

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 Forglan.* 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 Muncieps 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: *Imo,* That he was the person injured, and therefore was presumed to retain re-

sentment : And in support of this Sir George Mackenzie's authority was cited, Tit. Deforcement, Numb. 5. where he says, That a messenger is not admitted in a deforcement to prove an injury done to himself; *2do*, It was objected, That the messenger had given partial counsel, he having wrote a letter to Ascog's doer, informing him of the affair, and advising that a complaint should be made in order to procure him assythment and damages; *3tio*, That he might be a gainer in the cause, as the person entitled to the damages. No. 157.

It was answered, *1mo*, That this was not an action of deforcement pursued either by the King's advocate or the party injured, but a summary complaint at Ascog's instance upon reiterated acts of oppression and violence: And Sir George Mackenzie in the place cited adds, that this is an arbitrary question; and in this case the messenger was a necessary witness; *2do*, The letter mentioned could not infer partial counsel, it containing only an account of what passed, but did not tend to instigate Ascog to make his complaint; nor was the messenger present at any consultation with Ascog upon this head, nor ever offered to depone in his favours, from which circumstances only partial counsel could be inferred; *3tio*, The messenger could not be gainer, since the complaint was at Ascog's instance, and concluded damages and expense to him only.

The Lords repelled the objections, and allowed the witness to be received.

Act. Jo. Macleod.

Alt. Arch. Stewart.

Reporter, Lord Polton.

Edgar, p. 52.

1728. July. MARJORIBANKS *against* TROTTER.

No. 158.

The Lords, in re antiqua, et ubi erat penuria testium, allowed women witnesses to be received to prove a propinquity in order to a service. See APPENDIX.

Fol. Dic. v. 2. p. 430.

1730. June. MURRAY *against* SMITH.

No. 159.

A woman having raised a declarator of her marriage with a certain person then defunct, in order to have the benefit of the legal provisions, the Lords refused to sustain the naked testimony of two women witnesses offered for the pursuer to prove the solemnization of the marriage, unless further adminicles could be condescended upon. See APPENDIX.

Fol. Dic. v. 2. p. 530.