

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.

No. 206.

Answered : Mr. Reid is merely a nominal pursuer. His interest in the issue of the cause, which was at first but contingent and remote, the principal pursuer being undoubtedly solvent, is now entirely done away.

Besides necessary witnesses, like the present, have in many cases been admitted, even where they had a real interest ; 12th July 1743, Lindsays against Ramsay, No. 168. p. 16746 ; 19th December 1786, Scott against Caverhill, No. 204. p. 16779. and other cases *supra h. t.*

The Lord Ordinary allowed Mr. Reid to be examined, reserving all objections to his credibility.

Upon advising a reclaiming petition and answers, the Court " adhered."

Lord Ordinary *Justice-Clerk.*
Clerk, *Gordon.*

Act. M. Ross.

Act. Honyman.

Fac. Coll. No. 26. p. 53.

1793. February 26.

JAMES WEMYSS and Others, *against* WILLIAM WEMYSS.

No. 207.

Objection that witnesses were precognised before a Justice of the Peace at the instance of the pursuer in a civil action, repelled.

David Wemyss named William Wemyss his sole executor, to the exclusion of the nearest of kin, who resided in a different part of the country.

Upon David's death, James Wemyss, one of the nearest of kin, came to the place of the deceased's residence, where, entertaining suspicions that the will had been obtained by improper means, he presented a petition to two Justices of the Peace, praying that the surgeons and others who had been most with the deceased during his illness might be examined ; and the declarations of several persons were accordingly taken in their presence.

None of the persons examined were allowed to be present during the examination of the rest, till their own was finished ; but those first examined were permitted to hear the declarations of those who came after them.

Some time after the nearest of kin caused the declarations to be cancelled, each in the presence of the person by whom it was emitted. And in a process of reduction afterwards raised against the executor, they proposed to adduce as witnesses the persons who had been thus examined.

The defender

Objected : The peremptory diets of Court, and the accuracy required in laying the indictment, render precognitions necessary in criminal cases ; and as they are taken at the instance of a public officer, who cannot have any private interest in the matter, no bad consequence can result from them.

But such a practice would be both unnecessary and dangerous in civil actions, where the pursuer is allowed considerable latitude both in framing his libel, and in leading his proof. In such cases, too, precognitions are taken by a party interested in the issue of the cause, in absence of his opponent, in a loose and inaccurate manner ; and, in these circumstances, the persons examined will hazard