

1794. December 3.

WILLIAM GORDON *against* JOHN and HUGH MACFARLANES.

William Gordon, writer in Dumfries, having been cited by John and Hugh Macfarlanes, to appear at Edinburgh as a witness, came to Town in the ordinary stage-coach; he was detained two days there in order to be examined, and returned on the 4th from his departure, by the same conveyance.

He afterwards claimed £4. 12s. as the actual expense of the journey, exclusive of any charge for trouble and loss of time.

The Macfarlanes refused to give him more than 12s. 4d. in terms of the act of sederunt, 21st December 1765, which allows a witness 1s. 2d. for each day he is detained at the place where he is to give his evidence, and, provided he travel on horseback, 2s. 6d. for each day he is on the road; contending, that in the present case, Gordon might have come to Town on horseback in two days, and returned in the same time. They farther

Pleaded: It was the object of the act of sederunt to make a general rule applicable to all cases, and however inadequate the indemnification it affords, no more can be exacted while the act remains unaltered. To allow a witness the actual sum expended by him, would not only often be hard on poor litigants, but, as the sum to be given would vary in each case, would be the source of constant disputes.

Answered: As every individual in the community is interested in the punishment of crimes, there might be some reason for maintaining, that a witness in a criminal cause should pay his own expenses; even in that case, however, the public prosecutor is accustomed to give a sum for indemnification, suited to the circumstances of the case. But as the benefit arising from the evidence of a witness in a civil cause is wholly confined to the individual litigants, the party by whom it is cited ought to pay his full expenses: Indeed, if witnesses are not indemnified, it would be an easy mode of gratifying malice against a person living at a distance, to cite him in that capacity; and there would besides be danger of a bias in his deposition, if his only chance for indemnification depended on the good will of the person by whom he was adduced. As therefore the sum allowed by the act of sederunt is, from the change of circumstances, totally inadequate for the purposes for which it was intended, the act ought not to be, and in practice never is, enforced.

The Lord Ordinary found, That Mr Gordon was not legally entitled to demand more than what was allowed by the act of sederunt 1765.

Upon advising a reclaiming petition for Mr Gordon, with answers, the Court, though they considered the allowance fixed by the act of sederunt to be too low, were of opinion that effect must be given to it, untill it be altered; but sensible of the hardship of the case, they thought that the act ought to be liberally construed as to the time allowed for travelling.

The Lords therefore found the "petitioner entitled to fourteen days travelling-charges, besides the two days he was detained in Edinburgh, which, at the rate

No. 209.

A witness is not entitled to charge more for his travelling-expenses, than what is allowed by the act of sederunt, 21st December 1765.

No. 209.

of 2s. 6d. Sterling for each travelling day, and at the rate of 1s. 2d. Sterling for each of the two days he was detained in Edinburgh, amount to the sum of £1. 17s. 4d. Sterling; found the respondents liable to the petitioner in that sum, and of £5. Sterling of expenses of process, and the full expenses of extract."

Lord Ordinary, *Abercromby*. For Gordon, *D. Cathcart*. Alt. *Turnbull*. Clerk, *Pringle*.
D. D. *Fac. Coll. No. 137. p. 312.*

No. 210.

The defender, in an action of divorce, cannot adduce her mother, brother, or sister, as witnesses.

1797. *January 21.*JAMES BELL *against* ISOBEL KING.

In an action of divorce, at the instance of James Bell, against Isobel King, she proposed to adduce her mother, brother, and sister, as witnesses. She wished, in particular, to disprove a material circumstance, sworn to by a single witness for the pursuer, which she alleged to be false, and her brother was the only person who had access to know it to be so.

The pursuer having opposed the examination of these witnesses, the Commissaries "sustained the objection."

The defender presented a bill of advocation against the judgment, which the Lord Ordinary took to report.

The Court thought the interlocutor of the Commissaries right. The opinions delivered were the same in substance with those stated in the report, 10th July 1790, Dalziel against Richmond, No: 205. p. 16780. It was also observed, that the fact which the defender was desirous of disproving by her brother's evidence being sworn to by one witness only, could not materially injure her cause.

The Lords unanimously refused the bill.

Act. *Solicitor-General Blair, G. J. Bell*. Alt. *Fletcher*. Clerk, *Menzies*.
Fac. Coll. No. 12. p. 24.

No. 211.

A witness found to be admissible, although, while in the service of the party by whom he was adduced, and before his citation, he had drawn up, at his master's desire, and delivered to him, a state-

1798. *February 10.*THOMAS DURHAM *against* THOMAS MAIR.

Thomas Durham brought an action against Thomas Mair for defamation, in which the latter adduced as a witness, Alexander Wardrop, formerly his clerk, who being examined *in initialibus*, deposed, "that before he left the defender's service, and long before he received any citation as a witness, he drew up a paper containing an account of all the facts which he knew with regard to the cause, and likewise of other particulars which did not come within his knowledge, and that he signed the paper at the desire of the defender, and delivered it to him and has not seen it since."

The writing alluded to having been produced by the defender, it appeared, that although written by the witness, it was not signed by him, as he had erroneously stated.