1724. *February.*

The EARL of WEMYSS *against* MR. ALEXANDER GIBSON of DURIE.

No. 155. Day-labourer.

The Earl being in possession of a dam upon the water of Leven, a little below where the burn of Kennoway falls into it, by which he had the benefit of both waters, and from thence he carried a stream for the use of his corn mills and coal engines;

Durie had lately diverted the water of Kennoway; upon which the Earl brought a process of declarator against him, concluding, That he had no right to carry off any part of the water, in respect that the Earl and his predecessors had been immemorially in possession, and that his mills and coal engines were stopt from going for want of water in the summer-time, to his great damage and loss.

In the course of this process the Earl adduced one Foreman, a cooper at Methill, (who served him for a weekly wage in making and keeping in repair the buckets used in drawing water from the coalworks) to prove the want of water in the summer season.

It was objected against this witness, That he was wholly dependent on the pursuer, as receiving a weekly wage from him, and that he was also personally interested in the event of the cause, in so far as it affected the engines for drawing water from the coal-works, upon which his employment and bread depended.

Answered for the pursuer, That the case of this witness could be no worse than that of a domestic servant or tradesman's apprentice, and yet these have been found habile witnesses, 11th July 1705, Lord Inverury against Gordon, No. 127. p. 16710. and 31st December 1708, Smith (Factor to the Earl of Winton) against Matthie, No. 133. p. 16714.

The pursuer further observed the variation of the law of Scotland as to the general rules about witnesses, the strictness of which has been found inconvenient, and has occasioned their being laid aside; as in the case of women witnesses, against whom the antient rule was generally and strictly observed, but now was out of use.

Replied for Durie, That domestic servants and apprentices, or journeymen, might be admitted for their masters, in cases where there was a penury of other witnesses, as in the case of the decisions cited; but in the present case there could be no pretence of that sort as to a quantity of water running in an open stream; and besides, the Earl had called no fewer than one and twenty witnesses.

In the same cause an objection was moved against admitting three brothers of the name of Landalls, in respect that one of them had an interest in the cause, and had raised a declarator against Durie in relation to his diverting the same water of Kennoway.

It was answered, That the process, at Landall's instance, was now over, he having agreed with Durie and dropped it.

Replied, That though he had dropped his own process, yet if the Earl should

No. 155. prevail in this, it would have the same effect that Landalls aimed at by his process of stopping Durie from diverting the water of Kennoway.

The Lords sustained the objections, and rejected the witnesses.

Act. *Ja. Graham, sen.* Alt. *Alex. Boswel.* Reporter, *Lord Forglen.* Clerk, *Hall.*

Edgar, p. 85.

1724. *February* 22.

The MAGISTRATES of FALKLAND *against* KINLOCH of CONLAND.

No. 156.
Common interest in the matter at issue.

During the dependence of mutual processes of declarator betwixt these parties, the one for ascertaining the marches of the Lowmonds at the instance of the Town, the other of property and molestation at Conland's instance; Conland applied by petition to the Lords, setting forth, That he was apprehensive the Town would adduce as witnesses the inhabitants of Falkland, heritors, tenants, possessors, or their servants, of the lands, to which a pasturage was claimed upon the Lowmonds, and craving, That none of them might be received as witnesses, because the more extensive the bounds of the Lowmonds were made by their oaths, the more enlarged their pasturage would become; so that each of these persons would be deponing in their own cause, against which there was an established objection.

It was answered for the Town, That it was not every distant remote view or concern, that a person may have in a cause, that will be sufficient to set him aside as a witness, but only such direct interest as might give occasion, to suspect him. That Municeps in causa municipii, et cives in causa civitatis, testes esse possunt; which opinion was founded upon the L. 7. § 1. D. Quod cujusque universitatis nomine, &c. And agreeably to this the Lords had determined, 13th June 1672, The Town of Inverness against Forbes of Culloden, No. 74. p. 16675. and lately in a case betwixt the Town of Perth and Sir Thomas Moncrief, No. 154. p. 16737.

The Lords found, That none could be witnesses who had themselves the privilege of pasturage.

Lan. Craigie, for the Town. Alt. *And. Macdowal.*

Edgar, p. 38.

1724. *June* 20.

JOHN STEWART of ASCOG, *against* CORNELIUS and JAMES ROBERTSONS.

No. 157.
Found that a messenger might be a witness relative to deforcement.

In a process at Ascog's instance against the defenders, as being guilty of beating James Johnston a messenger employed by Ascog to execute a summons of deforcement in the Isle of Bute, a proof was allowed; and Johnston being adduced as a witness by Ascog, the following objections were made against his being admitted: *1mo*, That he was the person injured, and therefore was presumed to retain re-