1672. *June* 13. The TOWN of INVERNESS *against* FORBES of Culloden.

No. 74.
The office-bearers in a town not admitted as witnesses for it. One who was in the council was admitted *cum nota.*

The Town of Inverness having adduced witnesses, to prove the quantity of the multures of their mill, and several objections being made against the Town's witnesses, debated before the Ordinary on the witnesses, and reported to the Lords;

They found that these who were present Bailies, or town officers, could not be witnesses in this cause, which concerned the common good; but that others, albeit members of the incorporation, might be witnesses, though they had been formerly Magistrates or officers, they not being such now; and did also admit a witness who was a present member of the council *cum nota.*

Stair, v. 2. *p.* 84.

1673. *December* 18. THOMSON *against* CORBET.

No. 75.
Effect of the testimony of an executor.

Corbet of Towcorse pursues a reduction of a decreet at his instance against Hardray, *in anno* 1656, before the Commissioners for administration of justice, wherein this point was debated, that it being referred to the oath of Hardray, who was executor to Towcorse's mother, and married his sister, that Towcorse had paid to his mother £800 Scots. Hardray deponed that he was eye-witness to the delivery of that sum; but it being alleged, that an executor's oath could not prove against the legatars, whereupon it was not sustained; which was alleged unwarrantably done as to this point, that there being two universal legatars, whereof one is the executor's own daughter, as to his daughter's interest the father's oath should be sufficient, or at least the daughter being now come to age, should be examined upon her oath of credulity, whether she believes her father's oath to be true.

The Lords found the executor's oath, albeit the father, was not a sufficient probation against his daughter, being but the testimony of one who in this case was not a party, but a witness; but appointed the daughter and her husband to depone, whether they knew that this sum was paid by Towcorse to his mother or not, and that her father's oath should be produced to her as a ground of her knowledge.

Stair, v. 2. *p.* 243.

1675. *July* 21. WILKIE *against* MORISON.

No. 76.
Women were not admitted to prove the lending of a

Agnes Wilkie having pursued Christian Morison as heir to her husband, for aliment of her child, mournings, and funeral expenses; in which the defender alleged compensation, because the pursuer intromitted with a furnished bed be-

No. 76. bed by a mother-in-law to a daughter-in-law, who lived under the same roof.

longing to the defunct, and his heirship falling to the defender as heir, which is worth 600 merks. Compearance was made for the pursuer's mother, who alleged that the bed belonged to her, and was lent by her to the defunct her good-son, who dwelled under the same roof with her, and had been only a short time in his possession, which she offered to prove by the oath of her daughter, the pursuer, and some women servants. It was answered, That in moveables possession presumeth property; and it is acknowleged that the defunct died in peaceable possession of this bed which was in his house, and not in his good-mother's family; and albeit the allegeance of lending the bed be relevant to exclude the presumptive right of property, yet it must be proved *habili modo*, by habile witnesses, and not by women. It was replied, That the matter was domestic, in which women witnesses are adhibited in important cases, as that a living child was born, and the property being only by presumptive probation, any positive probation to the contrary is sufficient. It was duplied, That albeit women be admitted witnesses at the bearing of a child, where men cannot be present, they were never admitted in any other civil process.

The Lords found the reply of lending the bed relevant to be proved by habile witnesses, but refused to admit women witnesses.

Stair, v. 2. p. 355.

1676. *July* 20. LEITCHES *against* LOCH-HEADS.

No. 77. Probation by witnesses being craved by a suspender resiling from the charger's oath, warrant was granted for summoning summarily such witnesses as could be got.

There being a contract betwixt Leitches and Loch-heads, whereby the Leitches were to set up a work for weaving of ribbons, and to teach Loch-head's son that trade, and Loch-head was to furnish a house and materials, and the Leitches were to have the fourth part of the profit from their work; Leitches having charged upon the contract, insisted upon damage and interest, because Loch-head had not performed; which being referred to Loch-heads' oaths, they compeared to depone; but Leitches resiled from their oaths, and offered to prove by witnesses their damage. It was answered for Loch-heads, That having resiled, they behoved to instruct instantly, or otherwise every pursuer might vex the defenders by attending at two terms, the first being assigned to take their oaths, and when they appeared to depone, resiled, and taking a new term to prove; and therefore when any party resiles, they must instantly verify by writ, or by witnesses, to be called summarily by a macer. It was replied, That pursuers are not supposed to delay themselves, or to crave defender's oaths to vex them, but it were of advantage to justice, that pursuers might resile when they saw defenders ready to depone, who seldom compear to confess, but either suffer themselves to be holden as confessed, or at best to give a qualified oath, and would not be too ready to qualify the same if they knew the pursuer might resile, and take a time to prove; and though this