

articles of improbation, (though they owned it to be out of the common road of form), or at least, that the two living witnesses might not be examined in the common way before the Ordinary on witnesses, but that they should be examined by the Lords *in præsentia*, outwith the presence of the defender, and of one another, and not upon interrogatories given them before to see, but upon such as should be offered from the bar, or should occur to the Lords; to which last the defender consented, but objected the established form against the first.

“ The Lords, before answer to that point, How far it is competent to insist in the indirect articles of improbation, declared they would examine the living witnesses in their own presence, upon such pertinent interrogatories as should be offered at the bar, or as should occur to their Lordships.”

Act. Ro. Dundas.

Alt. Graham.

Clerk, Robertson.

Bruce, No. 35. p. 46.

1716. November 30.

The TOWN of PERTH against Sir THOMAS MONCRIEF of that ilk.

In the mutual processes of declarator betwixt the Laird of Moncrieff and the Town of Perth, wherein each of them laid claim to a sand-bank that had lately arisen in the water Tay; there having been, (as is usual in such cases,) an act before answer, allowing either party to prove their respective possessions, the Laird of Moncrieff made these following objections against some of the witnesses adduced by the Town, viz. That they were burgesses of the town, and had interest, and might lose or gain by the cause, in so far as they were entitled, for a small gratuity, to pasture upon the controverted ground, and to bleach there *gratis*; and therefore it was their interest to aggrandize the island; *2do*, In that they were under influence of the Town; because the Magistrates are in use to pay the half of the stent and imposition on their respective houses and trade, and that out of the Town's common good, which they, when they please, may impose or exact from them, and must necessarily do it according to the circumstances of the Town's common good; which therefore it is the witnesses' interest to increase.

Answered for the Town, to the first: That the burgesses have no peculiar right either to pasture or bleach on the inch, but what depends on the free will of the Magistrates, who may let it out to other uses; and, though they set the inch to a tacksman, with a restriction upon him not to burden the inhabitants beyond the sum condescended on, yet that is only to prevent extortion.

To the second, answered: That a considerable part of the stent is indeed imposed on the common good; but yet the boroughs, in laying on the stent, have regard thereto, as well as to the houses and trade; and if the common good were diminished, the stent upon the Town would be diminished also, which would be neither less nor more to the inhabitants; besides, that, if such consequential advantages were sustained, a community would not possibly have any witnesses,

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No. 154.

Burgesses.

Cousin-germans.

Sub-tenants.

No. 154. at least they would not be witnesses with respect to the common good; the contrary whereof was found the 15th June 1672, Town of Inverness against Coloden, No. 74. p. 16675.

“ The Lords repelled the objections.”

*Falconar sen. for Moncrieff.*

*Alt. Ro. Craigie.*

*Clerk M<sup>r</sup> Kenzie.*

In the above cause there was this objection made by the Town against one of Moncrieff's witnesses, viz. That he was uncle to Moncrieff, and therefore could not be received, as was found the 15th January 1679, Brown against the Town of Kirkcudbright, No. 84. p. 16679. where even a cousin-german was rejected, as also a son-in-law.

Answered for Sir Thomas: That there is no law debarring an uncle-in-law from being a witness in his nephew-in-law's cause; and the decision cited respects only a cousin-german and a mother-in-law, the one a nearer degree in affinity, and the other, though more remote in the degree, yet is really a blood-relation, which makes a considerable disparity; and, even in that decision, the cousin-german was not absolutely rejected, but only in case there was penury of witnesses; besides, by our law, a cousin-german may be a judge.

Replied for the Town: That, though a judge, who is presumed to be a person of approved integrity, cannot be declined in the cause of his nephew-in-law in our supreme courts; yet will it not from thence follow, that the same trust is to be reposed in every man that is adduced as a witness; and the decision adduced makes this clear beyond dispute; for, though a cousin-german cannot be declined as a judge in our supreme courts, yet there the Lords rejected such an one's testimony, unless where he was a necessary witness, and, even in that case, allowed him only to be admitted *cum nota*.

“ The Lords repelled the objection.”

*Procurators and Clerk ut supra.*

In the foresaid cause, it was objected by the Town, That some of Moncrieff's witnesses were sub-tenants or cottars, at least tenants without a tack, and that others were sub-tenants to the tacksmen of the fishing; and both master and tenants being to be gainers or losers by this cause, the sub-tenants are too much under influence to be unsuspected.

Answered for Moncrieff: That, though these witnesses were the tacksmen's cottars, yet that had no respect to the fishing, but only to the labouring the ground, and they were only interrogated with respect to the fishing; besides, that there is no law debarring tenants, servants, and cottars, from being witnesses for the heritor; yea the practice is uniform to the contrary.

“ The Lords repelled the objection.”

*Procurators and Clerk ut supra.*

*Bruce, No. 38. p. 49.*