

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

‘a reservation of all objections, and seal up the same until the rest of the proof should be concluded.’ After the proof was concluded, the Commissaries refused to remove the seals. The defender again complained by bill of advocacy, and the Lord Ordinary (Craig) having taken the case to report, the Court were a good deal divided in opinion. Several Judges, who were against sustaining the objection, thought that the Ladies having seen the deposition arose from an accident; for which the defender was not responsible; and besides, that the fact on which the objection rested, was not, in all circumstances, of that kind which could affect the credibility of their evidence. But other Judges observed, that there were grounds for believing that the defender meant that Mr. Forbes should shew the depositions to his sisters, and therefore that he was barred *personali objectione* from availing himself of their evidence.

The Lords sustained the objection by the narrowest majority; but reserved to the Court or the Commissaries to examine the Miss Forbeses *ex officio*.

2. The Reverend John Gordon deponed *in initialibus*, ‘That since he received said citation, the defender had some conversation with him relative to what passed at the session; in the course of which he asked the deponent, ‘Whether he considered it as a case of simple fornication? from which conversation the deponent was led to suppose, that when adduced as a witness, he would be examined relative to the proceedings before the session, though he does not remember that Mr. Anderson told him so in express terms. Depones, That prior to his citation, he saw and perused a paper, purporting to be a copy of the declaration emitted by the pursuer in this case; which paper was, according to the best of the deponent’s recollection, given him or sent to him by the defender: That he has also seen a copy of the deposition of the Reverend Mr. Farquharson, the pursuer’s brother; which deposition was first shewn to the deponent by the said Mr. Farquharson himself, and another copy was afterwards shewn to the deponent by the defender.’

Besides stating the same objection to Mr. Gordon as to the Miss Forbeses, the pursuer further contended, that he was likewise inadmissible, on the ground of the defender’s having had conversation with him regarding the cause subsequent to his citation.

To the first objection the defender answered, That its circumstances were considerably different from the case of the Miss Forbeses. And to the second, That in all objections founded on alleged *proditio testimonii*, the judgment of the Court was governed by the extent of the party’s interference, together with the effect it appeared to have had on the witnesses’ mind; and in the present case, it was impossible that the evidence of Mr Gordon could be affected by the question put to him by the defender.

No. 2.
ness and the party by whom he is adduced, is not a bar to his examination.

A person was found to be disqualified as a witness, the party by whom he was adduced having, after citation, indorsed a bill for him without value, the proposed witness being then in labouring circumstances, notwithstanding that the party had been in the practice of occasionally assisting him with his credit for a number of preceding years.

No. 2. The Commissaries found Mr. Gordon inadmissible; and the Court at first adhered; but afterwards, on advising a reclaiming petition, with answers, they, by a narrow majority, 'repelled the objections.'

3. Alexander Farquharson deponed *in initialibus*, that, 'since he received his first citation, Mr. Anderson, the defender, has interposed his credit for the deponent, by indorsing bills without value to the amount of several hundred pounds.' It further appeared, that the defender had, for ten years preceding, occasionally interposed his credit for Farquharson, and that Farquharson had lately become bankrupt, while considerably indebted to the defender.

The pursuer contended, that, in these circumstances, Farquharson could not be an impartial witness, and that the pecuniary assistance, obtained from the defender after citation, must, in legal construction, be regarded as a reward for giving his evidence; Ersk. B. 4. Tit. 2. § 25.; Leach's Crown Cases, pp. 6. 139. 144.

Answered: If the defender had never assisted the witness till the rise of the present question, there might be room for the present objection; but, as the fact turns out, it would be fatal to the administration of justice in a commercial country, if the mere circumstance of a witness and a party standing in the relation of debtor and creditor, should deprive the latter of his debtor's evidence. See 7th February 1711, Farquhar against Campbell, No. 142. p. 16731; 30th November 1716, Town of Perth against Moncrieff, No. 154. p. 16737.

The Commissaries sustained the objection, and the Court adhered.

Lord Ordinary, *Craig*.

Act. *Jas. Gordon*.

Alt. *W. Erskine, Rat.*

R. D.

Fac. Coll. No. 200. p. 459.

1801. July 11. MARY MACGREGOR against MALCOLM MACGREGOR.

No. 3.

Objection of partial counsel sustained.

In a declarator of marriage brought by Mary Macgregor against Malcolm Macgregor, the pursuer proposed John Macfarlane, her cousin-german, as a witness in her favour, and particularly as to an alleged bedding between the parties, where one other person only was present.

The defender objected to Macfarlane's admissibility, that he had given partial counsel in favour of the pursuer.

From a proof of the objection, and Macfarlane's deposition *in initialibus*, it appeared that he had introduced the pursuer to her law-agent, had been present at the first consultation between them, and had otherwise taken an interest in her favour.