For the Appellants, *C. Yorke, R. Mackintosh.*

For the Respondents, *Fl. Norton, Alex. Wedderburn.*

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WALKER, &c. *v.* DRUMMOND, &c.

[Dickson on Evidence, p. 986, *et* p. 644.]

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DOUGLAS, &c. *v.* THE DUKE OF HAMILTON, &c.

ARCHIBALD DOUGLAS, Esq. of Douglas, an Infant, and his Guardians, Her Grace the DUCHESS DOWAGER OF DOUGLAS; His Grace the DUKE OF QUEENSBERRY, and Others, ... } *Appellants;*

The DUKE OF HAMILTON; LORD DOUGLAS HAMILTON, and their Guardians, SIR HEW DALRYMPLE, Bart., and Others, } *Respondents.*

House of Lords, December 1764.

TITLE TO SUE—PROOF—WITNESS—RE-EXAMINATION.—Held (1) that the respondents had sufficient title and interest to sue. (2) That it was competent to examine witnesses of new, who had been examined in Paris, in a process *tournelle criminelle*, in regard to the same matters. (3) That it was not necessary to make the cancellation of the witnesses' previous testimony an absolute condition of their being examined of new; and, therefore, their evidence allowed to be taken, but to be sealed up, reserving all objections. (4) Copies or excerpts of documents, and proceedings had before a foreign court, were ordered to be produced in case the originals themselves could not be got, or delivered up.

Archibald Douglas, the infant appellant, had been served heir to the Duke of Douglas, his grandfather, upon a proof taken that he was the eldest lawfully born child of the marriage of Lady Jane Douglas with Sir John Stewart. Under this service, he had attained possession of the estate, when the respondents brought a reduction of that service, and for declaring their right to the estate.

Before this action was called in Court, and some days after the summons was executed, the respondents applied for and obtained an order to have the examination of Sir John Stewart taken to lie *in retentis*, which was done, and sealed up accordingly.

The allegation of the respondents being, that Lady Jane and Sir John Stewart had adopted two foundlings in Paris as their children, the appellants stated, that through the agency of James Stewart, they had set on foot a prosecution

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against Lady Jane and Sir John Stewart, before the Parliament of Paris, to have them punished criminally, for setting up supposititious children. In this process, called the process Tournelle, several witnesses were examined, writings were produced, and police books founded on.

June 21 and 30, 1763. The appellants objected to the respondents' title to sue, but the Court repelled that objection.

It was stated that the intention of this process Tournelle was to prepare witnesses to be examined afterwards under the authority of the Court of Session, and to oblige the persons examined before the Tournelle, to stick to a tale once told, whether true or false, under pain of perjury. It was with a similar view that Sir John Stewart's examination was demanded so early in the stage of the proceedings.

Having complained of these proceedings, to the Court of Session, that Court ordered the respondents to specify and explain if these proceedings were adopted with their sanction. They confessed they had been so adopted.

Thereafter, the respondents put in their condescendence, consisting of sixty-one separate articles, the first forty-three articles containing a detail of Sir John and Lady Jane's journey to Paris, with many circumstances tending to raise a suspicion that Lady Jane could not be delivered of twins at the time and place mentioned in the service.

The Lords of Session having heard counsel upon the matters contained in the condescendence, and the appellant having particularly insisted that the illegal methods taken to prepossess the witnesses examined in the Tournelle, should be held as a total objection to those witnesses in the present action; the Court appointed informations on these points.

Upon advising these informations, this interlocutor was

July 27, 1763. pronounced:—"Before answer, allow the pursuers (*i.e.* re-
"spondents) to prove the facts contained in the condescen-
"dences given in for them; and allow to the defenders (*i.e.*
"appellants) a conjunct probation, and both parties to prove
"every other fact and circumstance which they may judge
"material in the cause; and for that effect grant commission
"to both parties: Find the objection that certain witnesses
"had been examined before the Tournelle Criminelle of the
"Parliament in Paris, not relevant to incapacitate those
"witnesses from being examined as witnesses in this cause,
"reserving all objections to their credibility, when the proof
"comes to be advised. But find that the pursuers, before
"executing the commission now granted, must give in a

" petition to the Parliament of Paris, praying that the depo-
" sitions of the witnesses taken, in consequence of the plaintes
" at the instance of any of the pursuers, may be delivered
" up to the Commissioner to be named by the defenders, that
" these depositions may be cancelled; and also praying,
" that inspection be granted to the defenders of plaintes,
" records, or writings produced therein, and whole procedure
" had thereon, with liberty to the defenders to take copies,
" extracts, or excerpts thereof. And in case the depositions
" cannot be delivered up, find the pursuers must procure to
" the defender, or his agents at Paris, free access to, and
" inspection of, the plaintes, proofs, books, writings, and
" whole procedure had in these plaintes, before the Tournelle
" Criminelle, and liberty to the defender to take copies ex-
" tracts or excerpts thereof; and this at least fifteen days
" before the pursuers examine any witness that has been
" adduced before the Tournelle Criminelle. And the Lords
" hereby discharge the pursuers, upon their peril, to examine
" any more witnesses, or to give in any more plaintes relative
" to the question in issue between the parties in this cause
" before the Tournelle Criminelle, or any other Court in
" France, or to carry on any farther procedure in the pro-
" secution of the said plaintes, after the 11th of August
" next, and during the dependence of this cause: And find
" that no witnesses examined at the instance of the
" pursuers, before any Court in France, from and after the
" 10th August next, shall be admitted as witnesses in this
" cause. Find that the pursuers must procure inspection to
" the defenders, or their agent at Paris, of all such letters to
" the Lieutenant-General, or other present officers of the
" police, relative to the matters in issue between the parties,
" as shall, between the 15th day of August next, be specially
" condescended on at Paris by the defenders or their agent,
" as shall be extant at the time; and also of all books and
" registers of police, or other writings, relative to the matters
" in issue between the parties, which have been founded on
" by the pursuers, or which have been or may be communi-
" cated to him, and are in the custody and possession of the
" Lieutenant-General de Police, or other officers of the police,
" with liberty to take copies or extracts or excerpts from
" them, at least fifteen days before any witness can be ex-
" amined for the pursuers in France."

On reclaiming petition to the Court, the Court pronounced this interlocutor:—" Adhering to their former interlocutor,

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" with these additions, that they appoint the depositions of " the witnesses who have been examined before the Tournelle, " to be sealed up separate from the testimonies of the other " witnesses to be examined, and to transmit them as sealed " up, not to bé opened by either party without the authority " of this Court; reserving to the defender to object against " these examinations being made part of the state: And " find that the defenders may examine any of the witnesses " that may have been examined before the Tournelle, whether " the pursuers shall have complied with the conditions of this " or the preceding interlocutor in the cause or not: And " find that the pursuers must procure free access to the de- " fenders or their agents, to the proofs taken at Rheims, " before the Commissioners of the Parliament of Paris, and " also to any proof that may have been taken in England or " Scotland, and to all reports that have or shall be made by " the Curées to the Parliament or Procureur-General, in " consequence of the monitoire which the pursuers have had " inspection of, or are possessed of; and, if desired, shall " join with the defenders in any application for getting pos- " session or inspection of them."

On further reclaiming petition, the Court pronounced this

Dec. 21, 1763.

interlocutor :—" But with this farther explanation, that before " proceeding to the examination of any of the witnesses who " have already been or shall hereafter be examined in the " Tournelle Criminelle of the Parliament of Paris, either at " the instance of the Procureur-General, or at the instance " of the pursuers, the pursuers shall be obliged to comply " with the conditions contained in the former commission. " And ordain the pursuers and their doers, betwixt this time " and the 1st January next, to produce, in the hands of the " clerk to this process, copies of the whole plaintes given " in by Sir Hew Dalrymple, and in name of the Duke of " Hamilton and his tutor, or either of them, to the Tournelle " Criminelle of Paris, on or since the 16th day of December " 1762. And appoint the clerk of this Court, to furnish the " pursuers with an extract of this judgment, to enable them " to make due intimation thereof in manner above set forth."

Dec. 24, 1763.

On further petition the Court adhered.

Against these interlocutors, the appellants brought this appeal to the House of Lords, 1st, In so far as these interlocutors sustained the respondents' title to sue; 2d, In so far as they found the objection to the witnesses examined before the Tournelle Criminelle, not relevant to incapacitate these

witnesses from being again examined; and 3d, In so far as it did not make the cancellation of their evidence an absolute condition, in case these witnesses were re-examined. There was a cross appeal on the part of the respondents.

Journals of the House of Lords.

After hearing counsel, &c., upon the original appeal of Archibald Douglas, complaining of an interlocutor of the Lord Ordinary of 21st June 1763, and of five interlocutors of the Lords of Session of the 30th June, 27th July, 11th August, and 21st and 24th December, 1763, and praying, &c., and likewise upon the cross-appeal of George James, Duke of Hamilton, and his trustees, and Sir Hew Dalrymple of North Berwick, Baronet, complaining of two interlocutors of the Lords of Session, of 27th July and 11th August 1763, and two interlocutors of 21st December 1763, and praying, &c., as also upon the said George James, Duke of Hamilton, and his tutors, Lord Douglas Hamilton, and his tutors, and Sir Hew Dalrymple, put into the said original appeal; and the joint and several answer of Archibald Douglas of Douglas, Esq., an infant, and his guardians, the Duchess Dowager of Douglas, the Duke of Queensberry and others, put into the said cross-appeal; and due consideration had of what was offered on both sides in this cause: It is ordered and adjudged that the interlocutors of 21st and 30th June 1763, complained of be affirmed: And it is hereby ordered, that the interlocutor of the 27th July 1763, in part complained of by the said original and cross-appeals, after the word ("grant") the words ("a new") be inserted; and after the word ("commission to both parties") that following words be inserted ("to be executed in the usual manner, pur- "suant to the authority thereby given;") and that after the words ("can be examined for the pursuers in "France,") the following order and declaration be inserted ("But in case the pursuers shall insist that they "cannot procure the depositions or writings above- "mentioned, to be delivered up, or obtain inspection "thereof, it is hereby ordered, that they shall produce "all copies thereof, or of any part thereof, as also all "such letters or copies of letters, to the Lieutenant of "the Police, or other officers of the police, for the "time being, relative to the matters in question, between "the parties, and all copies or registers of police, and

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" all writings, memorandums, entries, or extracts relative " to any information or transaction before the curées, " in consequence of the French monitoire, which are in " the custody or power of the pursuers, their attorneys " or agents; such production to be ascertained before " the Court of Session, upon the oath of the pursuers, " their attorneys and agents; and that the pursuers " forthwith do everything in their power to retract or " discharge the said plaints before the Tournelle Crimi- " nelle; and to procure the same to be dismissed"). And it is hereby ordered and adjudged, that the said interlocutor thus amended be affirmed: And it is further order and adjudged, that that part of the interlocutor of the 11th August 1763 complained of in the original and cross appeals, which finds, "that the pursuers must " procure free access to the defenders or their agents to " the proof taken at Rheims, before the Commissioners " of the Parliament of Paris," be reversed; and that the other parts of the said interlocutor be affirmed: And it is hereby ordered and adjudged, that in the foremen- tioned interlocutor of the 21st of December 1763, like- wise in part complained of, by the said original and cross- appeals, the words ("with and under the conditions " therein contained"), be left out; and that the following words of the said interlocutor, viz. ("but with this " farther explanation, that before proceeding to the ex- " amination of any witnesses who have already been, or " shall hereafter be examined in the Tournelle Criminelle " of the Parliament of Paris, either at the instance of " the Procureur-General, or at the instance of the pur- " suers, the pursuers shall be obliged to comply with the " conditions contained in the former commission"), be also left out; and that the said interlocutor thus varied, be affirmed: And it is also ordered and adjudged, that the interlocutor of the 21st December 1763, complained of in the cross-appeal, be affirmed: And it is also ordered and adjudged, that the interlocutor of the 24th December 1763, complained of in the original appeal, be also affirmed: And it is hereby further ordered that the con- sideration of the costs occasioned by the proceedings at Paris, be reserved till the hearing of this cause. And it is hereby declared, that the Court of Session ought not to receive any transmission from the Tournelle Crimi- nelle of the proceedings before the Court. And it is

hereby further ordered that the Court of Session in Scotland do give all proper and necessary directions for carrying this judgment into execution.

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For the Appellants, *Fl. Norton, Fra. Garden, Jo. Burnet, David Rae.*

For the Respondents, *Tho. Miller, C. Yorke.*

SIR WILLIAM DUNBAR and SIR ALEXANDER GRANT, Baronets, DUNCAN URQUHART, and ALEXANDER TULLOCH, Esqs., ... } *Appellants;*

ALEXANDER BRODIE of Lethen, Esq., *Respondent.*

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DUNBAR, &C. *v.* BRODIE.

House of Lords, 15th February 1765.

SALMON FISHERIES IN THE RIVER FINDHORN.—(1) Held, that the appellants had right to the fresh water fishings in the Findhorn, and that the boundaries extended from fixed points; and (2) that the respondent had right to the five stells on the east side of the river Findhorn, and that Sir William Dunbar had right to the stells on the west of the said river, and that Mr Brodie had the only right of fishing on the sand beds, and on the east side of the river, at all times of the tide, and also on the west side during the ebbing of the sea, and that he and Sir William Dunbar had right to exercise their stell fishings without any limitations as to the mode of fishing.

King Robert de Bruys, by charter of date 1st July 1309, granted to the Abbot and Monks of Kinloss, "Totam pis-"cariam Aquæ de Findhorn." This was afterwards confirmed by charter from King James the First, which also granted and confirmed, "Zaras suas solitas et consuetas prope "dictum monasterium situatas."

The burgh of Forres having lost its original corporation charter, records, and whole title deeds in the troubles of the times, a new charter, proceeding upon the recital of this loss, was obtained from the Crown, re-establishing the corporation, and regranting to it such estates as were represented anciently to belong to the burgh.

Among other subjects, the fishings of Findhorn, both in fresh water and in salt, were thrown into this grant.

Claims to the right of fishing having been set up by the corporation, and by two other persons, Alexander Urquhart