

1790. July 10. MARGARET DALZIEL *against* JOHN RICHMOND.

No. 205.

The evidence of the mother and sister of a pursuer in a declarator of marriage inadmissible.

In an action of declarator of marriage, Margaret Dalziel the pursuer adduced, beside other witnesses, her father, mother, and sister. The Commissaries admitted the evidence of the father, and the defender having acquiesced in that judgment, he was examined. Other witnesses were also examined, but their testimony proved nothing decisive of the question. The Commissaries then, after a strenuous opposition, likewise found the evidence of the mother and sister to be admissible; upon which the defender presented a bill of advocacy, and

Pleaded: When persons nearly related to a party appear as witnesses in his behalf, they approach more or less, according as the relation is close, and of consequence the interest strong, to the situation of a man bearing evidence in his own favour. It never was, therefore, or could be made a question, whether such were legal or impartial witnesses. The only doubt was, if in cases where a *penuria testium* was the result of the circumstances, their testimony could be at all received, not as proper parole-proof, but rather as of the nature of real evidence, tending to corroborate or illustrate what antecedently had been in some degree, though imperfectly, proved. Of this kind of evidence then, the sole efficacy consists in its having a relation to such antecedent proof. But in the present case, there exists no sort of previous evidence of the pursuer's allegation, the testimony of her father being justly disregarded.

Answered: Clandestine marriages are not put *extra commercium*. Such evidence then as is consistent with the nature of the transaction, must be admitted with regard to them. As the secret will naturally be instructed to the near relations of the parties, they, of course, become necessary witnesses. Accordingly, in the case of Sibilla Barber against Stewart, the brother and sisters of the pursuer of a process of adherence were received as witnesses *cum nota*, 31st July 1732, No. 161. p. 16742. And in the later case of Cameron against Malcolm in the year 1756, when a declarator of marriage was 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.

Replied: With respect to the case of Cameron and Malcolm, the pursuer there, by the nature of his plea, made a sort of appeal to the evidence of the defender's mother. Besides, the counter action went on the allegation of the crime of abduction.

The bill of advocacy having been passed, the Lord Ordinary before whom the cause afterwards came, took it to report on informations, when

The Court strongly expressed their sense of the importance of the case in point of precedent. No temptation to perjury, it was observed, could operate more irresistibly, than that to which parents would be liable, if the fate of their children were made to depend on their testimony in a process of declarator of marriage; an idea in every view alarming to society. The objection to a brother or a sister's evidence in similar circumstances, was considered as also insurmountable.

To the decision in the case of Barber, little respect seemed to be paid; the distinction having been made betwixt that *penuria testium*, which necessarily results from the situation of the party requiring evidence, as where a crime has been committed against him, of which the case of Malcolm was an example, and such a *penuria* as arises from his own fault.

The Lords "remitted the cause to the Commissaries, with an instruction, to alter their interlocutor, and to refuse to admit any of the witnesses."

Reporter, Lord Dreghorn.

Act. Cathcart.

Alt. Stuart.

Clerk, Sinclair.

S.

Fac. Coll. No. 145. p. 288.

1793. February 9.

JOHN SIME and his ATTORNEYS, against The CHILDREN of GEORGE SIMPSON.

George Simpson having purchased some houses from the Earl of Findlater, John Sime, his son-in-law, advanced him £200, to enable him to pay the price, for which George Simpson granted a missive, obliging himself to give an heritable security over the subjects, as soon as his titles to them should be made up. William Reid, Town-clerk of Banff, who wrote the missive, and the Earl's factor, seem to have been the only persons except Simpson's own family who knew any thing of this transaction. Soon after the missive was granted, John Sime went abroad, and left with Mr. Reid the charge of getting his heritable security made out.

George Simpson died without granting the heritable security, and Sime wishing to recover his money, named Reid and others his attorneys, who brought an action against the children of George Simpson, as representing their father.

The original missive was in the possession of one of the defenders, who said she had found it among her father's papers, and contended, that it had either never been delivered, or had been given up upon payment. Sime, on the other hand, alleged, that she held it, as depositary for him.

A proof having been allowed, the pursuers proposed to examine Mr. Reid. This being opposed, the Lord Ordinary, "in respect of his being one of the attorneys for the pursuer, and by that means materially interested in the issue of the cause, *in hoc statu* sustained" the objection.

Upon which the agent of the pursuers granted and produced in process an obligation, binding himself and his heirs to free Mr. Reid of every claim which might arise against him, in consequence of his being attorney in the action.

The defenders still

Objected: Mr. Reid is a pursuer in this action, and is nevertheless insisting that his own oath should be taken; but as his interest in the issue of the cause was originally an unsurmountable objection to his being admitted, (Erskine, B. 4. Tit. 2. § 25.) it would be dangerous, in point of precedent, to give the bond produced the effect of removing it. *Vide supra h. t.*

No. 205.

No. 206.

Objection to a witness that he is a party in the process, as attorney for the pursuer, found to be removed by his obtaining a bond relieving him from the consequences of the action.