

No. 177.

1747. *June 16.*GORDON *against* GORDON.

Gordon younger of Balledgarno pursued a proving the tenor of a disposition, in virtue whereof he claimed the said estate, to which otherwise his father would have succeeded, and offered to adduce as a witness his sister, to prove a conversation between her father and her, owning him to have had the paper in his possession.

Objected, That she could not be examined, as being sister to the adducer; to which it was answered, Her relation was nearer, as being daughter to the defender.

The Lords were dubious; but observing that there were several old decisions in favour of the objection, and that there did not appear any since, in which the contrary determination had been given, they sustained it.

D. Falconer, p. 251.

1748. *March 5.* CUMING *against* CUMING her HUSBAND.

No. 178.
A witness related to the adducer was repelled, though nearer related to the objecter.

In a process by a wife against her husband for separation and aliment, on account of maltreatment, she was allowed to adduce their common children as witnesses; not because they were the same relation to both parties, which were no good reason, but because they were necessary witnesses *in re domestica*.

Kilkerran, No. 9. p. 599.

* * * D. Falconer reports this case :

Mrs. Cuming insisted against her husband, a brewer in the Canongate, for a separation on account of maltreatment, and having adduced as witnesses the servants who from time to time were in the family, offered to adduce their common children, because for a considerable time he would keep no servant, during which he had maltreated her in the presence of the children, who therefore were necessary witnesses.

The Commissaries allowed the children to be examined, and the Lords refused a bill of advocation.

D. Falconer, v. 1. p. 334.

1748. *July 20.*

STRANG *against* STRANG.

No. 179.
A witness within the forbidden degrees to both parties.

The objection to a witness adduced by the defender, in an improbation for proving his approbatory articles, that he was within the forbidden degrees to the adducer, was sustained, notwithstanding the answer, That he stood in the same relation to the pursuer; as had been formerly done, Jan. 24. 1744. A. against B. No. 170. p. 16749.

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.