

# APPENDIX.

## PART I.

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### WITNESS.

1800. November 15. ANDREW MACDOWALL *against* JOHN KELLY.

JOHN GORDON, at purchasing some cattle from Andrew Macdowall, delivered to him a letter, bearing to be subscribed by John Kelly, guaranteeing the price.

Macdowall having brought an action for payment against Gordon and Kelly, before the Stewart of Kirkcudbright, decree in absence was obtained against the former; but Kelly contended, that the letter was a forgery; and a proof having been allowed, the pursuer proposed to adduce the sister and acknowledged natural son of John Gordon to prove that it was genuine.

The admissibility of both having been objected to by Kelly, the Steward repelled the objection to the son, and reserved consideration of the objection to the sister till she should be adduced.

An advocacy having been passed, the Lord Ordinary remitted the cause *simpliciter* to the Stewart, 'in respect the interest of John Gordon is not in question, either in a civil view, seeing decree has already gone against him as principal debtor, and it is of no consequence to him, whatever it may be to the respondent (Macdowall) that the representer (Kelly) should be found liable as cautioner or guarantee; nor in a criminal view, seeing no criminal action has been brought against him; and found, that even lawful relations standing within the prohibited degrees to Gordon, are competent witnesses in this case.'

In a petition, Kelly

*Pleaded*: Gordon has evidently a material interest in the cause, as the result of it, if against him, will destroy his character, and perhaps pave the way for a criminal prosecution. There is, therefore, the same room for apprehension of partiality of the witnesses in his favour as if they had been adduced by

No. 1.

In an action upon a letter of guarantee, where the defence was, that it had been forged by the principal debtor, his sister and acknowledged natural son were admitted as witnesses for the pursuer to prove its authenticity.

No. 1. himself. The objection against the admissibility of his sister is therefore clear; and although, in a legal view, a natural son is to be held to be *filius nullius*, there may be the same reason, from his feelings of natural affection, to apprehend unfair testimony, and the same *metus perjurii*, as in the case of lawful offspring, Ersk. B. 4. Tit. 2. § 24.

Observed on the Bench: The decision of the House of Lords in the case of Hay Marshall has put an end to the objection of *metus perjurii*, and the objection of relation does not apply to the present case, where the witnesses are not related to either of the parties, but to a third person. (No. 212. p. 16787.)

The Lords, by a narrow majority, refused the petition without answers.

Lord Ordinary, *Hermann*.

For the Petitioner, *Thomson*.

Clerk, *Menzies*.

*D. D.*

*Fac. Coll. No. 194. p. 447.*

## No. 2.

If a party has been in any respect instrumental in communicating to a proposed witness, the import of that part of a proof which has been led, he will be barred *personali exceptione* from the benefit of his evidence.

But the contrary found, where the proposed witness saw part of the proof without the party's knowledge.

A slight communication after citation, respecting an unimportant point in the cause, between a wit-

1800. December 2. JEAN FARQUHARSON against ALEXANDER ANDERSON.

IN an action of declarator of marriage, with an alternative conclusion for damages on account of seduction, brought by Jean Farquharson against Alexander Anderson, a proof was allowed by the Commissaries to both parties, in the course of which the following objections were stated to the admissibility of witnesses adduced by the defender.

1. The defender had given John Forbes a copy of part of the proof which had been led in the cause, which he read to his sisters Ann and Isobel; both of whom had conversed with different persons on the subject of it; and one of them had mentioned the circumstance of her having heard some parts of the proof read, in a letter to one of her friends. Mr. Forbes also admitted upon oath, that at the time when he read the depositions to his sisters, he had heard it rumoured, that one of them was to be called as a witness in the cause.

On these facts the pursuer objected to the Miss Forbeses, on the ground, that the wilful communication to one witness of what another has sworn, is an insuperable bar to the admissibility of the former; Hales' Pleas of the Crown, vol. 2. p. 280.; January 1741, Geddes, No. 166. p. 16744.

Answered: No direct authority can be produced in support of the objection. Its validity depends on the *animus* of the party in showing the proof; and it does not appear that the defender intended that it should have been seen by the Miss Forbeses. Besides, having been read to them merely as a matter of amusement, it can have no effect on their testimony.

The Commissaries refused to examine the witnesses; but the defender having complained by bill of advocation, the Lord Ordinary (Justice-Clerk Eskgrove) 'remitted to the Commissary to examine the Miss Forbeses, under