

* * * Forbes reports this case :

No. 134.

In the process of removing at the Lady Cardross's instance against Pumpherstoun, a joint probation being allowed for proving meliorations, the defender objected against some of the witnesses adduced by the pursuer, That they were cottars or sub-tenants to her moveable tenants, and so equally inhabile witnesses as the moveable tenants themselves; seeing the heritor hath the like awe and influence over both, and may remove them at pleasure; yea, may remove the sub-tenant or cottar, with less prejudice than the immediate tenant, whose removal may occasion the lands to lie waste; *2do*, He objected, That one of the witnesses was the Lady's domestic servant since he was cited to depone, and therefore cannot be received; because, it is presumed the servile awe he was in use to be under doth still remain; and probably he was industriously put out of his service to habilitate him to be a witness for her. Our law guards against such practices; for a moveable tenant getting a tack after commencement of a process, is not sustained as a witness therein; because, it is presumed he got his tack in that view.

Answered for the pursuer: Sub-tenants or cottars are receiveable as witnesses, because not reprobated by law or custom. Whatever an heritor hath power to do in turning out sub-tenants or cottars, direct and singular methods are not to be presumed; or if suspected, may be cleared by the oath of the adducer or witnesses; *2do*, No person *sui juris* was ever rejected from witnessing in the cause of his former master.

The Lords repelled the objections, and sustained the witnesses. See No. 65. p. 8951.

Forbes, p. 317.

No. 135:

1709. February 22. TAYLOR against LINDORES.

There being a competition for a kirk seat betwixt James Taylor writer, claiming it in right of his lands of Pitcairly, and Lord Lindores, as patron, it was objected against one of L. Lindores' witnesses, that he was *infamis infamia facti*, having confessed adultery before the kirk-session, and satisfied for the same. Answered, *Non relevat*, unless he had been pursued criminally, and convicted by a legal sentence of the crime, where his confession before the kirk would not be so much as esteemed a probation, if he should deny it. The Lords considered what was done *in foro poenitentiali* for exonerating one's conscience, and purging the scandal, was no ground to deprive him of his civil privileges, as a witness, or otherwise, else that would scare men to confess, and harden them in their sins; and therefore repelled the objection, unless he had been convicted in a civil court.

Fountainhall, v. 2. p. 495.