

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.

No. 82.

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.*

---

1678. November 29. BAILIE OF FALKIRK.

No. 83.

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.*

---

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

No. 84.

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

*Fountainhall.*

\* \* 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.

No. 85. has privilege of pasturage, and putting in his beasts, then the citizens are not receivable. See Cavalcanus de testib. p. 119. ; and Mascardus de probat. Conclus. 1406. N. 13. and Conclus. 1422. De testibus universitatis. Yet in causa ecclesiæ clericus admittitur. Vid. Harprecht. ad Tit. Instit. De serv. præd. Balf. Pract. Tit. Of Probation by Witnesses, and 6th June, 1679, Abbotshall, No. 24. p. 9414.

1679. February 21.—The Lords sequestrated this afternoon for advising the cause betwixt my Lord Halton, treasurer-depute, and the Town of Dundee, (17th January, 1679.) The probation was so long, that it took the Lords from three o'clock till near 11 at night, the latest that any remembers they sat ; but he was one of their own, and I think none will quarrel that it was done *de nocte*, since the sentence was next day pronounced in day-time. See Polidorus Ripa de his quæ fiunt nocturno tempore, C. 134. “ The Lords having considered the writs and testimonies of the witnesses, and books produced for either party, and dispute thereon, do find and declare, that the pursuer Halton is heritable constable of Dundee, and hath the sole criminal jurisdiction both in capital, and lesser crimes and delicts, blood-wits, riots, batteries ; and that the Town of Dundee have only been in use to fine and amerciate their burgesses, and others, in small mulcts and punishments for preserving the peace of the burgh, and for injuries and wrongs to the Magistrates, (this is mixtum imperium, or jurisdictio ad explicandam et tuendam suam jurisdictionem,) as also for breach of the Town's proper acts, and for turning of noxious persons out of the Town ; and allow them to continue therein, and declare the same to be nowise prejudicial to the constable's criminal jurisdiction, which may be exerted upon the same persons for the same offences, (this is *jurisdictio cumulativa*,) according as they are liable by the public laws, of the kingdom : And find, that the constable hath the sole civil jurisdiction by the space of eight days (this is privative) of the first fair in August yearly, and that during that time he hath right to have all the keys of the tolbooth, and to keep guards there : And find, that the constable hath right to ride the first fair of Dundee with such number of persons as he sees fit, and to uplift the customs of the said fair, and the best colt at the said fair : And also find, that the constable hath right to the assize fish, viz. 100 herring out of each boat, and the like number of other small fish, either dry or green, coming into the harbour of Dundee, and of kieling, ling, and other fishes of that kind, two out of each boat : And ordain the Magistrates of Dundee to receive his prisoners into their tolbooth, and to concur for furnishing assizes to him from time to time, as they shall be required. And the Lords declare, in case of the concurrence of the jurisdiction of the constable and the Magistrates of the burgh, that the constable shall have the presiding, and that all summonses, acts, sentences, and executorials, in case of the said concurrence, shall pass in name of the constable in the first place, and in the name of the Magistrates in the second place ; and find the probation to extend no farther, and decern for all the particulars above-mentioned.” This made much noise, that

Dundee of a burgh royal was thus degraded to less than a burgh of barony; and it was known that the Scrymziors, former constables of Dundee, who were haughty and great men, never possessed all these privileges. However, the President said, they had now the marches of their jurisdictions, and that the Lords had left Dundee as they found it, and had taken nothing away from them whereof they found they had ever been in possession.

No. 85.

*Fountainhall, v. 1. pp. 33. and 43.*

1679. February 13.

A. against B.

It is objected against a witness, that he had told what he was to depone, and so was *proditor testimonii*. The Lords found, they might be asked what they knew of the matter, providing no paction be made with them to abide at that information.

No. 86.

*Fountainhall MS.*

1680. July 16.

ROOME against M<sup>c</sup>BRAIR.

In a cause Roome against M<sup>c</sup>Brair, the Lords sustained this objection against a witness, that he was a moveable tenant wanting a tack at the citation, though he had gotten a tack afterwards, because it might be given him of purpose to capacitate him.

No. 87.

*Fountainhall MS.*

1680. July 21. ARBUTHNOT of KNOX against The LADY.

It was objected against Lamb of Brigtown, one of the witnesses led by her, that Lawriston her nephew had been sounding him what he could say; and Lamb confessed that Lawriston had asked him what he knew anent that bond which was quarrelled by Arbuthnot, and what he could depone thereabout. And he having confessed all this, and it being reported to the Lords, they "found, since there was no good deed nor promise of it, the objection ought not to cast him from being a witness."

No. 88.

*Fountainhall, v. 1. p. 109.*