

whom it it was objected, They were inhabile by law to extinguish debts and civil rights, however they might be allowed to prove a riot ; and he can never pretend to have been dispossessed, seeing he was never in possession of that house, in regard his father having given him off a part of his estate, he had riotously mispent the same, which made the father dispone the rest of his estate to his second son ; and *esto* he had been thrust out of the house, and Sir Thomas, with other friends, had inspected the writ ; where lies the presumption, that therefore he abstracted the instructions of his own payments ? But the truth was, they were sealed up. Answered, The circumstances are such as require expiscation by all sorts of witnesses ; for beating and violence is libelled to have been done under cloud of night, and at his father's door and close ; who could see this but the domestic servants then about the house ? And by the witnesses already adduced, it is proved, that one of Sir Thomas Kennedy's sons stood at the door with a drawn sword, and pulled off Craigcaffie's wig when he offered to return. The Lords finding it was *in re domestica*, and under night, and to prove acts of violence, they allowed the women witnesses to be received.

Fountainhall, v. 2. p. 542.

1711. February 7.

CAMPBELL *against* FARQUHAR.

No. 142.

It being objected against a witness, that the adducer had got bond for a sum of money from the witness, whom he had under diligence for it, which impression might bias him to be partial ; the Lords repelled this objection.

Fountainhall.

* * * This case is No. 186. p. 12082. *vide* PROCESS.

1711. November 16.

WILLIAM ARMSTRANG in Bogside, and JOHN IRVING of New-orchyard, his Master, *against* JOHN SHARP of Hoddam and his TENANTS.

In the process of spuilzie at the instance of William Armstrang and his Master, against Sharp of Hoddam and his Tenants, a conjunct probation being allowed to both parties. The pursuer objected against Archibald Currie produced as a witness by the defender, That he could not be received, because both the pursuer and he had sworn judicially before the regality court of New Dalgarno, that each of them dreaded malice, ill-will, and bodily harm of other, whereupon both were put under law-burrows to keep the peace.

Answered for the defender : Archibald Currie's being under law-burrows at the pursuer's instance, is no argument that the former bears bodily malice against the latter ; law-burrows being used, not out of malice, but as a legal remedy to defend against oppression ; and suppose the witness might fear oppression from the pursuer, that doth not argue that he hates him ; seeing our Saviour commands.

No. 143.

One of two persons under mutual law-burrows received as witness against the other, the former purging himself by oath against the other.

No. 143. us to do good for evil, and love our enemies ; and if the witness purge himself of malice, it is supposed that he walks conform to the Gospel rule.

The Lords allowed the witness to be received, he purging himself by oath of any malice towards the pursuer.

Forbes, p. 540.

1712. *January 17.*

SIR WILLIAM MENZIES and ALEXANDER CLERK, *against* WILLIAM MORISON
of Prestongrange.

No. 144:

Upon report of the Lord Bowhill, the Lords allowed Marini a Jew to be received a witness, because his religion doth not hinder him to swear our *formula* by God himself, &c. unless he were a Sadducee, who denies the Resurrection, and so could not depone "as he shall answer to God at the Great Day."

Forbes, p. 570.

* * * Fountainhall reports this case :

A Jew being adduced as a witness in a certain cause, it was objected by the other party that he was inhabile in law, considering the rooted hatred they bear to all Christians. The Lords thought, if a Jew were led a witness in a cause betwixt a Christian and a Jew, there might be reason in that case to suspect him, but it being betwixt two Christians, his disowning Jesus Christ for the Messias could no more incapacitate him, than it would do a Socinian ; our *formula jurandi* mentioning only God in the general ; and though he will not swear on the New Testament, yet he will swear by Jehovah, on his Torah or the law of Moses. Yea, which is more, a Turk or a Pagan are capable ; for in Captain Green's case for piracy, two Heathen boys were admitted ; and if in criminals, why not in civil causes ? It was also remembered, that the Queen had knighted Sir Solomon de Medina a Jew trading at London ; and if capable of honours, why not of bearing testimony ? And we allow Quakers to declare in their own way.

Fountainhall, v. 2. p. 708.

1712. *June 28.*

The EARL of WINTON *against* MR. WILLIAM HAY of Drummelzier, and
MR. JAMES SETON, Brother to the Viscount of Kingston.

No. 145.

Upon report of the Lord Ormiston, the Lords refused to examine witnesses, as to Drummelzier's concurring with Mr. Seton in the management of the Earl's estate by advice ; because, advice and concurrence are general terms dipping in law ; but ordained the witnesses to be examined as to words or facts they heard or saw Drummelzier say or do.

Forbes, p. 604.