

No. 98. 1685. *March.* BISHOP OF EDINBURGH *against* WILLIAM HAY.

The advising to raise or carry on a process, or doing service therein as an agent, found to be partial counsel. But the telling some matter of fact by one before he was cited as a witness, upon which relation process was raised, was not understood to be partial counsel, he not having advised to raise the process. And a Bishop's quote-master, though he received salary therefor, was a habile witness for the Bishop, he not being a menial servant.

*Harcarse, No. 791. p. 224.*

---

No. 99. 1685. *March 20.* DUKE OF GORDON *against* CATHARINE GORDON.

Found that witnesses in a charter subscribing, but not insert or designed, before the late act of Parliament, might be condescended on; but the defender not having designed them before extracting, the Lords would not in a reduction allow it, as being omitted.

*Harcarse, No. 792. p. 224.*

---

No. 100. 1685. *March 31.* PROVOST DRUMMOND *against* ———.

One who had a *benorum*, deponing he was worth £10, (though properly it [was] not free gear) received as a witness.

*Harcarse, No. 794. p. 224.*

---

No. 101. 1685. *March.* DR. SIBBALD.

In Dr. Sibbald's process of fire and burning his house, the Lords sustained the seryant-maid in the house as a necessary witness *in facto domestico*.

*Harcarse, No. 796. p. 225.*

---

1685. *January 28:*  
WILLIAM CRAIGIE OF GAIRESY IN ORKNEY *against* MOODY OF MELSETTER.

No. 102.  
Depositions,  
bearing only  
that the wit-

Upon report of Redford, the Lords refuse, either to make the Steward of Orkney's fiars, or the Exchequer prices, the rule of compt and reckoning between.

them, as to the price of the victual and tack-duty, for extinguishing Craigie's wadset by payment; but did not find the contract usurious; and ordain the prices at which victual then sold in the country to be the rule, in so far as the same can be proved; and where it cannot be proved, they remit to the auditor to take the way he finds most probable for knowing the prices, by the commissary fiars of Caithness, (which is the next adjacent shire, though its corn is better,) or by making them to be so much more than the Exchequer price, or so much less than the Steward's price, as he shall find to be just according to the ordinary custom.

Then Melsetter, upon a bill, craving a commission to examine the witnesses at Kirkwall, the Lords 26th February 1685, remitted to the Ordinary who heard the cause, to grant a commission or not; as also to name the commissioner.—And Gairsey having reclaimed, the Lords, on the 6th of March 1685, adhered to their former interlocutor, and refused to oblige Melsetter to prove only by the Gentlemen and Merchants the current prices of victual in Orkney since 1638, (the date of the wadset) he proving by habile witnesses against whom there is no legal exception; and refused to allow Gairsey a joint probation as to the prices then giving among Gentlemen in that country.

Yet Gairsey, on a new bill, obtained a contrary deliverance on the 24th of March 1685, allowing the prices only to be proved by Merchants and Gentlemen who traded in victual, and not by other witnesses: but they still refused him a mutual probation, or to make the compt proceed for the prices which he or his father got for Melsetter's farms.

- 1685. November 4.—Moodie of Melsetter gave in a bill against William Craigie of Gairsey, shewing, that he had reported the commission granted *supra*, 28th January 1685, with the depositions, and craving that they might be pleased to advise it summarily without enrolling; and for their ease, that they should recommend to Lord Redford, who heard the cause, to peruse the depositions, and prepare the report to the Lords; which desire was granted.

1685. Dec. 9.—Lord Redford reporter of the cause betwixt William Craigie of Gairsey, and William Moodie of Melsetter, mentioned 4th November 1685, put a preliminary query to the Lords, seeing their commission required the witnesses should be merchants, if they could be reputed merchants who could not subscribe their oath, but the Judge had signed for several of them? The Lords found this did not hinder, and instanced Thomas and others.

Then the Lords, on the 23d of December, advised this cause. The report was quarrelled by Gairsey, that it was not taken in Orkney, but in Caithness, anent the prices of Orkney victual; and though the interlocutor restricted Melsetter to prove it by merchants and gentlemen, yet he had trucked up sundry, and given them the denomination of merchants, who never traded in victual, but might buy a boll or two for their family at a great price upon trust, which could be no rule; and some deponed on the dear years 1674, and 1675, and what prices the Steward, Bishop, or other superiors, took, when their feu-duties were not delivered, which was *in*

No. 102.  
witnesses were deeply sworn, not that what they deponed "was true, as they should answer to God," were not sustained as probative.

No. 102.

*modum pene*, and so no constant standard nor rule. Melsetter contended, that Gairsey's back-tack duty (being eight score of bolls of bear upon the malt-pundler of Kirkwall, which is six score of bolls of our Linkithgow measure, for the annual-rent of his 9000 merks of principal sum) was certainly usurious and exorbitant, seeing the wadset was in 1638, when the annuals were at 8 *per cent.* and the wadset having been granted conform to that, when they came down in 1649 to 6 *per cent.* he ought to deduct a fifth part of his victual-duty; and any who depone on low prices, as three or four pound the meal or boll, must be understood of old bear or spoiled victual. The Lords annulled the report; and, for adjusting the price, ordained the Lord reporter to call for such merchants of Edinburgh, as traded in Orkney victual, and examine them anent the current price. The words are, "The Lords having considered the report, they find the same is not a formal report, the depositions bearing only in the narratives, that the witnesses were deeply sworn, but not that what they deponed was truth, as they should answer to God; and therefore refuse to sustain the said depositions as probative; but remit to Lord Redford to endeavour to settle the parties upon a certain price *communibus annis*, and if they do not agree, that he may call before him such merchants within the town as he thinks fit, and to examine them upon oath what they know of the prices of Orkney victual the years libelled; and to report to the Lords."

Melsetter reclaimed against this, and his bill with theans wers being advised on the 14th of January 1686, they adhered to their former interlocutor, and ordained the merchants formerly named in Edinburgh, and such others as Melsetter's procurators will adduce, to be examined anent what they know of the prices of the Orkney victual, for the years controverted; and allow Melsetter to produce the Caithness fiars, if he think fit.

Thereafter, on mutual bills and answers, and instructions, the Lords, on the 21st of January, ordained the commission to be renewed, but allowed a joint probation to both parties, notwithstanding that by the former act Melsetter had the sole probation.

Upon a new application, the Lords, on the 29th of January, renewed the old commission, with this difference, *1ma*, That now they allow both parties probation; *2do*, That they will not determine the quality of the witnesses; but allow either party to adduce what habile witnesses they please, wherever they dwell, though not in Orkney and Caithness; and refused Gairsey's desire as to the sequestration of Melsetter's rents *medio tempore*, during the probation. Thus far President Lockhart altered the former President's interlocutor, though he was very tender that way.

*Fountainhall, pp. 334, 371, 386.*

\* \* \* Sir P. Home's report of this case is No. 9. p. 4419. *vide* FIARS OF THE YEAR.