

It was doubted by some of the Lords in this case, Whether a nephew-in-law was a habile witness; for that they inclined to think, that it was a good declinator of an inferior Judge, that he was uncle or nephew-in-law to the party, though it be not a ground to decline a Lord of Session. But the Lords repelled the objection.

No. 179.

—Nephew-in-law received.

Kilkerran, No. 16. p. 599.

1749. November 21.

EARL OF MARCH *against* SAWYER.

In the competition between the Earl of March, and Anthony Sawyer, concerning the right to an heritable bond of £10,000 Sterling, by Lundin of that ilk, to the deceased Countess of Ruglen, the Earl her son claiming the same as heir, and Anthony Sawyer, her husband, as disponee; the Earl objected to the disposition as never a delivered evident, but found lying by her at her death, and not containing a clause dispensing with the not delivery; and Sawyer offered to prove the delivery at the date, by the instrumentary witnesses, who were John Dickie his agent in this process, and John Lamb clerk in his office of Paymaster-General.

It was objected by the Earl, that neither could be admitted; not Dickie, as being Mr. Sawyer's agent in the cause; not Lamb, as being his servant, and who had given partial counsel.

The Lords "Sustained the objection to Dickie, and repelled the objection to Lamb."

The objection to a witness, that he is the adducer's agent in the cause, has been often sustained, and as instrumentary witness, he is no more a necessary witness than any other person, except in so far as concerns the execution of the deed; and if there be other matters to be proved, which the adducer cannot prove without him, he has himself to blame for not making choice of unexceptionable witnesses. And one of the Lords put the Court in mind of a case, where, in the reduction by a minor of his bond granted in minority, the answer being that *se majorem dixit*, which the creditor offered to prove by the instrumentary witnesses, who were his own father and brother; the Lords, on report, "Sustained the objection," July 22, 1742.

But as to the objection to Lamb, a man's clerk in his public office is not, in sense of law, his servant. And *separatim, in rebus domesticis*, such as delivery of a writ by the wife to the husband servants may be admitted; and the giving partial counsel was not properly qualified, no fact being alleged from which it could be inferred, but only a general allegation, That it would appear from the correspondence by letters between him and Sawyer, which the Earl insisted might be produced; which resolved rather in an expiscation.

It farther occurred to be said in the reasoning upon the objection to Lamb; that the objection to a witness cannot be proved by witnesses, that is, no term is

No. 180.

If the agent in the cause can be admitted to prove the delivery of the deed in question, to which he was an instrumentary witness?— Or the adducer's clerk in a public office?—No term allowed to prove objections against witnesses.

No. 180. allowed to prove an objection. But the answer to this was, that it may be proved either by the oath of the witness himself, or of the adducer; and had what was to be proved by the correspondence, been properly qualified, the correspondence itself could have been proved by the oaths of Sawyer the adducer, or of Lamb the witness.

N. B. This judgment *quoad* Dickie was reversed upon an appeal, and he allowed to be received a witness in this cause, but *cum nota*.

When the cause came again into Court, upon the question moved, Whether the judgment of the House of Peers was to be understood as only allowing him to be received upon the delivery of the deed, or if he was allowed to be received at large? The Lords, in respect there was no limitation in the judgment, "Found he was to be received at large."

Kilkerran, No. 11. p. 600.

* * * D. Falconer reports this case :

The Earl of March claimed several bonds for considerable sums, which had been assigned by the deceased Countess his mother, to Anthony Sawyer her husband; alledging the assignation was not delivered: And to prove the delivery Mr. Sawyer adduced John Dickie, an instrumentary witness to the deed; to whom it was objected, that he had given partial counsel in the cause, being agent therein.

Answered, He is a necessary witness, as the delivery was immediately upon the execution.

Replied, He is indeed a necessary witness to the subscription, but not to the delivery; which might have been at a distance of time, and is to be proved to have been immediate, only by his evidence who has given partial counsel.

The Lords sustained the objection to the witness.

Reporter, *Justice Clerk*.

D Falconer, v. 2. p. 113.

* * * This was reversed upon appeal.

1750. January 31.

NAPIER *against* YOUNG.

No. 181.

The messenger is admitted to be a witness in a deforcement.

It appears from Sir George M'Kenzie, Tit. Deforcement, That in his time the messenger deforc'd, even though the pursuit was not at his own instance, was not admitted to be a witness in a deforcement. But by the present practice, which of a long time has obtained, where the process is not at the messenger's instance, but at the instance of the private party injured, or of His Majesty's Advocate, messengers are admitted as witnesses. And accordingly, a constable who had been deforc'd, was, in a process at the instance of the private party, in this case admitted to be a witness.

Kilkerran, No. 12. p. 601.