

1712. July 9.

—— HAY, Minister of the Gospel, *against* SIR SAMUEL FORBES of Foveran.

No. 146.

In a spuilzie at the instance of —— Hay against Sir Samuel Forbes, a person called as a party in the process being passed from *simpliciter*, was allowed to be examined as a witness *cum nota*; the reason for taking his oath *cum nota*, was, because the Lords thought that the passing from him might be some obligation upon him to the pursuer, or that perhaps he was passed from to catch greater fish.

Forbes, p. 614.

1712. July 26.

JOHN CORSBIE, Portioner in Prestonpans, *against* GEORGE M'LAIR there.

No. 147.

In the action at the instance of John Corsbie against George M'Lair, for the spuilzie of a caldron, the Lords sustained a tenant in a dwelling-house in Prestonpans belonging to the pursuer, as a habile witness for him; in respect our custom rejects only moveable tenants in lands, whereby they have their subsistence, from bearing witness for their masters, as supposed to be more under his influence, than tenants in dwelling-houses can be thought liable to the influence of their landlords.

Forbes, p. 628.

1722. November.

BAILIE TOD and the PROCURATOR-FISCAL of MUSSELBURGH, *against* BAILIE CROOKSHANKS.

No. 148:

In the process at the instance of Bailie Tod against Bailie Crookshanks, for a verbal injury committed by him against Bailie Tod when a present Magistrate, the pursuer adduced Bailie Mitchel and two common town-officers for witnesses.

Objected for the defender: *1st*, Bailie Mitchel cannot be admitted a witness, in respect at the time of committing the alleged injury he was a Magistrate himself, and pronounced decret against Crookshanks for the injury; which showed his affection in the cause, and is something more than the giving partial counsel; *2do*, The two common officers having a dependence upon, and being under the impression of the Magistrates of the burgh, cannot be received witnesses for the pursuer, who, though he be not a present Magistrate, is still upon the council.

Answered: Though Bailie Mitchel were still in office, he might be judge to an action for injury done to his colleague, there being no parity betwixt his judg-

In a process for a verbal injury done to a present Magistrate pursued after he was out of office, his colleague, who fined the offender for that injury being also exauctorated, was admitted as a witness for the pur-

No. 148.
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ing in the cause, which is *ex officio*, and the giving partial counsel, which is an officious intermeddling in an affair without a call; besides, both the pursuer and Bailie Mitchel being now exauctorated, they are to be considered only as in a private capacity; consequently, *2do*, They cannot be supposed to have any authority over the officers produced as witnesses of the personal injury done to Bailie Tod, though aggravated by the circumstances of his being a Magistrate.

The Lords repelled both the objections made for the defender, and allowed Bailie Mitchel and the town-officers to be received as witnesses.

Forbes, p. 633.

1713. June 11.

JOHN CHALMERS, Merchant in Dunfermline, *against* GRANT of Dalrachny.

No. 149.

Upon report of the Lord Cullen, in the action at the instance of John Chalmers against the Laird of Dalrachny, the question being, Whether in the modification of the expenses of a witness, he ought to have allowance for the charge of a horse? The Lords found, That if the witness depone, That he used to ride when he travelled, and that he came on horseback to depone in this cause, he ought to have the expense of his horse allowed him.

Forbes, p. 677.

1713. June 19.

The CREDITORS of the Deceased WILLIAM HAMILTON of Orbiston, *against* JAMES HAMILTON of Dalziel.

No. 150.

In a reduction *ex capite lecti* of a disposition made by the deceased William Hamilton of Orbiston to James Hamilton of Dalziel, pursued against him by the granter's creditors; the Lords, upon report of the Lord Royston, refused to admit the defender's uncle as a witness for him to prove that Orbiston was *in liege poustie* when he granted the disposition, albeit he was an instrumentary witness therein, because the instrumentary witnesses were chosen of consent only for instructing the verity of the deed; and the pursuer did not quarrel that, but only its being granted on death-bed, which allegiance of death-bed ought to be redargued by unexceptionable witnesses.

Forbes, p. 680.