therefore ought to be rejected. Answered, An ultroneous witness is he who compears before the Judge uncited, and offers himself ready to depone, or instigates the pursuer to insist, on the assurance he shall be a witness: But so it is, this party now adduced did not compear before the Lords till he was cited by a messenger to bear witness in the cause. The Lords found he had shewed too great earnestness in coming to Edinburgh on their call, without any legal citation till he came there, and for this cause rejected the witness. No. 121.

Fountainhall, v. 2. p. 116.

1701. *June* 16. SHARP *against* MURRAY.

No. 122.

George Irving being adduced a witness in the process Sharp of Hoddam against Murray of Brockelrig, and having deponed, he gives in a bill to the Lords, pretending some things had escaped him, which now burdened his conscience, and therefore craved to be re-examined for exonering thereof. The Lords refused the bill; for by his oath there is a *jus quæsitum* to the party which the witness cannot retract. If one has not been interrogated fully, or has not deponed distinctly, he may be re-examined, but it must be at the desire of the party adducer, and not upon the witness' own application, who may be suborned to retract what he has said, and so infer perjury.

Fountainhall, v. 2. p. 120.

1701. *December* 17. ALISON *against* GORDON.

No. 123.
Where the witness has a direct interest in the cause.

In a cause betwixt Alison and Peter Gordon merchant in Aberdeen, about a bill of exchange, improbation being proponed against it, and each party being allowed to improve or astruct, Mr. Gordon adduces one Wilson as a witness; against whom it was objected, That he was inhabile, being cautioner for Mr. Gordon in the suspension. Answered, *Non relevat*, because the principal is more than sufficient, and there is a posterior suspension wherein another cautioner is found, and so he is upon the matter exonered and relieved. The Lords sustained the objection, and repelled the witness. Then Gordon offered to consign the sum contained in the suspension, which gave him effectual relief, so he could no more lose or win in the cause, which reason did cast him formerly. Answered, This was a good deed or gratification, and a sort of corruption—I will relieve you providing you depone. Replied, Though such a paction between parties might be liable to suspicion, yet when it is done *palam et auctore prætore*, there can be no corruption, especially where one is cautioner for another that is uncontrovertedly responsal: If there were difficulty in recovery of his relief, there might be more ground of suspicion. The Lords found he might be simply received as to the producing of writs that *comparatione literarum* may serve in the improbation; but as to his giving his judgment and opinion upon the hand-writ and subscription, they admitted him only *cum nota*.

No. 123. 1602. *February* 18.—John Alison, merchant at London, and Henry Hawthorn his factor, against Patrick Gordon, merchant in Aberdeen, mentioned 17th December, 1701. Patrick being debtor to Alison, gave him bond for £56 Sterling, and alleged he had likewise given him a bill for the same debt on John Forbes; and being charged on the bond, he craved compensation, in regard he produced the said bill, where Alison acknowleged on the back of it, that he had gotten the contents. Alison proponed improbation against the bill, acceptance, and indorsation as false; and in regard bills need not writer's name and witnesses, and the solemnities or formalities requisite in other writs, but are regulated *jure gentium*, and so cannot be improved in the direct manner; therefore many indirect articles were adduced against this bill, as that it was not a bill of foreign commerce, but drawn by one in London upon another there, and payable to a third in the same city, and so deserved not the usual favour and privileges; it related to a bond given for the same sum, and yet they differed in 10 shillings Sterling; and it is extraordinary and unusual among merchants to take such double securities of both bond and bill; that bills have their currency by acceptance or protest, but are not commonly used as grounds of compensation; that Forbes, on whom it was drawn, was insolvent at the time, and so Alison would never have taken a bill on him; that Forbes, by an affidavit before the Aldermen of London, hath, upon oath, denied his acceptance, or that he knew of any such bill, and utterly disowns it; and Gordon long after this bill bears to be paid, by his missive letters to Alison, confesses the debt, begs terms of payment, and never mentions the bill, or any compensation thereon; and that by occular inspection, *et comparatione literarum*, and many subscriptions both of Forbes and Alison, it is palpable there is a great diversity and disconformity between these uncontroverted subscriptions and those of the bill now quarrelled; and Alison's receipt is wrote with ink so dim and so obscure, that it is scarce legible. Answered for Gordon, Such villainy is not to be presumed against one who has always lived with the reputation of integrity, as he has done; et ex fama bona et conversatione cum bonis oritur præsumptio favorabilis, et è contra, as Crusius, De judiciis delictorum, Part 2. Cap. 7. et 8. shows; neither is falsehood presumed in re minoris pretii, as this bill is; and the presumption is rather to be taken ut actus valeat quam pereat, as Alciat proves, De præsumptionibus, Reg. 3. Præsumpt. 34. and in this improbation none of the grounds which the Doctors urge to infer crimen falsi do here concur; such as nimia antiquitas scripturæ et longum silentium, rasura, contrarietas, obscuritas, notæ marginales diversa manu scriptæ, contradictiones, nimia prodigalitas in eo qui suum jactare non præsumitur, nova charta, nova cera, novum sigillum, &c. all enumerated by Crusius, Part 2. Cap. 36.; and the qualifications adduced can all admit of another interpretation than that of forgery; for why may not a bill be used for a compensation extra suam materiam? and wary merchants used to take both bonds and bills for the same debt; the reason why Mr. Gordon did not mention the bill in his letters, but promised payment, was,

because he did not know then that the bill was paid, Forbes not having given him advice thereanent till afterwards, and such letters cannot be now obtruded when falsehood is proponed, for that is omnium exceptionum ultima; and though Forbes was then insolvent, yet he might pay this bill by compensing it with a balance of trade that had been betwixt Alison and him; and Forbes's denying his subscription is of no moment; for, 1*mo*, He is ultroneous, there being no warrant nor commission for his deponing; next, it is easy to get a knight of the post at London to personate any man; so that *non constat*, that it is this Forbes who deponed; 3*tio*, His own letter sent down with the bill canvels it; and Waterton, his own brother, depones on the verisimilitude of his subscription; and there can be nothing more lubric and conjectural, than to find a writ false on the mathematical points of the longitudes and angles of letters and subscriptions, seeing, in uncontroverted ones, there occurs evident diversity every day, according to the pen or situation of the hand or the ink, and the like circumstances; et in pari casu absolvendus reus, et tutius est decem nocentes dimittere quam unum innocentem damnare. The Lords thought there were presumptions here to infer suspicion, and farther enquiry; but, by an unanimous vote, found they did not amount to prove the bill false, or Gordon the falsarius; but allowed the parties to be farther heard, how far the qualifications will infer the bill not to be a probative writ, so as to be the ground of an action either for payment, or to found a compensation.

Fountainhall, v. 2. pp. 129. and 147.

No. 123.

1703. *July* 13. COCHRAN *against* CUNNINGHAM.

No. 124.
A hired servant found admissible after being dismissed.

Mr. William Cochran of Kilmarnock pursuing Robert Cunningham, the factor of Newark, for count and reckoning, and adducing one James Sclater to be a witness of his intromission with a wood, and some grass; it was objected, That he was his bowman and moveable servant; and the Lords, the last winter session, found him not receivable: Since that time, Kilmarnock resolving not to continue his bowery, he dismisses him from his service, and brings him in of new to depone. It was objected against him, 1*mo*, He was ultroneous, and showed too much willingness and concern to depone in this cause. Answered, The witness being brought in upon a caption, no fault could be imputed to him. Replied, Being once cast, he could not be adduced in that cause without a new special warrant from the Lords. Duplied, The cause of his inhability ceasing, viz. his being bowman, his capacity reconvalesced, and so he might be lawfully adduced. The Lords found the caption purged his being ultroneous, but thought he could not be adduced without a new warrant; but the material difficulty lay in this, that a master had no more ado but to put away his servant where he had been rejected on that head, and then seek to have him received; and who knows, but after his deponing he may take him back again? so the preparative is *pessimi exempli*. Answered, 1*mo*, However this might be dangerous in servants or tenants, yet