

No 192.

* * Haddington reports this case :

ANE man at the horn for ane civil cause being pursued be another party for ane fact or debt, and the same being referred to his aith of verity, the LORDS considering the defender's difficulties, either to be holden as confest gif he compear not, or to be imprisoned gif he compear, will sometimes incline, out of pity, either to give to the pursuer his choice of any Judge or clerk to receive the party's aith, or to give ane protection to the defender to compear and depone in the cause.

Haddington, MS. v. 2. folio 238.

1710. June 17.

GEORGE MOUAT, Petitioner.

No 193.

In case of necessity, reading in the minute book may be dispensed with.

GEORGE MOUAT of Hammer in Zetland, gives in a bill to the Lords, representing that William Mouat of Balquholly his cousin, having lately deceased, he has served himself heir-male and of tailzie to him *cum beneficio inventarii*, and that by the 24th act 1695, he must within year and day of his predecessor's death make up inventories of the lands and estate whereto he succeeds, and depone thereupon before the Sheriff of the shire where the lands lie; and that Balquholly lies in the shire of Aberdeen, and he has dwelt these fifty years in Zetland, and, by testificates produced is wholly unable to travel from his own house to Aberdeen; besides that their coast is full of pirates, that there is little safety in sailing, so that necessary it is that he have a commission to depone at home, which the Sheriff of Aberdeen refuses to grant him, alleging he must, by the act of Parliament, compear and depone before him: Therefore craves the Lords would either authorise the Sheriff to direct his commission, or grant it themselves, for his deponing at home, to be reported back to the Sheriff within the year of deliberation, and recorded in his books. THE LORDS saw the case was new and unprecedented, being the first of this kind demanded since the act was made; yet thought where the heir lived at such a distance, and was valetudinary, there behoved to be a remedy; and therefore yielded to a commission, but demurred if they or the Sheriff by their authority should grant it, and thought it easier to direct it straight to the Stewart-depute of Zetland themselves, to be reported to the Sheriff of Aberdeen. But it being further represented, that the occasions going thither were very rare, especially now in the time of war, and that there was a fleet ready to sail from Leith to the Orkney isles, with which the commission might be sent, and if that were lost, it may be another occasion would not offer this summer, so he should not get it reported within the year, and so lose the benefit of the act of Parliament; and therefore craved the commission might be allowed to be extracted, and given him before it came to be read in the minute-book, otherwise

he might lose the opportunity of this fleet. THE LORDS on this specialty dispensed with its being read in the minute-book; though regularly nothing should be extracted till 24 hours after it has been read there, to give due advertisement to all parties concerned.

Fol. Dic. v. 2. p. 191. Fountainball, v. 2. p. 577.

No 193.

1749. February.

HAY and ROSE against DRUMMOND.

A PROCESS being brought before the Admiral, at the instance of Hay of Hops and Rose of Blackhill, executors of Andrew Ross, cloathier in Musselburgh, against William Drummond of Balhadie, to account for the profits of a copartnery trade, in which there occurred a variety of points to be cleared by Balhadie's oath; and as he was now in France, and for certain reasons found it not convenient, perhaps not safe, to come home; a commission was therefore agreed to for his deponing at Boulogne. But, as in a case of that sort, it was impracticable to engross every interrogatory in the commission, the pursuer qualified his consent to the commission with this provision, "That a proper person should be sent to Boulogne on Balhadie's charges to examine him." And accordingly, in these terms the commission was granted by the Judge, the said expense not exceeding L. 25 Sterling.

This was complained of by bill of advocacy, on this ground, that as a commission is never refused to a man when necessarily absent, so there is no cause for loading him with so unusual a thing as the expense of sending a person to examine him, and which in all events should be reserved till the event of the cause, that if he should depone negative, these expenses might lie on the pursuer.

THE LORDS "refused the bill, and found, that the expense should lie on Balhadie, depone what he will."

The thing is new, but not unreasonable; for whatever be the cause of a defender's absence, it is a favour to indulge him with a commission. And where the case is of that nature that he cannot be examined to purpose, but where a person known to the affair is present, it is just he bear the expense, which his not attending in Court occasions, and which in strict law he is bound to do.

Fol. Dic. v. 4. p. 150. Kilkerran, (PROCESS.) No 10. p. 437.

No 194.

Who liable to the expense of a commission?