

Peers in the case of *Woodstoun*. The caption was never discharged: Allison was never a man of credit after it.

HAILES. It is unnecessary to inquire into the effects of an act of warding, for here there was none such. The supposed execution in effect bears, that the officer did not touch Allison by reason of his bodily distress. He ought not to have conveyed him to prison; *that* would have been an inhuman action meriting punishment; but neither ought he to have left him at full liberty: He ought to have taken the middle course, put him in the hands of some of the people about him, and returned the *res gesta* in his execution. As to the other point, I do not see the difference between this case and that of *Nisbet of Dirleton* joined to that of *Woodstoun*.

KENNET. The caption was never discharged, and therefore this case is the same with that of *Woodstoun*. The act of warding is not of the same notoriety with the alternatives in the statute 1696.

PRESIDENT. I do not think that the act of warding is sufficient, for that does not operate beyond the narrow territory of the magistrate who issues it. Besides, Allison was not apprehended upon that act: the officer left him in no custody at all. This question, upon act of warding, decided formerly.

PITFOUR. Admitted the weight of the President's observation, upon the narrow territory over which an act of warding is effectual.

On the 22d November 1771, "The Lords sustained the reasons of reduction, upon the Act 1696, in respect that Allison had been apprehended upon a caption; that the caption was not discharged, and that the insolvency was sufficiently proved."

Act. A. Lockhart. *Alt.* G. Wallace.
Reporter, Auchinleck.

[The President wished to have the question put upon the act of warding also; but Lord Coalston objected to the determining a point not necessary, as there was no difference in opinion upon the other.]

1771. November 27. ALEXANDER MACLATCHIE *against* MARY BRAND.

WITNESS.

Objection of Partial Counsel.

[*Faculty Collection, V. 334; Dictionary, 16,776.*]

IN a reduction on the head of deathbed, the defender cited Archibald Malcolm, town-clerk of Dumfries, the writer of the deed, and an instrumentary witness to it. The pursuer OBJECTED,—That Malcolm could not be received as a witness, for he had acted as doer for the defender,—had suggested what

questions were fit to be put to the witnesses, and had informed Mary Brand's doer in Edinburgh, what evidence he himself could give. His evidence was taken to lie *in retentis*; and the question ensued, whether the deposition of Malcolm should be opened and made a part of the state?

AUCHINLECK. I have always thought that, as we must judge from the testimonies of witnesses, it is necessary that witnesses should be disinterested: *the giving partial counsel* is a strong objection, and *here* strongly proved.

MONBODDO. The defender has done great injury to her cause by employing Malcolm as her agent; for the opposition made to the receiving his evidence shows that it is material for the defender.

PITFOUR. The judgment in the House of Lords, in *Dickie's* case, did not mean to impugn the general principle: *there* the evidence of the witness was absolutely necessary for proving the execution of the deed.

KAIMES. I should have had great difficulty in admitting Malcolm, even if he had not acted as agent, for he is under the necessity of supporting the deed, in order to support his own good name.

HAILES. The last reason moves me not: It is established in practice, that they who assist ministerially in the execution of a deed, may be examined as to the circumstances attending its execution: this happened in the case of *Mrs Trotter*, and many others. I think, however, that the evidence of Malcolm cannot be received. If one acts with propriety in the character of an agent or of a witness, it is enough. No one is called to act in *both* characters. Malcolm was an agent as long as he could. When he found that his evidence, as a witness, was necessary or fit, he ceased to be an agent; at least he declined acting openly in that character, and observed that it was not right that he should be much seen: This is saying, in other words, as long as I can, I will draw the emoluments of an agent, and, when I can do that no longer, I will change my character, and become an excellent witness. If the defender suffers by losing Malcolm's evidence by his own fault, she may insist against him for damages, as she may be advised.

JUSTICE-CLERK. It would be dangerous to hold that instrumentary witnesses ought to be set aside, because an objection is moved to the fairness of the deed. I am clear that Malcolm cannot be received, for he has given partial counsel. *Here* a man, bred to the law, is conscious that he is doing an act contrary to law: we therefore judge against Malcolm according to his own opinion.

PRESIDENT. The only plea is, that he is a necessary witness; *that* is not good, because the defender made him necessary by having the deed executed privately. The defender has cast Malcolm, by using him as an agent. Were it not for this, I would not cast him. The objection, however, of his share in the transaction might go to his credibility. I hope that Malcolm has not been urged by partial counsel: If he has, it will be odd; but, as his evidence will remain for ever unknown, we have no concern in this.

On the 27th November 1771, "The Lords sustained the objection, and appointed the examination of Malcolm to be cancelled."

N.B.—This altered on appeal, 22d March 1771, without law or necessity.

Act. J. M'Laurin. Alt. H. Dundas.