

1671. *February 13.*

Anent PROBATION by WITNESSES.

The Lords declared they would *ex officio* examine witnesses upon an allegiance of payment proponed against a bond, in regard there was a concurrence of several other presumptions, though this seems to take away writ by witnesses.

*Advocates' MS. No. 126, folio 89.*

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1671. *February 13.*WISHART *against* Lady CAMNETHAR.

IN the case of Wishart against Lady Camnethar, daughter to Mr. William Arthur, they found, an infetment of annualrent might be extinguished by offering to prove, (and that by witnesses, even the tenants themselves,) that the annual-renter had intromitted with as many mails and duties of the lands, though lands within the burgh, as will satisfy both the principal and annual.

This seems a very dangerous preparative to lay so great a stress upon the depositions of witnesses; and is contrary to our fundamental laws and practice that has been at much pains to avoid that inconvenience, and therefore allows nothing above L.100 to be proven by witnesses.

*Advocates' MS. No. 127, folio 89.*

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1671. *February 13.* GEORGE BAYNE, Merchant in Edinburgh, *against* the BURGH of CULROSS.

THIS is an action against the Magistrates, to pay the debt for setting the rebel incarcerated in their tolbuith at his instance at liberty. The DEFENCE was that though incarceration *seu squalor carceris* be *paena*, yet where the party was so very poor that he had no earthly thing, but from their prison went to an hospital, and there died, the bailies could never be made liable by setting such a miserable person at liberty.

This went to interlocutor; and the Lords assoilyied the Magistrates in regard of the rebel's poverty, and that he went to the hospital.

This seemed *pessime judicatum* to Mr. George Norvell and severals; for by our law there is nothing can put Magistrates in *bona fide* to set a rebel at freedom but only thir two, either a suspension and charge to set at liberty, or a consent under the party's hand by whom he was imprisoned. And the laird of Coldingknows, goodsire to this Earl of Home, being incarcerated within the tolbuith of Edinburgh for debt, upon a petition given in to the secret Council he obtained an order to the Magistrates to permit him to stay at such a person's house, in regard of his sickness and infirmity of body. This order the Magistrates, (having taken advice of their assessors,) did disobey, and next council day represented their reasons, whereupon the Council retracted their warrant.

*Advocates' MS. No. 128, folio 89.*