the other to the multurer, which the defenders averred to have been only one lippy for both; the Commissioners for taking the proof having referred to the Lords an objection made for the pursuer to certain witnesses adduced for the defenders, That they were within the prohibited degrees to some of the possessors of the barony, and therefore could not be received as to any of the possessors thereof, the defenders, applied by petition, praying for a direction to the Commissioners to repel the objection to the witnesses, so far as concerned such of the defenders as stood in no relation to the witnesses. No. 189.

The Lords, on advising this petition, with the answers, "Sustained the objection as to the whole defenders."

In both cases, the objection was considered as indivisible, and that the defenders might as well adduce one another, as adduce a witness within the forbidden degrees to any of them.

Kilkerran, No. 17. *p.* 603.

1752. *December* 19. DR. PARK *against* DALRYMPLE.

No. 190.
A witness liable to be set aside, because of proximity of blood to one of the parties, cannot be received, though he is of the same relation to the other party.

Dr. Park brought an action upon the passive titles against Elizabeth Dalrymple, his wife's sister, for medicines furnished to her deceased father, and fees for attending him. He offered proof of the furnishings and visits; and among other witnesses, produced the widow of the deceased.

Objected: That the witness was the pursuer's mother-in-law, and therefore could not be received,

Answered, 1*mo*, The witness was also the defender's mother; and so, being equally related to both parties, there was no fear of partiality; 2*do*, She was a necessary witness.

Replied, 1*mo*, Equal relation to both parties does not take off the objection of relation; 2*do*, The furnishing of medicines, and visits of a physician, are open and voluntary acts, and are easily proved; therefore the widow was not a necessary witness.

"The Lords sustained the objection."

Act *Geo. Brown.* Alt. *Boswel.* Clerk, *Forbes.*

Fac. Coll. No. 48. *p.* 72.

1755. *February* 28. BETHIA YULE *against* JOSEPH YULE.

No. 191.
A tutor admitted as witness for his pupil.

John Yule being eighty years of age and a batchelor, lent out two sums upon bonds, taking the securities to himself; and failing himself, to his brother Joseph Yule, his heirs, executors, or assignees.

No. 191. Thereafter John married, and had a daughter Bethia.

John named her his universal legatrix in all sums, bonds, &c. in general, but without specifying the above two bonds. In the same deed he named tutors to her, of whom his brother Joseph was one.

Upon John's death, the tutors claimed the sums in the bonds for behoof of their pupil, on this ground, that the securities taken by John, with a substitution to Joseph, at a time when John had no children and no likelihood of any, were evacuated by the supervening accident of his having a child; on the other hand, Joseph claimed the two bonds in terms of the substitution, and alleged, that the money which John had lent out was put into his hands by him, Joseph, and was the proper money of Joseph; and that the securities taken were really intended to take effect as expressed, although John should have children.

The circumstances which made this assertion probable or improbable, became, in a process at the instance of the tutors against Joseph, the subject of a proof; and in leading it, a question arose, Whether Bethia could have the benefit of the evidence of her own tutors?

Objected by Joseph: One of the strongest exceptions against a witness is, his having given partial counsel in the cause, which must apply against the tutors here, seeing they are themselves pursuers of the process.

Agents, trustees, and factors, are excluded from being witnesses, much more ought tutors, who are, in a manner, *eædem personæ cum pupillo.*

Accordingly the Lords decided in the case Waddels against Waterstone, 16th July, 1707, No. 337. p. 12484.; and Forbes of Gask against Lady Pitsligo, 1st July, 1628, No. 327. p. 12479. *Vide* others observed in the Dictionary, *supra, h. t.*

Answered: Though some Doctors in the civil law do exclude tutors in general, yet the texts of the civil law itself do not.

Agreeable to this, Lord Stair, Tit. Probation, B. 4. T. 43. § 9. in enumerating at large, and with accuracy, those who, in our law, are excluded from being witnesses, and particularly, advocates, agents, factors, and trustees, yet makes no mention fo tutors in the causes of their pupils.

These rules admit of two exceptions. A tutor cannot be a witness in a fact done by himself; a tutor cannot be a witness in a cause where he may have an interest, from being liable afterwards to the actio tutelæ. Concerning which the words of Voet. ad Tit. Pand. De Test. § 7. were cited for the one: Juris quoque ratio refragari, haud videtur quominus de rei gestæ veritate juratotestentur, si modo de iis, quæ per alios gesta, non quæ ipsi tanquam tutores gesserant: The words of the same Voet. in the same sect. were cited for the other; in which he adds, That the tutors' oaths shall not be taken in cases quorum intuitu actione tutelæ conveniri possunt, ne alias in re sua, seu ea ex qua damnum ipsis imminet, videantur testes esse.

In the case Waddels against Waterstone, the evidence of a tutor was excluded, because it came under the first exception; in the case Forbes of Gask against Lady Pitsligo, it was excluded, because it came under the second.

But, where these exceptions take not place, it stands to reason, that pupils should not be excluded from the evidence of those who must be better acquainted with all transactions relating to their affairs, than any others who have themselves no interest of their own at stake, and who are given by the law to minors for their benefit, not to exclude them from any benefit they might otherwise have. No. 191.

"The Lords allowed the tutors to be examined."

Act. *Dalrymple.* Alt. *George Brown.*

J. D. *Fac. Coll. No.* 144. *p.* 215.

1756. CAMERON *against* MALCOLM. No. 192.

In a declarator of marriage brought by the man, and a declarator of freedom by the Lady, the mother and sister of the latter were received as witnesses in her behalf. The man, however, had made a sort of appeal to the evidence of the Lady's mother. Besides, the counter-action went on the allegation of the crime of abduction.—See APPENDIX.

*** This case is mentioned in Dalziel against Richmond, 10th July, 1790, *infra, h. t.*

1757. *June* 27. GAVIN BEUGO *against* JOHN BEUGO.

No. 193.
Common brother rejected as a witness.

Gavin Beugo brought a process against his brother John, for destroying a deed executed by their father in Gavin's favour; and to prove the fact, cited their common brothers and sisters as witnesses. From the examination of two of the brothers and sisters, and some other witnesses, the fact came out, as alleged by Gavin, pretty clear; and that the brothers and sisters had been assisting in destroying the deed; for which reason, Gavin dreading the evidence of the other brothers and sisters, stopped short in his proof, and declined examining them.

John insisted to have the brothers and sisters examined, as having been once cited, and being equally relations to both parties.

Answered: Brothers and sisters may be witnesses against, but not for a defender; and, from the evidence already brought, it appears the witnesses now insisted for have an interest to swear falsely.

"The Lords having advised the proof already adduced, refused to allow the other brothers and sisters to be examined."

For Gavin, *John Dalrymple, Craigie.* Alt. *Miller, Lockhart.*

J. D. *Fac. Coll. No.* 31. *p.* 55.