

S E C T. VII.

Nobile officium.

1627. January 11. LUNDIE against GOURLAY.

No 139.

The Lords having appointed instrumentary witnesses to be examined as to the cause of the deed to which they were witnesses, granted a commission for examining one of the witnesses, who, from age and sickness, was not able to appear, notwithstanding of the maxim, that *ea quæ sunt ex nobili officio non possunt delegari.*

IN an action pursued by Andrew Lundie against John Gourlay, for payment of 500 merks, contained in a bond given by the defender to the Laird of Lundie, father to the pursuer, to whom he was executor, the LORDS having found, that the witnesses insert in that bond should be examined *ex officio*, for trial of the cause of the obligation and debt therein contained; and a day for that effect being assigned to the defender to summon them to compear before the Lords, one of the said witnesses being excused for age and sickness, and therefore a commission being craved to examine him; and the pursuers contending, that, in matters of this quality, no commission ought to be given, where the ordinance was done *ex officio judicis nobili*, and for informing of the judge in such particulars, which would occur to be inquired at the witnesses when they should compear, and as should occur to be asked for clearing of any doubts which the Lords would desire to be resolved of in the trying of that process, and which could not be done by virtue of any private commission, no more than witnesses of improbation could be examined by private commissions, except only by the Lords themselves.—THE LORDS found, that, notwithstanding this examination was ordained to be done only *ex officio*, yet that they would grant a commission to examine this witness, who, for age and sickness, was not able to compear before them; and, for that effect, ordained the judge, to whom commission should be granted, to examine him upon the interrogatories to be given in by both parties, and all articles which might give light to discover the true cause of the giving of the bond, that thereby the Lords might more clearly decide in the cause after the said examination. Yet it is a maxim with us, that *ea quæ sunt ex nobili officio non possunt delegari*. But Bartol. calls *mixtum imperium officium nobile*, ad L. 3. N. 15. *De jurisdictione. Et imperium mixtum (sicut jurisdictio cui cohæret) potest delegari, et hodie etiam ea quæ competunt jure magistratus possunt delegari.*

Act. Aiton.

Alt. Nicolson & Craig.

Clerk, Scot.

Fol. Dic. v. 1. p. 498. Durie, p. 256.