

No. 151. "The Lords found a woman-witness not habile to prove the set of a tenement within burgh."

*Dalrymple, No. 153. p. 212.*

1715. December 13.

MUIRHEAD *against* REID.

No. 152.

Women received as witnesses to prove an account of necessaries furnished out of a shop.

Mr. James Muirhead and his spouse, pursues Isobel Reid and her husband, for an account of brandy and other necessaries furnished out of the pursuer's shop, which was offered to be proved by women witnesses, who, the defender alleged, were not habile by the statute of King Robert I. and constant practice, conform to which the opinions of my Lord Stair, my Lords Dirleton, Sir James Stewart, and all other lawyers agree; and so it was expressly found, 21st July 1675, Wilkie *against* Morison, No. 76. p. 16975. though the point to be proved was a domestic affair, viz. the lending of a bed by the mother to the daughter-in-law living under the same roof.

It was answered for the pursuer: The rule is acknowledged, which is founded both on law, on the opinion of all the authors cited, and all other lawyers; but that rule hath many exceptions, especially where the point to be proved is such as falls most properly under the cognition of women, as a woman's bringing forth a living child, or where *ex natura negotii* there is *penuria testium*, and where the few witnesses that can be had are only women-witnesses, which is the present case; for here the particulars libelled were furnished out of a shop kept by the pursuer's wife, in which there were no men apprentices, nor other men adhibited to any business in the shop, but only the woman in the house where the shop was kept; and such persons as dealt with the pursuer's wife, seeing no man present, and buying in the ordinary way, without ready money, must be understood to submit to such a manner of probation as possibly could be had. And, as to the decision, it is single; and since that time women have been generally received, where there was no place for choice of witnesses.

"The Lords repelled the objection against the women witnesses."

*Dalrymple, No. 154. p. 214.*

1716. November 21.

No. 153. DUNBAR of Thundertown, and Others, *against* INNES of Dunkintie.

In a process of improbation of a disposition granted by Innes of Durkland to the defender Innes of Dunkintie his nephew; the paper, being signed by four witnesses, whereof two were dead and two alive; and the pursuers, upon several alleged circumstances in fact, having craved to be allowed to insist in the indirect

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.