

H O N O R A R Y.

1746. November 20. NAPIER against The LORD ELPHINSTONE.

GABRIEL NAPIER writer in Edinburgh, gave in a petition, shewing, that in a process depending at his instance against the Lord Elphinstone, a commission had been granted for taking a proof at Airth, which was accordingly done, the petitioner having, as was ordinary, named the commissioner for taking the other party's proof; that it was the custom for the party adducer of the proof, to give a gratification for pains to the commissioner before whom it was led, and his clerk, notwithstanding his being named by the other party; that nevertheless the Lord Elphinstone had not satisfied them, and therefore praying he might be ordained to do it.

'THE LORDS were of opinion, that the office of commissioner was not mercenary, and did not entitle him to claim a reward; and therefore refused the bill as to him, but that the clerk had a claim.'

Petitioner, *W. Grant.*

Clerk, *Justice.*

Fol. Dic. v. 3. p. 275. D. Falconer, v. 1. No 143. p. 180.

* * * Kilkerran reports the same case :

In a forthcoming, pursued by Gabriel Napier writer in Edinburgh, against Lord Elphinston, after a conjunct proof had been led by both parties, a farther proof was allowed to Lord Elphinston, and a commission, the pursuer naming the commissioner as usual.

After that proof was taken, the defender refusing to pay the commissioner and clerk for their trouble in taking his own proof, the pursuer who had named the commissioner applied to the Lords for having the defender found liable in payment of the same: On occasion of which petition, a question arose, Whether or not commissioners were entitled to any fee or reward? And it was agreed that they were not, as what might be *mali exempli*, should they, on whom the wording of the testimonies depends, be allowed to take money from either party. And the case of arbiters was remembered, wherein, though it

No 1.

A commissioner appointed by the Lords for taking a proof found not entitled to a reward, but that his clerk must have a fee.

No 1. be the practice to club for paying arbiters, yet, when the case came to be determined, Whether *de jure*, arbiters were entitled to any reward, the LORDS found that they were not.

But as to the clerk to the commission, it was agreed, that he was entitled to a gratuity; and it was remitted to the Ordinary to tax the same, to be paid by the defender, whose proof it was.

Kilkerran, (RECOMPENCE.) No 2. p. 477.

* * * An opinion, in opposition to the above case, has, in later instances, been incidentally expressed on the Bench.

See RECOMPENCE.

See APPENDIX.