

No. 199. out her ; wherein she was of course a material and necessary witness, not standing single, but to confirm and corroborate evidence already given with regard to an important circumstance in the cause.

The Court was of opinion, that the objections founded upon the relationship, and the letter written to the defender's father, were, in this particular case, without foundation : and though, as to the allegation of agency, the witness had taken rather too keen and decided a part, yet that it was not sufficient to set her aside, particularly as her testimony was limited to one precise point, as to which she was truly a necessary evidence.

The Court accordingly repelled the objection.

Lord Ordinary, *Kennet*.

For Stewart Nicolson, *Adv. Montgomery et alii*.

For Mrs. Nicolson, *J. Swinton et alii*.

Fac. Coll. No. 65. p. 160.

1771. *November 27.*

ALEXANDER MACLATCHIE *against* MARY BRAND.

No. 200.

Objection of partial counsel.

The pursuer having brought a reduction of a deed, executed by the defender's husband upon the head of incapacity, the defender proposed to examine Archibald Malcolm writer in Dumfries, the writer of the deed, and an instrumentary witness, which was objected to by the pursuer, as Malcolm had been the defender's agent in the cause from its commencement down to the taking of the proof ; had corresponded with the defender's agent in Edinburgh ; and had given partial counsel throughout, by suggesting what occurred to him as material, searching for and transmitting the proper writings to Edinburgh, and by procuring information as to proper witnesses, &c.

These facts were partly proved by a letter from the defender's agent in Edinburgh ; which, to a certain extent, admitted that Malcolm was employed in conducting the cause, and were farther offered to be proved by letters from Malcolm in the agent's possession.

The defender admitted, That, in the commencement of the cause, Malcolm had corresponded with her agent in Edinburgh, and had transmitted to him the information with which she had furnished him ; but that this correspondence had been entirely discontinued. That, in the present case, he was a necessary witness, being almost the only person who could explain in what manner the deed had been executed, from whom he had received his instructions, and whether the defunct seemed perfectly to understand the import of the deed, and what he was doing. 21st November 1749, Earl of March *against* Sawyer, No. 180. p. 16757.

The deposition had been taken and sealed up ; but the Court were unanimous

in refusing to allow it to be opened and made a part of the proof, grounding their opinion upon the objection of partial counsel given in the cause. No. 200.

Lord Ordinary, *Gardenstone.* For Maclatchie, *Lockhart, Maclaurin, A. Ferguson.*
Clerk, *Campbell.* For Brand, *Sol. H. Dundas, Macqueen, Abercrombie.*

Fac. Coll. No. 112. p. 334.

1773. *March 22.*

* * This judgment was reversed upon appeal, and the evidence of Malcolm allowed to be received.

1778. *August 4.*

BOGLE against YULE.

A party about to sue an action of reduction, took a precognition before an inferior Magistrate relative to it, in which he examined the defender and several other persons. Having in his after process of reduction, insisted for a re-examination of the defender, who demanded inspection, not only of his former declaration before the Magistrate, but also of those of the other witnesses; the Lords, after expressing their dissatisfaction with the pursuer's conduct, allowed the defender to see his former declaration, but not the other declarations called for.

Fac. Coll.

* * This case is No. 26. p. 4899. *vide* FRAUD.

1785. *August 10.* **ROBERT FALL against ALEXANDER SAWERS.**

Mr. Fall, with a view of commencing a criminal prosecution against Alexander Sawers, applied to a justice of the peace, by whom several witnesses were examined. Afterwards, having dropped his original purpose, he brought, in the Court of Session, a civil action for damages, in which a proof was allowed.

Mr. Fall intended to adduce as witnesses the persons who had been precognosed; and before their examination took place, his agent transmitted to each of them a copy of their own declarations, together with the declaration of a particular witness who was considered as the leading one, that they might recollect, as he said, what had passed when the facts were more recent.

The defender insisted, that this procedure disqualified those witnesses from giving evidence for the pursuer, and

Pleaded: Precognitions are allowed in criminal matters, to enable the public prosecutor to judge of the expediency of a trial, and to form his indictment with propriety. In questions of a civil nature they are altogether improper, as tending to give to one party an undue advantage over his antagonist, and affording a dangerous opportunity of tampering with the witnesses; Erskine, Book 4. Tit. 4. § 84, 86.; 4th August, 1778, Bogle against Yule, No. 26. p. 4899.

But even in criminal prosecutions, the declarations of those who have been examined in a precognition, are not to be used as evidence in the trial itself. They

No. 201:

Witness previously examined.

No. 202:

Objection to a witness sustained, that having been previously examined in a precognition, his declaration had been shown to him before he was re-examined.