

No. 79. The Lords found, That he could not be a witness, though he was a person of integrity above exception ; and that he was free to declare that, at the said consultations, the point whereupon he was to be used as a witness was not in consideration.

Clerk, *Gibson*.

Dirleton, No. 441. p. 215.

1677. *February 8.*

LUDOVICK STEWART and Others, *against* THEODORE MONTGOMERY.

No. 80.
A witness renouncing his interest in the cause may be received.

In an action for proving the tenor against Theodore Montgomery, there being one George Montgomery cited as a witness, it was alleged, that he could not be received because he might tyne and win in the cause, in so far as he had a right of wadset of a part of these same lands of Auchenhead, granted to him by the Earl of Eglintoun. It was answered, That his right was only a wadset, and besides his infetment, he had sufficient caution in case of requisition, and so was in no hazard to win or tyne in the cause. The Lords did find, that unless he would renounce his right of wadset, and take him to his security by cautioners, he could not be received a witness, seeing without his renunciation he kept it still in his option to make use of his infetment, or to require and pursue the cautioner.

Gosford MS. p. 634. and No. 956.

1678. *July 18.* CALDWELL *against* CALDWELL, and A. *against* ROLLO.

No. 81.

Being queried, If a curator, after expiration of his office, might be witness where it tended to his exoneration, since he never intromitted, and was alike sib to both ; the Lords resolved he might.

In another query, If a tutor could be admitted to prove the passive titles against the Lord Rollo, whose pupil had the like action on the passive titles ; the Lords determined negative, except *in penuria testium*, and then to be received *cum nota*.

Fountainhall MS.

1678. *November 27.*

TAIT and His WIFE *against* FORREST and His CAUTIONER.

No. 82.

A cautioner for a taverner being pursued for what she was wanting in her account of wine, alleged that her mistress by a back-door had at several times drawn off the wine ; which being found relevant, witnesses were adduced, and amongst

the rest several women ; against whom it was objected, that they were not habile witnesses by law. It was answered, That they were habile in domestic matters, and have been received in things of greatest importance, as bearing of a child, and the liveliness thereof, as being able to weep.

The Lords ordained the mistress to be examined upon oath, in presence of other women witnesses ; but if the husband used his privilege in refusing his wife to depone, the Lords would consider the bill, whether they would admit women as witnesses *ex officio*, or not.

Stair, v. 2. p. 648.

No. 82.

1678. November 29. BAILIE OF FALKIRK.

Queried if the regality of Falkirk's officer might be a witness for the Bailie. The Lords found he might, if he depended upon the Lord of regality for his out-putting, and not on the Bailie ; yet the Lords refused my Lord Nithsdale's officer *cum nota* in his cause with the King's vassals of Duncow.

Fountainhall MS.

No. 83.

1679. January 15. BROWN *against* TOWN OF KIRKCUDBRIGHT.

Brothers-in-law are refused as witnesses, unless when there is *penuria testium*, and then *cum nota*.

Fountainhall.

No. 84.

* * This case is No. 110. p. 10847. *voce* PRESCRIPTION.

1679. January 17. HALTON *against* The TOWN OF DUNDEE.

In Halton, treasurer-depute, his cause against the Town of Dundee, the Lords refused to admit as witnesses such burgesses as were sworn to advance the good of the Town by their burgess oath, (this, it may be, will not extend to the *cives honorarii*,) because it is presumed they will be partial, though it be not *in re propria*, but *in materia universitatis*. Some affirm, (and I heard the President say it,) that they rejected no burgesses to be witnesses, but only the Magistrates. It is well known that citizens have been frequently received in such cases before. The distinction of the Doctors, and interpreters of the Roman law is, *Si tangat cives ut universos*, (as in matter of privileges,) then burgesses may be witnesses ; but if it concern them *ut singulos*, as if it be in the case of a commonty, where every burgess

No. 85.
In what cases burgesses may be witnesses relative to the affairs of the Town.