factum premunt ut moraliter impossibile sit rem aliter se habere. And Dirleton, in his decisions, Numb. 215 *. gives a case where all the circumstances here concurred, as the creditor's poverty, the debtor's substantiousness, the long silence, &c. and yet the Lords repelled them all, and sustained the bond; and whatever might be pretended if this bond were impugned by co-creditors, yet, being only quarrelled by the heir, it must stand good against him. It is true, the Lords have sometimes taken away bonds on violent presumptions, but that was always in one of three cases, fraud, trust, or payment, none of which are pretended here. There was a long struggle that the Lords might proceed to advise Kilmaronock's probation as it stood, in which case it not being so full, Houston probably might have fallen to be assoilzied from the reduction, and the bond sustained. But others moving for an *amplius inquirendum*, the vote was stated, allow Kilmaronock a farther probation as to his qualifications, or not; and the Lords being equally divided six against six, my Lord President's vote gave him a farther probation before answer *ad informandum judicis animam;* and the pursuers urging, that Robert Cunningham should astruct and document his assertion, how he came by this bond among Agnes Montgomerie's papers, the Lords thought they could not oblige him, except he pleased; and being asked if he would have any probation, his lawyers declared they would stand upon the foundation of law; that the writ being in his hand, presumed he lawfully came by it, unless it were redargued.

* The case alluded to is, Laird of Luss against Earl of Nithsdale, mentioned above.

1712. *January* 16.—In this case mentioned *supra*, 27th December 1610, there fell in an incident question and complaint by Mr. Patrick Houston advocate, accusing one Mushat his servant, that he had stolen some holograph declarations out of his chamber, and delivered them to Kilmaronock's doers, which were made use of as interfering with his oath he had emitted in that cause; and charging Kilmaronock, Robert Campell, and others his doers, that they had corrupted the boy to betray his master, and promised him a clerkship at Inverary, and other rewards. The Lords having allowed both parties to adduce what probation they can for clearing the matters of fact alleged *hinc inde*, Mr. Patrick offered to adduce his father's and brother's servants to prove that they heard Mushat say, that his master had been unkind to him, and threatening he should be even with him if he could. Objected by Kilmaronock, they being menial servants to the adducer's father and brother, and depending on them for their livelihood, all the laws of the world rejected them, and such domestic witnesses were never admitted. Answered, Though the rule be that *testis domesticus non probat* in the case of their master or children *in familia* with him, yet it suffers many exceptions, as appears by Mascardus *De probationibus*, *voce Testis*. Such as if the deed be latent and difficult to be proved; *2do*, If it be upon facts betwixt domestic servants themselves; *3tio*, If it be to vindicate and exculpate a party's innocence against atrocious accusations. See also L. 8. § 6. C. De repudiis. Replied, These parties' oaths may have an influence on the principal cause depending betwixt Kilmaronock and Sir John Houston his father, so that as they could not be received for Sir John, no more can they for his son: And the design of vindicating him is of no weight, for they may load Kilmaronock to favour their master; and his fame is as dear to him as Mr. Houston's reputation can be to him. Duplied, Consequential and contingent events are not to be regarded; and therefore though these oaths should dip on the principal cause, it is no ground to reject them, as the same Mascardus observes, testis non principaliter sed tantum in consequentiam commodum sentiens admittitur tamen ad testificandum: And uncertain imaginary disadvantages to Kilmaronock's cause, cannot influence the rejecting these witnesses. The Lords found them not receivable. The second point debated betwixt them was about one Williamson, who had deponed already, and on a general interrogatory if ever he heard Mushat say that Kilmaronock, or any of his doers, in his name, had desired him to bring his master's papers to them, or had given or promised any thing to him on that account, he deponed *negativé*. Some days after Mr. Houston desired he might be re-examined on this special interrogatory, if he did not hear Mushat say, that Robert Campbell, Kilmaronock's doer, sent him word, if he could serve them, he should get some clerkship in the Highlands? Objected, Though re-examinations are sometimes granted, for clearing matters of fact not already deponed on, where there is some dubiety, or they have deponed in absence of the other party; but where they have already answered the question, it were captious and ensnaring, after a witness has deponed *negativé* to a general, to bring him again to answer special interrogatories: For this the Lords have ever refused *ob metum perjurii*; No. 140.

No. 140. and this the Lords laid down as a rule on the 20th of November 1678, Husband *contra* Blair, No. 34. p. 9422. where one being interrogated on a general, and having deponed *negativé*, the Lords refused to re-examine him on a special condescendence, lest it should clash and interfere with his former oath, and declared they would inviolably follow that method in time coming, which is equivalent as if they had made an act of sederunt in the case; since which time all cautious managers of processes have always begun with the special interrogatories, and left the general last. Answered, Williamson can be in no hazard in this case; for all he has said is only he never heard Mushat say any thing was promised him for getting up his master's papers; but now the query is, if any thing or clerkship was promised him to befriend Kilmaronock; which, though acknowledged, would infer no contradiction to his former oath. The Lords refused to re-examine him on special interrogatories, he having denied the general. The third point debated betwixt them was, that Mr. Houston adduced one Elisabeth Borthwick to be examined, that she living next door to Mr. Houston's chamber, where he left the key, when he went abroad, some of Kilmaronock's doers were frequently seeking Mushat, and conversing very seriously with him. Objected, That women regularly were not legal habile witnesses, and only admitted in some special excepted cases, as *in puerperio*, and the like, where men use not to be present; and they are expressly rejected by the 34th chapter of the 2d statutes of King Robert I. Answered, The Lords are not at this time of day to be taught the capacity of women's being witnesses in many cases, our law having received vast improvements since Robert the Bruce's days: And they are never refused in criminibus occultis seu domesticis, yea even in civil cases; 21st December 1630, Johnston against Anandale, No. 59. p. 16665; 21st July 1675, Wilkie *contra* Morison, No. 76. p. 16675; 27th November 1678, Tait *contra* Forrester, No. 82. p. 16678; and in the case of adultery they were admitted, but required to be omni exceptione majores; 1st January 1684, the Earl of Monteith against his Lady, No. 94. p. 16684. See Cap. 10. extra in decretalibus De verbor. significatione; 2*do*, Objected, Though she be called 15 or 16 years old, yet by ocular inspection she is not of the growth and bigness of one of 10; and in determining the age of women, law in some cases says that *malitia* (that is a ripe understanding, though under 14) supplere potest ætatem; so by the reverse of that exception, if a girl past it be so weak, that she falls short of the perfection of body or mind usual at these years, she may be repelled *a testificando*, as much as if she were under age. Answered, That the spirit is not regulated by statute. Magnitudo non est virtus: A dwarf may be fully as sensible as a bigger person. 3*tio*, Objected, She lived on charity, proved by a testificate of the kirk session clerk, and so inhabile. Answered, Poverty is not a known exception in our law: All we allow is, if they be not worth the Queen's unlaw, which is £10 Scots, they are rejected; but this lass has the fee of some tenements; she is only debarred by a liferentrix. The Lords called for her into their own presence, and though small and low, yet did not seem to be an idiot; therefore the Lords received her *cum nota*. See the Roman law *De servo corrupto*, who were very severe on this point.

1712. *February* 23.—The Lords having allowed a production of the several matters of fact, mentioned 16th January, 1712; the depositions came this day to be advised, and it was proved by many concurring testimonies, that Mushat had fraudulently abstracted some declarations and other papers, wrote with his master's hand, out of his chamber, and given them up to Robert Campbell's servants, and that he had threatened to do his master an ill turn, because he had been unkind to him. It was alleged for Mushat, by way of excuse and alleviation, that he was but a young boy of 17 or 18 years of age, who knew not the hazard of such tampering, by want of experience; that by the Roman law the Prætor gave actionem in duplum in casu servi corrupti § 23. Inst. De Act. but that pre-supposes damage, whereas there is none here; and in Scotland we have no special law about it, et ubi nulla lex ibi nulla transgressio; and at most it was inconsiderate rashness and inadvertency, proceeding from childish resentment for his master's bad using him. Answered, The crime can allow no such varnish nor palliation. What master is secure if his servant betrays his secrets, and then plead youth and ignorance? Murder and theft under trust are most atrocious crimes, and what other name can this get? Human society must dissolve, if this be connived at: And what needs a law to prohibit such villainies; it is not lex lata vel scripta, but nata, imprinted by nature's law on every man's heart, as Cicero orat. pro Milone speaks. The Lords found his guilt incontestibly proved; and, in their reasonings what should be the punishment, some argued for a mitior pœna, being a gentleman's son; others thought that an aggravation, and proposed his banishment to the plantations in America. Others took a middle way, seeing he had nothing, to fine him in a pecuniary mulct, ut luat in corpore; and remembering how one Riddel, who had cut off some gold and silver buttons on a gentleman's coat in the session-house, in the throng when the Lords were sitting, was censured by an act of sederunt, on the 20th July, 1675, they followed the example, and ordained him to be brought on Wednesday next, being the market day, by the hand of the hangman, out of prison to the great door of the Parliament House, and there stand with a paper on his brow containing his crime of stealing his master's papers, and there to stand betwixt 9 and 10, and from that to be conducted to the Trone, where he is to continue for another hour, in view of all the people, and thence to go back to prison, till the Lords relieve him; and declared him incapable of managing any business about the session. No. 140.

The next thing came under the Lords' consideration was, If Kilmaronock's accession to the corrupting was proved; and here it was argued, that the re-setter was as bad as the thief; and if it was a fault in Mushat to give up the papers, it was as great in them to take them. On the other hand it was argued, there was no parity; for I may receive a deserter without any crime, though he acts treacherously in forsaking his party. Yea, at Rome a price being put on a malefactor's head, and his servant bringing him in, he got the premium in the proclamation, but was hanged the next day for his treachery and ingratitude. The Lords found the accusation, that Kilmaronock had bribed and corrupted him, not proved; and assoilzied from the complaint.

No. 140. The third point was Kilmaronock's bill against Mr. Patrick Houston, craving reparation for his defaming him, as corrupting his servant. Alleged, He had probable grounds of suspicion, by Kilmaronock's agent's conversing so much with Mushat, and his being flush of money at that time; and he could guess no other source from whence it flowed, but for betraying him, and gratifying his father's enemies and his own with his papers. Answered, Gentlemen's reputation must not be attacked on conjectures, and exposed on mere hearsays; and both the common law and ours have provided suitable remedies, by fining the party injurer, and making him give an honourable reparation by a palinodia and acknowledgment of his fault; and it is no reproach to any to confess his error. See Sir George Mackenzie's Criminals, Tit. Injuries. The Lords found Mr. Patrick Houston had exceeded the bounds of his duty, and failed in proving what he had rashly charged him with; and therefore ordained him to come to the Inner-house Bar, and publicly crave Kilmaronock and his doer's pardon; and fined him in £100 Scots, to be paid in to the treasurer of the Society for Propagating Christian Knowledge. Mr. Houston, for extenuating his fault, alleged Kilmaronock had as reflecting harsh expressions in some of his bills against him, and so injuriæ mutua compensatione tolluntur; at least he should also be ordained to acknowledge his fault. Law says ignoscendum ei qui retorsione se ulciscitur provocatus. Kilmaronock exculpated himself on the principle of self defence; and alleged that Mr. Houston was the first aggressor in the defamatory and injurious expressions. Mushat was present in the House when the Lords were advising his case, and suspecting the worst, knowing his own guilt, he privily retired and fled; whereupon Smith of Methven his cautioner's bond of 300 merks, for sisting him, was forfeited, and a new order directed by the Lords to macers, messengers, and all other officers of the law, to search for him, and when apprehended to imprison him, ay till he be presented to the Lords again, that they may dispose on him as he deserves; and ordain his sentence to be posted up, and affixed on the doors of the Parliament House, on the Cross, and Trone, and other public places of the city, in resemblance of the French custom of hanging malefactors condemned, but escaping, in effigy, when they have fled from justice.

Fountainhall, v. 2. pp. 537, 614, 704, and 730.

1709. *December* 17. NEILSON *against* SIR THOMAS KENNEDY.

No. 141.
Women receiveable as witnesses, *ubi penuria testium*

Gilbert Neilson of Craigcaffie and Sir Thomas Kennedy being in mutual processes anent the right of these lands, it was contended for Craigcaffie, that the night of his father's burial, Sir Thomas thrust him and his wife violently out of his house, and then intromitted with the writs and charter chest, and so might abstract and destroy discharges that would have extinguished Sir Thomas's debts he claims on that estate. And this being admitted before answer to probation, Craigcaffie adduces sundry women to be witnesses for proving his violent expulsion; against