

1757. December 16.

ALEXANDER FAIRLY *against* WILLIAM BANNATYNE and COMPANY.**No. 194.**

Servants admitted as witnesses in behalf of their masters *ubi est penuria.*

Bannatyne and Company in **Ayr**, were in use to send yarn, in the way of trade, to the Cumberland factory at Glasgow: The yarn was delivered to Fairly a carrier, and carried by him, and sometimes by his servant Arrol, and delivered to Lang, clerk to the Cumberland factory at Glasgow.

At settling accounts, the Cumberland factory denied the receipt of 400 spindles with which they were charged. Bannatyne and Company brought a suit against the partners of the Cumberland factory, Fairly, Arrol, and Lang, concluding against them, to give an account, each for himself, of this yarn, and to make payment of it; and in the course of the process, the delivery to Fairly was proved.

Fairly, to exoner himself, endeavoured to prove that he had delivered it to Arrol, and that Arròl had delivered it to Lang; and offered the evidence of Arrol in support thereof.

Lang objected, That Arrol was not a *habile* witness, having an interest in the cause to exoner himself.

Answered: If carriers were not allowed the benefit of their servants' evidence to prove the delivery of goods, under a pretence, that their servants had an interest to swear falsely, in order to clear themselves, it would be impossible for them to carry on their business.

“ The Lords, before answer, allowed the evidence of Arrol to be taken, *cum nota.*”

For Fairly, *J. Dalrymple.*For Lang, *Miller.**J. D.**Fac. Coll. No. 71. p. 118.*

1759. July 5.

GEORGE MUSCHET Merchant in Stirling, *against* WILLIAM CHRISTIE Merchant there.**No. 195:**

Objection sustained, that the witness proposed, had an interest in the cause at issue.

Muschet being copartner with Corsar in a skinner-trade, Corsar, in conjunction with one Barclay, embezzled, and fraudulently disposed of the skins to Christie.

Muschet complained of this fraud by petition to the Magistrates, and craved, That Corsar and Barclay should be incarcerated; and that the skins embezzled should be sequestrated. He thereafter brought an action against Christie for repetition of the skins.

These processes were conjoined; and Christie offered to prove by Corsar and Barclay's oaths, that he fairly bought the skins, and paid for them.

Objected: That they are not *habile* witnesses; they are defenders in the conjoined processes; they may lose or gain by the determination in the cause; for

their evidence may tend to make them liable in high penalties for the fraud committed.

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Answered: Though they are defenders in the conjoined processes; yet their evidence in the one case will not be evidence in the other.

They can neither gain nor lose by their evidence in this case; because they are liable either to Christie or to Muschet for the price of the skins; and it is a matter of no consequence to whom they are found liable.

Though they may gain or lose by the cause; yet such witnesses are received in many cases. The owner of goods stolen is a good evidence when the prosecution is at the instance of the Crown, for theft; and yet his oath, so taken, may have some weight in the after question, Whether the goods shall be restored to him? In the same manner, the evidence of an inn-keeper is admitted in the prosecution of the person who robbed his house, though it may have the effect to free him from the action on the edict *Nautæ, Caupones*.

The inferior Court refused to admit of their evidence.

“ On an advocacy, the Lords remitted the cause *simpliciter*.”

For George Muschet, *Walter Stewart*.

Alt. *Macqueen*.

Clerk, *Justice*.

J. C.

Fac. Coll. No. 190. p. 340.

1764. January 25.

SIR ROBERT POLLOK of Pollok, Supplicant.

In a petition concerning a proof, in a question between Sir Robert Pollok and the feuers of Mearns, he, *inter alia*, represented, That John Roger in Callory, one of the witnesses, had, some years ago, contracted an impediment in his throat, which rendered his articulation so indistinct, as to be understood only by those who daily conversed with him: That, though it was thought the Commissioner, in this case, could swear an interpreter, in the same way as when a witness cannot speak English; yet, to avoid any dispute, he prayed the Court specially to authorise the Commissioner to do so.

“ The Lords granted the desire of the petition.”

For the Petitioner, *Lockhart*.

J. M.

Fac. Coll. No. 129. p. 305.

1766. March 11. HUNTER against ROBB, &c;

A petition being given in to the Court against those who were elected magistrates and councillors of the burgh of Anstruther-wester the Michaelmas preceding, complaining, that the election was procured by bribery and corruption, the magistrates and councillors denied the charge; and at the same time, by way of recrimination, insisted, that the complainers had been guilty of bribery and cor-

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Commissioner for taking a proof, allowed to swear an interpreter in examining a witness, who, from indistinctness of articulation, could be understood only by those who daily conversed with him.

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In a complaint for an undue election of magistrates and councillors, who are habile witnesses?