

No 94.

or oath of party; for albeit the laying in of drink by the pursuer, and the defender's venting of it, might be proved by witnesses, yet, that it was so long owing unpaid, was found ought to be referred to the defender's oath; for, in cases of this nature betwixt the master and taverner, it is presumed that they make their counts weekly or nightly, and so they are in use to do; neither is it likely that the master would have suffered his servant to go out of his service, and to stay still in the town of Edinburgh, where she remained ever since, and not all this time to have craved her therefor, there being three quarters of an year since she left her service, during which space he never challenged her, till now that he intented this action, to meet a pursuit which she had before moved against him for her fees; in respect whereof, it was found probable, as said is.

Act. *Craig.*Alt. *Gray.*Clerk, *Gibson.*

Fol. Dic. v. 2. p. 140. Durie, p. 789.

1671. *November 25.*IRVINE *against* FALCONER.

No 95.

THE deceased Alexander Falconer, having been domestic servant to the Lady Drum the years 1657, 1658, and 1659, and having lifted her rents and disposed upon her corns, and coming thereafter to be Sir Alexander Falconer's servant, and dying in his service, he did legate to him some of his means. Francis Irvine, as assignee by the Lady Drum his mother, pursues Sir Alexander Falconer, as executor and intromitter with the goods of the said Alexander, to pay great quantities of corns and rents intromitted with by him, belonging to the Lady. It was *alleged*, Absolvitor, because the deceast Alexander Falconer having intromitted as a domestic servant by the Lady's command, from time to time, and having paid his fees, and dismissed him without quarrel, it must be presumed that he hath made count of all his intromissions; and, albeit he were alive, he might be pursued, on his oath, for any thing resting of his intromission, yet now, after his death, to make any representing him liable, by witnesses or otherwise, for his intromissions, and to put them to insruct his debursements which he gave out from time to time by verbal order, were unjust, and a ready way to destroy all servants.

Which the LORDS found relevant, and assolizied the defender, and made no difference whether the said Alexander were a domestic servant within the house, or received weekly livery, or fee, though he staid without the house.

Fol. Dic. v. 2. p. 140. Stair, v. 2. p. 13.

* * * A similar decision was pronounced February 1730, Morison against Bruce. (See APPENDIX.)