Sir Robert Gordon, of Gordonſtoun, Bart. *Appellant;* Caſe 56.
James Brodie of Brodie, Eſq; - - *Reſpondent.*

8th *February* 1719-20.

Proceſs—Incident Diligence.—In mutual actions relative to the property of a common, ſeveral witneſſes on both ſides, are examined upon an act and commiſſion; and upon a ſecond diligence others, who had not before appeared, are alſo examined: one of the parties gives in a new liſt of witneſſes, praying a new act and commiſſion, and to have ſome witneſſes re-examined on commiſſion who had already deponed before the Court; but his petition is refuſed.

Coſts.—30*l.* coſts given againſt the appellant.

THE appellant was proprietor of the lands of Drainie, and the reſpondent of the lands of Kinnedour, in the county of Moray. Adjacent to the ſeveral eſtates was a piece of moor and meadow land, called the moor of Drainie, to which both parties claimed a right. The reſpondent and his tenants being prevented by the appellant from paſturing the ſame, the reſpondent brought an action againſt the appellant before the Court of Seſſion to have it declared that the ſaid moor and meadow land were pertinents of his lands of Kinnedour, at leaſt that they belonged to him in common with the appellant: and the appellant thereupon brought a counter action to have it declared that the conteſted ground was a pertinent of his lands of Drainie, that the property thereof belonged ſolely to the appellant and that the reſpondent and his tenants might be enjoined not to diſturb his poſſeſſion of the ſame. It appears that the reſpondent's ſummons had been firſt dated, but that the appellant's was firſt executed.

After both parties had produced in Court the ſeveral charters, infeftments and other writings by virtue of which each of them claimed, the Court, before determining the import of theſe writings, by interlocutor on the 14th of February 1718, "allowed "both parties to prove by living witneſſes by whom and in what "manner the controverted lands had been poſſeſſed, for ſome time "paſt, and with conſent of parties granted a commiſſion to" certain perſons "to take the oaths of ſuch witneſſes as the parties "ſhould think proper to bring before them upon the ground of "the controverted lands to give evidence in the ſaid matter, and "ordered their depoſitions to be brought into court the firſt of "June following."

Several witneſſes were ſummoned by both parties and deponed upon the conteſted premiſes. All the witneſſes who were ſummoned not having appeared, both parties obtained in July 1718 an act, ordering thoſe who had not appeared to come and make oath before the Court. Some of the reſpondent's witneſſes were accordingly examined before the Court, and the appellant afterwards preſented a petition, ſetting forth that he had received information of ſome old witneſſes who might be privy to ſeveral facts in queſtion, of whom he was before entirely ignorant, and ſome of whom had been abroad, and had returned home ſince the execution of the

original act and commiſſion; and he prayed the Court to grant a new act and commiſſion for examining the new witneſſes (whoſe names were annexed to his petition,) and likewiſe to re-examine ſome of the witneſſes already examined, ſome of whom had been examined before the Court; and the appellant agreed to have the act and commiſſion reported before expiration of the time already allowed for examining witneſſes. On the 24th of July 1718 the Court "refuſed the deſire of the appellant's petition."

The appellant reclaimed: but the Court on the 29th of July 1718 alſo "refuſed the deſire of the petition."

Entered, 7 Jan. 1718-19.

The appeal was brought from "two interlocutory ſentences "or decrees of the Lords of Seſſion of the 24th and 29th days of "July 1718."

Heads of the Appellant's Argument.

When, by the law of Scotland, liberty is given to both parties to examine witneſſes, and a commiſſion is granted for that purpoſe, the examination is not cloſed by the return of the commiſſion, nor is either party barred from adducing further proof until there be an order of the Court for that purpoſe, which is called a circumduction of the term: and ſuch an order is neceſſary before the Court proceed to give judgment, or determine upon the evidence. But no ſuch order was made in this cauſe, and therefore the appellant ought to have been indulged in what he applied for.

Though regularly all the witneſſes ought to be examined, when the commiſſion is executed, yet if new witneſſes be diſcovered, whereof the appellant was entirely ignorant when the commiſſion was executed, it would be very hard if he ſhould be deprived of the opportunity of examining theſe witneſſes, ſo lately come to his knowledge, or ſuch of them as were out of the kingdom, and whoſe reſidence he was not at all acquainted with till after the execution of the commiſſion. It has therefore been almoſt the uninterrupted courſe of the Court of Seſſion to come into ſuch a motion. Lord Stair is an expreſs authority for this: he ſays;

B. 4. Tit. 46. § 6. "Yet by ſupplication for more witneſſes, in place of theſe that "are dead, or out of the country, or for witneſſes new come to "knowledge; the party deponing that they are come to know-"ledge ſince the former diligence, will get a diligence againſt "theſe other witneſſes." If a new diligence be to be granted in any caſe, it ought to have been in the preſent, where the appellant was but lately come of age.

The Court of Seſſion have been almoſt in conſtant uſe to grant ſuch commiſſions, and particularly in two caſes very lately; the

3 Dec. 1717. one was *Smith* v. *Heritors of Kinnaird*, where upon an application by a petition from the purſuer, the Court, after witneſſes had been examined, granted liberty for ſummoning new witneſſes not formerly cited, and for re-examining ſome witneſſes who had been

29 Nov. 1718. formerly examined. In the other, *The Earl of Marchmont* v. *The Earl of Home*, the Court did the like. So their Lordſhips, both before and ſince the appellant's application to them, have granted to others what they refuſed to him.

This

This ought the rather to have been granted, ſince the appellant agreed to have the witneſſes examined and the commiſſion returned, before lapſing of the time granted to the reſpondent for the examination of his witneſſes.

Heads of the Reſpondent's Argument.

No new diſcovery of witneſſes proceeded from the depoſitions of thoſe already examined, nor was it ſo pleaded for the appellant in the court below. He had formerly ſummoned thirty-five witneſſes to give evidence in the cauſe, many of them his own tenants, who had lived long near to the controverted lands, and as many of them as the appellant thought proper to examine, have made oath upon their knowledge of the limits and boundaries of the ground in diſpute, and how the ſame was poſſeſſed by the reſpondent and his predeceſſors. The appellant too had a ſecond diligence allowed him againſt ſuch of the witneſſes as had not appeared upon the firſt, and theſe were brought to Edinburgh, and deponed before the Court. But their not proving the allegations of the appellant, was the true reaſon of his petitioning the Court for leave to bring in freſh evidence: and the appellant had not been ſtraitened in point of time, for after his action came before the Court of Seſſion, he had eight months to ſummon ſuch witneſſes as he thought fit.

The appellant contended, that ſome of his witneſſes who had deponed, had not been examined, concerning ſeveral facts, which it appeared by the oaths of his other witneſſes that they had particular knowledge of; and therefore thoſe ought to be re-examined upon the ground of the controverted lands, and a commiſſion or warrant granted for that purpoſe. Though the Court indeed ſometimes in extraordinary caſes have directed evidences to be re-examined in their own preſence, for clearing any point that might be doubtful in their oaths; yet they never allow witneſſes, who had deponed before the Court, to be re-examined upon a commiſſion. Three of the witneſſes in queſtion were then alſo in Edinburgh.

After a purſuer's own evidences have deponed, and he has an opportunity of ſeeing the teſtimonies of the evidences brought in for the defender, the Court never allows the purſuer to bring in more witneſſes than he has at firſt made choice of, leſt the one might contradict the other, and thereby be guilty of perjury: and in a parallel caſe, betwixt Mackenzie of Roſend, and Swinton of Strathore, the Court of Seſſion refuſed to grant warrant for ſummoning new witneſſes. 12 June, and 2 July, 1718.

The appellant contended, alſo that ſome of the witneſſes, whom he had diſcovered to be neceſſary for his purpoſe were not in Scotland at the time of the examination, and ſo could not be brought in evidence; and ſecondly, that the appellant could not be barred from further proof until circumduction of the term. But, when the appellant put into Court a liſt of the twelve new witneſſes, it was aſſerted for the reſpondent, that ſeven of them were either dead, or none ſuch to be found out; and that the

other five were the appellant's own tenants, whom he could not be ignorant of, and might have ſummoned with the firſt thirty-five witneſſes. To this no anſwer was made. And though there was no circumduction of the term made when the appellant petitioned the Court in July 1718, yet ſuch circumduction was made in December thereafter, before the petition of appeal was lodged; and that interlocutor is not appealed from.

The appellant in the Court below ſupported his allegations by the deciſions of the Court, *Sir John Houſton againſt Cochran of Kilmaronock*, and *Smith againſt the Fewars of Brichen*, in both which caſes the Court allowed the purſuers a warrant for ſummoning new witneſſes. But theſe precedents differ very much from this caſe: that of Sir John Houſton againſt Cochran was in order to diſcover a fraud; and there it appeared that ſome witneſſes pointed out new diſcoveries that might be made by others, which in ſuch a matter it was moſt juſt for the Court to enquire into. But here the facts were all plain, done in the open fields, within a furlong of the appellant's houſe, and he and his tenants were daily witneſſes of the reſpondent's poſſeſſing the ground in controverſy, and ſo could not be ignorant of the proper witneſſes he was to make uſe of. Neither is the caſe, *Smith againſt the Fewars of Brichen*, the ſame with this; for that action was at the inſtance of a miniſter for proving what the defenders were in the uſe to pay yearly to his predeceſſors; miniſters are preſumed to be ignorant of what their predeceſſors poſſeſſed, and by their ignorance their ſucceſſors in office might be deprived of a living. Before any ſuch warrant be granted, even in the moſt favourable caſe, the Court muſt be ſatisfied that it is *res noviter veniens ad notitiam*. The reſpondent is ſufficiently ſupported by the act of Parliament 1672. c. 16. Art. 25. whereby it is ſtatuted, that "there ſhall only be two diligences againſt witneſſes" &c.; ſo that if they appear not to give evidence upon the firſt ſummons there is a ſecond warrant for taking them into cuſtody until they give caution to appear: and he is ſupported, alſo by the acts of ſederunt, by which it is clear the appellant is excluded from all pretence of ſummoning new witneſſes.

Judgment, 8 February 1719-20.

After hearing counſel, *It is ordered and adjudged, that the petition, and appeal be diſmiſſed, and that the interlocutors, ſentences or decrees complained of in the ſaid appeal be affirmed: and it is further ordered, that the appellant do pay or cauſe to be paid to the reſpondent the ſum of* 30*l. for his coſts in reſpect of the ſaid appeal.*

For Appellant, *David Dalrymple. Rob. Raymond. Will. Hamilton.*

For Reſpondent, *Thomas Lutwyche. Sam. Mead.*