

- No. 59. * * * This same was done the same month before, in an action betwixt the Earl of Cassilis and Alexander Barclay, wherein witnesses were ordained to be examined *ex officio*, at the desire of the Earl of Cassilis, albeit there were lawful objections otherwise to decline them. In which process also a woman was found might be examined *ex officio*, viz. Alexander Barclay the pursuer's wife.

1632. December 11 E. of HADDINGTON against L. LAMINGTON.

- No. 60. Witnesses being produced to prove a contravention at the Earl of Haddington's instance, and it being alleged against them, that some of the witnesses were sub-tenants to the Earl of Haddington's removeable tenants, and some others were sons to these removeable; the objection was repelled, and found that both the sons and sub-tenants to the master's removeable tenants, might be witnesses to the master of these tenants in his cause.

Act. Stuart.

Alt. Gilmore.

Clerk, Scot.

Durie, p. 658.

1632. March 15.

A. against B.

- No. 61. In an ejection wherein an exception being admitted of a voluntary removing, and found proveable by witnesses, at the term of probation, a witness being produced at the fourth term after caption, and it being objected, that he was not a competent witness, being tenant to Robert Gibson, which Robert had set the lands libelled, for which ejection was pursued, to the defender, who entered by his setting, as tenant to him, and so who in law was thereby obliged to warrant these defenders from this action of ejection; and it being answered, that the witness was become Robert Gibson's tenant in other lands than the lands libelled, and that only since the last term of caption, and had a three years tack of him, so that he was not tenant removeable; and albeit he were, yet not being declineable, but who might have been a lawful witness, when he was first summoned, and all the terms since his now becoming tenant ought not to prejudge him *ex post facto*; attour, Robert Gibson will not be subject in warrandice to the defenders; the Lords found, that albeit the witness could not have been declined, if he had compeared at any time before this term, yet seeing he was at the time and term of his compearance such a person, as legally could not be then witness, as becoming then tenant or servant to the party, albeit he was not so before, that therefore he ought not to be admitted witness; but in this instance, because it was not declared nor found, that the said Robert Gibson his master was in law holden to warrant the defenders, therefore he was received as a witness, and the objection repelled, but he was received *cum nota ob penuriam testium*.

Alt. Gilmore.

Clerk, Hay.

Durie, p. 620.