

1750. June 23. FALCONER *against* ARBUTHNOT.

John Falconer of Phesdo pursued a reduction of certain bonds granted by Dame Elizabeth Trent his mother, the Lady Phesdo, a short time before her death, to John Arbuthnot of Fordon, and others her grandchildren and great grandchildren, upon the head of incapacity or total deprivation of judgment in the granter at the time when the bonds were executed, and that her sight was so failed at the time that she could not see to write, so that her hand behaved to be led.

And a conjunct probation being allowed, a question arose, How far Fordon, for example, could be allowed to adduce as witnesses any of the others who had got bonds themselves, to whom two objections were made; *1st*, That the whole bonds being granted at the same time, at least within a few days of one another, it was therefore a common transaction in which the parties could not be admitted to bear witness for one another; *2dly*, An objection lay to some of them, that they were within the forbidden degrees.

But some being instrumentary witnesses, the Lords found, That these objections notwithstanding, the instrumentary witnesses may be examined, as to those bonds only to which they were instrumentary witnesses, and only as to what passed at signing the said bonds; and as to the circumstances of the Lady Phesdo's health at the time of signing, that such of the witnesses as had got bonds, and are not instrumentary witnesses, could not be examined at all. *Vide supra* November 21, 1749, Earl of March against Anthony Sawyer, No. 180. p. 16757.

*Kilkerran, No. 13. p. 601.*

No. 182.  
Instrumentary witnesses otherwise exceptionable were sustained to prove the execution of a deed; and several deeds making part of the same business, the persons benefited by either of them were not sustained to support the others, but persons so connected by relation, with any of the persons benefited, as to be inhabile in their favour, sustained, in support of the other deeds.

\* \* \* D. Falconer reports this case :

The Lady Phesdo having named her son John Falconer of Phesdo her executor and universal legatar, gave by several bonds, executed betwixt the 6th of May and 3d of June, 1748, considerable sums to her daughter, her grandchildren, and great grandchildren; particularly to Patrick Falconer, son to Monkton, her grandchild, and Elizabeth Douglas, daughter to John Douglas of Tilliquholly, her great grandchild; which bonds were witnessed by two servants, and either by Thomas Arbuthnot of Fordon, her grandchild, or the said John Douglas, who had married one; and she died in about a month.

Phesdo pursued a reduction of these bonds, and examined the two servants, who deponed that the Lady's hand was held and supported in signing, and that the bonds were not read in their presence; and there inclined to rest his proof, when Patrick Falconer and Elizabeth Douglas applied, by petition, for a diligence to cite Margaret Falconer the Lady's daughter, the said Thomas Arbuthnot and

No. 182. John Douglas, and Margaret, Jean, and Anne Arbuthnots her grandchildren, to prove the state of her judgment, and manner of executing the bonds: To which it was objected, that all these persons were related to Elizabeth Douglas, in the degrees defendant of bearing testimony in her favour; and, though they did not all stand in the same relation to Patrick Falconer, yet, as they had either got bonds themselves, or stood in that degree of relation to those that had, and these bonds were granted so near in time to each other, as that they ought to be considered as one settlement, the witnessess ought not to be received; especially considering they were not cited at first, but were now sought to be brought after the pursuer had led his proof.

Answered: The whole witnesses are nearer related to the pursuer than any of the defenders, and are proper witnesses to give account of the condition of their parent, when she was dying; the instrumentary witnesses are necessary, and will prove the reading of the papers before the servants were called in; and though the others cannot support their own bonds by their testimony, yet as the causes are different, they ought to be examined touching the other bonds, especially such as are granted to those to whom they do not stand in the defendant degree of relation.

The Lords found that the two instrumentary witnesses, Thomas Arbuthnot, and John Douglas, might be examined as to those bonds only to which they were instrumentary witnesses, and only as to what passed at signing the said bonds, and as to the circumstances of the Lady Phesdo's health at the time of signing: And found, with respect to Elizabeth Douglas, that none but the instrumentary witnesses could be examined as to the bond in her favour: And with respect to Patrick Falconer, found that such of the witnesses mentioned as had not got bonds, might be examined as to the bond in his favour, but that such of them as had got bonds, and were not instrumentary witnesses, could not be examined at all.

Act. Burnet.

Alt. Maitland.

Clerk, Kirkpatrick.

*D. Falconer, v. 2. p. 166.*

1750. July 3.

The ROYAL BANK *against* YOUNG.

No. 183.

*Socius criminis* no objection to a witness in the crime of forgery.

The Royal Bank discovered a forgery of their notes, wherein three persons were concerned, John Young, serjeant in Colonel Rich's regiment, an Irishman, who employed the other two; one of them, Parker, an Englishman, a centinel in the same regiment, formerly a schoolmaster, the greatest master of the pen that has been known, and who wrote the notes and subscriptions so dextrously, that the cashier and accountant, when upon oath, owned they could not have denied the subscriptions to be theirs, but for the paper they were wrote on, which wanted the white letters in the paper put in at the mill; the third, David Gray, a Scots