No. 115. Giving more to a witness than the ordinary charges, disqualifies him.

1699. *June* 13. FORBES *against* UDNEY.

Samuel Forbes of Foveran, and the Laird of Udney, being in mutual declarators as to the right of a fishing, and some links; and Udney adducing some witnesses, it is objected against them, That they cannot be received, because they have gotten good deed, in so far as Udney had hired a boat for them in the north to bring them about to Edinburgh, and had put in considerable quantities of provision to serve them by the way; and being, by storm, put in at Arbroath, he had assisted them since, and caused his stabler at Edinburgh give them lodging; and though parties be liable to witnesses for their necessary expenses, yet the giving of it by way of per-advance is a subornation, and dangerous novelty, especially with common people, who, at such a time of scarcity, will do much for good fare and entertainment. Answered, He had them under caption, and could have brought them *per* force, and all he furnished them with was only bread and ale, which is far within the eight pence a day, which the Lords modify to a footman; and it imports not whether they get it before or after, even as it is no usury to adjudge for the expenses of the infeftment, though they are to be debursed afterwards; and, in the civil law, *edulia* are not reputed a bribe; and Udney had no design but to make his diligence effectual against the witnesses, and they shall purge themselves upon oath that what they have gotten was within the allowance of law. The Lords thought there was no design of corruption here, yet judged it of a bad preparative to engage the affections of such poor folk; and that in Spain, drunkenness, or a habit of swearing, or too much familiarity with the adducer, will reject a witness; therefore, to avoid all suspicion, they desired the Ordinary to try what quantity of provision Udney had laid in for them, and of what quality and kind it was, if beyond what they either used or ought to have; and accordingly to receive, if it did not exceed the legal allowance, with this reserve always, that the quantity might be the more because of the uncertainty how long they might be at sea.

Fountainhall, v. 2. p. 51.

No. 116.

1699. *July* 5. HOME *against* HOME.

It being objected against a witness, that he not only was frequently entertained in the adducer's house, but was present at consultations in the cause, though that was before, not after the Lords by an act fixed the points to be proved; yet their Lordships thought this an affected abstinence, and therefore rejected him from being a witness.

Fountainhall.

*** This case is No. 5. p. 5238. *voce* HEIR APPARENT.

No. 117. Inhabile witnesses admitted *ex officio*.

1699. *November* 17. WILSON *against* WILSON.

Helen Wilson raises a reduction of a testament made by Alexander Wilson, her brother, whereby he nominated James Kelburne, his executor: And the tes-

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 judicis animum*, 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*mo*, 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*do*, 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.