

No. 180. allowed to prove an objection. But the answer to this was, that it may be proved either by the oath of the witness himself, or of the adducer; and had what was to be proved by the correspondence, been properly qualified, the correspondence itself could have been proved by the oaths of Sawyer the adducer, or of Lamb the witness.

N. B. This judgment *quoad* Dickie was reversed upon an appeal, and he allowed to be received a witness in this cause, but *cum nota*.

When the cause came again into Court, upon the question moved, Whether the judgment of the House of Peers was to be understood as only allowing him to be received upon the delivery of the deed, or if he was allowed to be received at large? The Lords, in respect there was no limitation in the judgment, "Found he was to be received at large."

Kilkerran, No. 11. p. 600.

* * * D. Falconer reports this case :

The Earl of March claimed several bonds for considerable sums, which had been assigned by the deceased Countess his mother, to Anthony Sawyer her husband; alledging the assignation was not delivered: And to prove the delivery Mr. Sawyer adduced John Dickie, an instrumentary witness to the deed; to whom it was objected, that he had given partial counsel in the cause, being agent therein.

Answered, He is a necessary witness, as the delivery was immediately upon the execution.

Replied, He is indeed a necessary witness to the subscription, but not to the delivery; which might have been at a distance of time, and is to be proved to have been immediate, only by his evidence who has given partial counsel.

The Lords sustained the objection to the witness.

Reporter, *Justice Clerk*.

D Falconer, v. 2. p. 113.

* * * This was reversed upon appeal.

1750. January 31.

NAPIER *against* YOUNG.

No. 181.

The messenger is admitted to be a witness in a deforcement.

It appears from Sir George M'Kenzie, Tit. Deforcement, That in his time the messenger deforc'd, even though the pursuit was not at his own instance, was not admitted to be a witness in a deforcement. But by the present practice, which of a long time has obtained, where the process is not at the messenger's instance, but at the instance of the private party injured, or of His Majesty's Advocate, messengers are admitted as witnesses. And accordingly, a constable who had been deforc'd, was, in a process at the instance of the private party, in this case admitted to be a witness.

Kilkerran, No. 12. p. 601.