

cerns, as prentices; because the latter being for the most part gentlemen's sons under indentures, who cannot be put away at the master's pleasure, are more like tenants having tacks, than servants, and so not so much under the impression of their masters. No. 133.

Forbes, p. 294.

1709. February 5.

LADY CARDROS *against* HAMILTON.

No. 134.

The Lords, 20th February 1708, No. 65. p. 8953. *voce* MINOR, reduced a tack set by the Lady Cardross her brother, to Hamilton of Pumpherston, as being set by a minor having curators without their consent; but it having been alleged, that, in contemplation of the long endurance of that tack, he had made considerable improvements and meliorations on the land, of the benefit whereof he was now deprived, and the lady ought not *lucrari cum ejus jactura*; the Lords allowed a conjunct probation to either party of the condition of the land at his entry, and at his removal, whether he had improved it by parking, hedging, planting, liming, building houses on it, digging out whins to make it arable or meadow ground, or if it be no better now than it was at the commencement of the tack.

Subtenants, to a moveable tenant admitted as witnesses.

A domestic servant *bona fide* dismissed may be a witness.

It was objected against some of the lady's witnesses, that they were either her servants, subtenants or cottars to her moveable tenants, and so no more receivable than their masters would be, being under the same influence, terror and awe; for, by removing a tenant wanting a tack, all his cottars and subtenants must go out with him; and all general laws reach not only the cases expressly insert therein, but likewise all cases of the same nature, where the parity of reasons concludes as pregnantly for the one as the other; and the cause of rejecting moveable tenants is every whit as strong against the cottars. See Stair, B. 4. T. 43. § 7. Answered, There is not the same parity of reason, for the cottar pays me no rent, as the tenant does; though, if the one be deficient, the other will be *subsidiarie* liable, as possessing a part of my ground. The Lords repelled the objections and sustained the witnesses. *2do*, Objected, the witness adduced was a domestic servant to the lady the time of the citation, at least was put away a little before, of purpose to habilitate him, which is no more to be allowed than for a master to give a moveable tenant a tack who had none before, to capacitate him. Answered, this witness was out of my service five months before the citation, and before there was any view of this probation. The Lords found the objection relevant, and likewise the answer to take it off; but these objections not admitting of terms for proving them, except by the witness's own oath, therefore they ordained him to be first interrogated, and purged anent the time of his going out of the Lady's service, and the occasion thereof, if it was in prospect of his being a witness, or not.

Fountainhall, v. 2. p. 488.

* * * 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.