

1770. November 28. ELIZABETH and ISOBELL CAMPBELLS *against* GABRIEL CAMPBELL.

SUCCESSION.

The Heirs of the Disponee, though he predeceased the Disponer, preferred in the succession to the Disponer's other nearest Heir.

[*Faculty Collection, V. 147 ; Dictionary, 14,949.*]

ALEMORE. A disposition to a man and his heirs will not be evacuated by the predecease of the man.

KAIMES. We must suppose that the disponee has a right, but still defeasible during the disponer's life.

PITFOUR. A deed is no less a deed *inter vivos* because I keep it in my pocket. The right is vested in one *ignorans et non sciens*.

PRESIDENT. We would shake the security of many land rights, were we to alter the judgment of the Ordinary.

HAILES. This is a foolish, vain deed ; but there is no law prohibiting foolish, vain deeds.

On the 28th November 1770, the Lords " preferred the heir-male ;" adhering to Lord Monboddo's interlocutor.

Act. A. Elphinstone. Alt. D. Rae.

1770. December 5. MRS MARGARET PORTERFIELD *against* HOUSTON STEWART NICOLSON of Carnock.

WITNESS.

The Adulterer is a competent witness upon the part of the Pursuer in an action of Divorce. A Negro Slave, not a Christian, may be received as a witness. Objection of Relationship, *proditii testimonio*, and agency.

[*Faculty Collection, V. 158 ; Dictionary, 16,770.*]

[As this question is curious and interesting, and as I took considerable pains in making a distinct report, I shall transcribe it at large from my notes.]

Mr Stewart Nicolson of Carnock insists in an action of divorce, for adultery, against his wife, Mrs Margaret Porterfield.

It was found, *first*, by the Consistorial Court, and afterwards by your Lordships, that the pursuer was obliged to specify the person with whom he charges his wife as guilty. Your Lordships know that this judgment was pronounced, because it appeared that the pursuer knew the supposed paramour. Such being the situation of the cause, the pursuer fixed upon one William Graham as the paramour; and he specially restricted his charge to the crime of adultery, committed with William Graham. This Graham was the son of a tenant of Sir William Maxwell of Springkell, who is married to the pursuer's sister. Graham was originally a stable-boy at Springkell,—afterwards a footman,—next a servant attending on Sir William's person,—and, at last, a sort of clerk or overseer to Sir William.

In the course of this action of divorce, the pursuer, among other witnesses, sought to produce Sir William Maxwell, one Latchemo, a negro, said to be the slave of Sir William, and William Graham. Objections were moved against their examination.

The Commissaries, upon considering the memorials, &c. of parties, and the proof already brought, “allowed Sir William Maxwell to be examined *cum nota*: Found the objections stated against the evidence of William Graham not competent at the defender's instance; and therefore repelled the said objections, and allowed the witnesses to be adduced; reserving to him, in case he thinks fit, to object to his own examination, or to the interrogatories to be put to him; and to the Court to judge of the import of his objections, if any such are offered, as accords. As to Latchemo, the negro; before answer, appoint him to appear in Court in order to be examined upon the articles of his faith.”

To this interlocutor they afterwards adhered, with this explanation, “that they reserved to themselves to judge what degree of credibility shall be given to the evidence of William Graham, in the event of his being examined as a witness in the cause.”

Mrs Nicolson, the defender, has offered a bill of advocation. I am to report the bill, answers, and replies. The objection to the testimony of Sir William Maxwell is threefold:—*first, relation*,—*second, interest*,—*third, his conduct* in the preliminaries of this cause: and the defender requests that these objections, though severally stated, may be taken in one complex view.

First, Relation,—“Sir William Maxwell is married to the pursuer's sister, and therefore cannot be received as a witness for the pursuer.”

In support of this objection, various authorities, well known to your Lordships, are quoted, and, in particular, *secunda statuta, Rob. I., c. 34*.

As to *secunda statuta, Rob. I.*, the pursuer answers, that the statute, c. 34, is obsolete. [He ought rather to have answered that there is no such statute; and, indeed, Skene, when he published what he called *secunda statuta, Rob. I.*, was conscious that they were of no authority. Unluckily, Lord Bankton has quoted them; and if the Latin copy is not studied, and if the origins of our law are neglected, it is possible that *secunda statuta Rob. I.* may, in some after age, be held to have been the law of Scotland.] Upon the whole, however, the pursuer seems to acknowledge the rule that such witness is not regularly admissible. Both parties agree that there are exceptions from the rule. The question, then, is, Whether the exception occurs here? The pursuer argues that, in atrocious

and occult crimes, the law relaxes the strictness of its rules ;—as in adultery, a crime most atrocious and most occult. In support of this, he quotes various authorities ; and particularly, with respect to occult offences, he quotes three precedents as analogous to the present case. In *Mrs Cumming's* case, her children were received as witnesses for proving her husband's maltreatment of her, 1748. Miss Cathcart was received as a witness for Lady Houston, her sister, in an action of separation and aliment. Mrs Malcolm was received as a witness for her daughter, Miss Malcolm, in a declarator of freedom from marriage. The defender answers,—from the atrocious nature of the crime of adultery, the pursuer cannot plead that witnesses, regularly inhabile, ought to be admitted ; for this is, in effect, to plead that, the greater a crime is, by the more exceptionable evidence may it be proved. And, as to adultery being an occult crime, that is inconsistent with the pursuer's own hypothesis, for that he describes the defender as foolishly enamoured,—as openly flagitious,—as infatuated in guilt ; and, for making good this horrid description, he has produced a list of twenty witnesses. He therefore cannot be admitted to argue from the occult nature of the crime in general. Further ; because adultery is an occult crime, it does not follow that the nearest relatives of either of the parties are necessary witnesses, and therefore admissible. On the contrary, unlawful intrigues are most carefully concealed from the observation of the nearest relations. Nor has the pursuer specified in what manner Sir William Maxwell became apprised of any particulars of the defender's conduct, or why he is to be considered as a necessary witness. The precedents of *Cumming*, *Houston*, and *Malcolm*, are not in point. In the case of *Cumming*, it appeared that the defender had dismissed his servants, so that his conduct in his own house could be proved by his children alone ; and therefore they were necessary witnesses. Besides, it was not pretended that the children had any interest in the cause ; whereas, it will be shown hereafter that Sir William Maxwell has an interest in this cause. For the case of *Lady Houston*, the facts to be proved by Miss Cathcart happened in foreign countries, and in such circumstances that none but those in family with the parties could know any thing concerning them. In the case of *Miss Malcolm*, there was an extreme penury of witnesses, incontestibly proved.

Second, The defender next pleads that Sir William Maxwell is not admissible, by reason of his interest in the event of this cause. This interest she specifies in two particulars : *first*, it appears that the pursuer's father has expressed his intention of excluding from his succession the second son of the parties as spurious. This intention was only upon the supposition of the defender's guilt. It places the wife of the witness in a degree nearer to the destined succession of her father. Her father has three sons indeed, but two of them are unmarried, and the eldest son of the other is an infant ; so that the hope of succession is not remote.

Secondly, Lady Maxwell, the wife of the witness, on the 4th of November 1769, wrote a letter to the father of the defender, wherein she says, "When you believe your daughter innocent, you must of course believe me guilty. And in defending her, [*i. e.* in the course of her defence,] I well know I must suffer. I confess it is natural for you to defend her ; I expected it. I have foretold it ; but you must allow it is equally so for me to vindicate myself. Therefore, since

matters are come so far, I frankly own that I shall not be easy till I have attested most solemnly by oath what I have already declared upon this subject." From the strain of this letter, the defender concludes that Lady Maxwell makes her own character depend upon the ruin of the defender's, and that she has expressed a sort of impatience to be admitted to make oath against her unhappy sister-in-law. Hence it is argued, that the ruin of the defender is determined at Springkell, in order to preserve the character of Lady Maxwell for candour and veracity; and that, if there is such a thing as female insinuation, Sir William Maxwell cannot give impartial evidence.

To the objection of interest, the pursuer answers; *first*, That the intention of Sir Michael Stewart creates no interest in the succession to his estate in favour of his daughter, or her husband. If it did, the interest is contingent and consequential, which the law regardeth not. Besides, the interest, were there any, would lie the other way. If a divorce follow, the pursuer might marry again and have issue. If not, enough has been already proved for preventing his cohabiting with the defender. As to the *second* objection, a long and laboured apology is offered for the conduct of Lady Maxwell: but, be her conduct what it will, that is no legal objection to the evidence of her husband.

Third. It is said that Sir William Maxwell is an inhabile witness for the pursuer, in respect that he was present when some of the witnesses made extrajudicial declarations.

This objection seems to have been overlooked by the pursuer. The probable answer seems to be, that Sir William Maxwell did no more than what every master of a family in his circumstances is authorised to do. And, as it is not said that he either intimidated or cajoled the witnesses, the objection is of no weight.

As to Latchemo the negro, it is objected, *first*, that he is not baptized, and, consequently, no Christian: And that, by the forms of the Consistorial Court, the oath administered is peculiar to Christians, and can be taken by none else. *Secondly*, That he is the slave of Sir William Maxwell, a party concerned, depending on him for the British air which he breathes, incapable of acquiring property, and not worth the king's unlaw.

As to the first objection, that "Latchemo is not baptized, and, consequently, not a Christian, nor capable of making oath in the Consistorial Court;"—the argument seems imperfectly treated by the counsel. Indeed, it appears to be premature; for that the commissaries have hitherto determined nothing as to his admissibility.

As to the second objection: the pursuer answers, that Sir William Maxwell is an habile witness, and, consequently, no objection of inhability can lie against a person merely because connected with him. Besides, there are no slaves among us, in the Roman sense of the word. Latchemo is indeed bound to perform service for life, but he is capable of acquiring property. His master, were he to beat him, would be liable to an action of battery. Were he to murder him, he would suffer no less punishment than if he were to murder the first peer of Great Britain. And as to his not being worth the king's unlaw, the objection is obsolete and exploded. It might go to his credibility, but cannot to his admissibility. The objection as to William Graham seems the question of most

moment. It is fit to premise, that your Lordships are not called to judge whether, supposing Graham to be received as a witness, he can, in law, be compelled to answer; nor whether he ought in conscience to answer: neither are you called to judge of the credibility of his testimony. The only question determined by the commissaries, and brought under your review, is, whether he can be received as a witness for the pursuer? I need not enlarge on the first objection,—that he is the menial servant of Sir William Maxwell. For that, independent of every other answer, *this* is sufficient,—that he is not the menial servant of Sir William Maxwell. The next objection is more natural. It is said that the proof is already restricted to guilt with Graham; and, therefore, no question can be put as to guilt with any one else. So standing the case, the pursuer must either admit that he cites Graham to no purpose, which would be calumnious; or that he cites him to prove his own guilt by his own testimony, which is contrary to the rules of law.” Here the defender lays down the argument as to the inhability of a *socius criminis* to bear witness. They are the same arguments, and supported by the same authorities, which your Lordships, either while at the bar, or sitting in another Court, have had full occasion to canvas. I will be permitted, therefore, to refer to them as fully stated in the printed papers. The defender enforces her argument by the case of *Carruthers of Dormont*, in 1742, where the husband fixed on one Bell, a servant in the family, as the guilty person. The wife offered to produce Bell as a witness, for discrediting other witnesses, and also to give evidence with regard to the alleged guilt. The judgment of the Court of Session was this—“Remit with an instruction to allow the defender a proof of the hails articles of the additional condescendence, except the article with regard to Bell’s oath; and with this instruction, that Bell be not admitted a witness, either for or against the defender, as to the facts charged against him by the other witnesses.” Here indeed the question was, as to admitting him for the defender; but the judgment of the Court went farther, and found, as if *ex officio*, that he could not be admitted either for or against the defender. This is a judgment in point, and there is no later judgment to the contrary. The pursuer answers that the objection of *socius criminis* may be good where the witness can have an opportunity of clearing himself by loading the person accused; but that this cannot take place here. Were Graham to swear against the defender, he could not, as the case is circumstanced, clear himself. The pursuer farther quotes, as a precedent in point, *Campbell of Ederline*, 1726, where Janet M’Lean and Helen Moodie, two prostitutes, with whom *Ederline* was charged as guilty, were examined by authority of this Court. The pursuer answers, to the case of *Carruthers*, 1742, that the interlocutor concerning *Bell* was not pronounced by the Court, but by a single Ordinary [Lord Drummore] in time of vacation;—so that can be no precedent. The pursuer admits that a *socius criminis* is not a witness *omni exceptione major*; for that it detracts from the credibility of a witness that he is supposed guilty of a crime. Consequently he admits, that, if there were no evidence of the guilt of the defender but what might arise from the testimony of her supposed paramour, a strong objection would lie against him. But he contends that the case here is very different. From the examination of many unsuspected witnesses, there is already a *semi-*

plena probatio, and Graham is produced to confirm and connect their testimonies, not to establish guilt by his single evidence. What the pursuer demands is agreeable to the forms established in the neighbouring kingdom: He has produced the opinion of English civilians, confirmed by various precedents. The opinion of Dr Compton begins thus: "I am clearly of opinion that it is the established practice of the ecclesiastical court in England to allow the libellant to adduce the *particeps criminis* as a witness, whenever he is willing to be examined, to prove the fact of adultery." And Dr Harris says, "that question is now at rest." The defender replies, That the Court varied in the case of *Ederline*; for the first judgment was against the examination of the two prostitutes, and that the case was not fully or properly argued: That it was unjust in the commissaries to rest any part of their judgment on the proof already brought by the pursuer, for that the defender has had no opportunity of bringing her reprobatory and exculpatory proof: That she cannot in prudence point out at present what she will hereafter prove. This would be giving her party an advantage too obvious in the conduct of the remainder of his proof.

She can only say that there are some trifling and inconclusive circumstances sworn against her, whereof she has no remembrance. As to the rest, they are incredible and false; and the witnesses, in speaking as they have done, speak from strange prejudices, or from some worse cause: That authorities from England are of no consequence; for that the practice of the two nations is different. Thus, in England, ultroneous witnesses are received; but it would be strange to argue, from thence, that they ought also to be received with us.

The *third* objection, for the defender, is, "that Graham, according to the pursuer's own hypothesis, is infamous and intestable. The 11th law of William the Lion says, *Infamas dicimus omnes illas personas esse, quæ, pro qua culpa, damnantur notabili*; and § 3, *similiter adulteros, &c.* Here infamy, by the crime, is distinguished from infamy by the sentence; and the law adds, § 7, *hi omnes supra dicti nec ad sacros ordines promovendi debent, nec ad accusationem vel testimonium admitti.* And this is agreeable to the maxim of the civil law, *l. 45, D. de Ritu Nuptiarum, § pen. quia factum lex non sententiam notaverit.*" Now, supposing that Graham were to be examined, and to accuse the defender as guilty with him, he becomes infamous in law, and consequently is not to be credited.

The pursuer answers, That the distinction between *infamia facti* and *infamia juris*, is fully established in the modern law and practice of Scotland. It may be questioned whether simple adultery, when a sentence follows, be sufficient to create an *infamia juris*. But it is certain that, before sentence, it has no such effect; and hence an acknowledgment of adultery before the minister and elders, *ad levandam conscientiam*, has been held no objection to a witness,—*22d February 1709, Tailor against Lord Lindores.*

The *fourth* and last objection is to this effect:—the defender takes it for granted, that Graham, if examined, may refuse to answer. If he does answer, when there is no legal compulsitor against him, he is plainly an ultroneous evidence, and, as such, his testimony will be set aside. The pursuer does not seem to make any answer to this objection, other than that Graham, if guilty, is bound in conscience to bear witness. Your Lordships will judge how far the

objection of ultroneous witness, as understood in practice, is applicable to the case of Graham. It remains with your Lordships to determine whether the cause ought to be remitted *simpliciter*, or with an instruction.

KENNET. As the defender, in the consistorial court, is not obliged to bring any proof, till the proof of the pursuer is concluded, it becomes necessary now to determine as to the examination of Sir William Maxwell. We must judge of the case, not of the man: he falls within the rule: there is no *penuria testimonium*: there is no evidence that he is a necessary witness. As to Latchemo, that he is a slave is no legal objection. Slavery is not the same now as among the Romans. It is fit to inquire what sort of a man he is, and what are his principles. But this is left entire by the judgment of the consistorial court. Graham ought to be received as a witness. He cannot clear himself by accusing the defender. He is under no *infamia juris*. The necessity of the case obliges us to examine such witnesses as can be had.

PRESIDENT. Occult crimes are to be discovered, and Courts will get over objections in the discovery of occult crimes. As to Latchemo, perhaps it may be proper to take declaration where oath is not proper, as was determined by the Court of Justiciary, in the trial of *Forbes*, the schoolmaster of the Poor's-house of Dalkeith. This, however, is left undetermined by the commissaries, and will be judged of by them hereafter.

AUCHINLECK. As to Sir William Maxwell, his interest is out of the question, and I am surprised that it should have been pleaded. Sir William's character is in itself irreproachable, but I wish to see a witness altogether disengaged from prejudice. Lady Maxwell has stated herself as a party. Declarations have been taken from witnesses, and in writing too. This is taking too active a part. Sir William assisted Lady Maxwell in precognosing witnesses, and therefore I would not receive him to bear evidence.

JUSTICE-CLERK. When an incident of so interesting a nature occurs in a family, it was natural for Sir William to assist in making inquiries. My doubt is, as to the matter of law, that he is within the prohibited degrees. This exception, in law, might be got over, were there any proof of his being a necessary witness—but there is none.

ALEMORE. There is no occasion to talk of Sir William Maxwell's character; for what we pronounce as law to-day, with respect to Sir William Maxwell, will be law to-morrow with respect to James or Thomas. Sir William may be a necessary witness; but, till that is shown, he is within the rule.

PRESIDENT. The objection of relation is good in general—but such a person is admissible from circumstances. There may be an objection, by way of reply, that the witness has taken a side, and this will bring back the objection to its original state. I think that the objection to Lady Maxwell's evidence ought to be determined by the commissaries before that the objection to Sir William's evidence is determined; and I would remit with that instruction.

On the 5th December 1770, "the Lords remitted *simpliciter* as to William Graham and Latchemo; but with this instruction, as to Sir William Maxwell, that, before deciding the objections as to him, they take trial of the objections as to Lady Maxwell."

For Mrs Nicholson, Ilay Campbell, H. Dundas. Alt. A. Lockhart, J. M'Claurin, Advocatus. Reporter, Hailes.

1771. February 18. Affirmed on appeal.

1770. November 2, and December 6. MISS ANNE BRUCE of Arnot *against* JAMES BRUCE CARSTAIRS of Kinross.

PRESCRIPTION—TAILYIE.

An Infertment in fee-simple, upon a precept of *clare constat* in the superiority of lands contained in a deed of entail, with possession maintained of said lands for 40 years, but which, *quoad* the property thereof, had been originally acquired upon a different title, *viz.*, the right of apparenay, found sufficient by prescription to work off the limitations of the entail, and to establish a right both to superiority and property in fee-simple.

[*Fac. Coll. V. 150; Dict. 10,805.*]

November 2. Being in the Outer-House, I did not hear the first part of the reasoning upon the bench. I only learnt that the President had changed his opinion, and now held that the argument upon prescription was good.

PITFOUR. Our prescription of forty years is like the *prescriptio longissimi temporis* of the Roman law. It requires no *bona fides*. Thus, if a tenant, possessing under a tack, should obtain a charter of property from the Crown, and, by the carelessness of the master, should pay no rent for 40 years, his right under the charter will be effectual, notwithstanding his *initium possessionis* was a temporary right—and that he could have no pretence of *bona fides*. By our law, all that is required is a charter and possession.

MONBODDO. The fact of possession is clear. My only doubt was whether the possession ought to be ascribed to the infertment on the precept of *clare constat*, or to the right of apparenay. From the arguments in Miss Bruce's memorial, I am become a convert to her, and think that the possession must be ascribed to the infertment.

COALSTON. I have always considered the question as to imputing possession, where there are two rights, to be of great difficulty. It is true that there must be no inquiry into the *initium possessionis*; but that does not affect the present question. When the same person has a right of property, under separate titles, he may ascribe his possession to that title which is most beneficial. The creditors of Sir Thomas, or Sir John, might also have done so. But my difficulty is, how far the one heir can do this to the prejudice of the other.