1736. *January* 13. WISEMAN *against* LOCKHART WISEMAN.

No. 164.

In a reduction of a disposition upon the head of death-bed, women witnesses were not sustained to prove an allegeance, That the granter was crazy in his judgment, there being no *penuria testium.* See APPENDIX.

Fol. Dic. v. 2. *p.* 529.

1738. *December* 8. ELIZABETH YOUNG *against* DOCTOR ARROT.

No. 165.
A sister and aunt to a woman were admitted as witnesses *cum nota*, in proving her marriage, even though it was to be established chiefly from circumstances.

In the process at Mrs. Young's instance against the Doctor, before the Commissaries, for declaring her marriage with him; the libel consisted of two branches; 1*mo*, The actual solemnization; 2*do*, Their being habite and repute man and wife; both which the pursuer was allowed to prove. In consequence whereof, she adduced her sister and aunt as witnesses for her, whom the Commissaries admitted *cum nota.* Against this interlocutor, the Doctor preferred a bill of advocation on the following grounds; 1*st*, That women are not habile witnesses, unless in particular cases, where, perhaps, from the nature of the thing, there is a *penuria testium*, and the truth cannot be discovered from others; but here there can be no *penuria*, since the pursuer does not pretend to bring the least evidence of the actual solemnization, but rests her proof allenarly on the habite and repute, which absolutely exclude such a supposition; these terms plainly denoting, that the fact alleged is known, not to a few people, but to a crowd or multitude of different persons; 2*dly*, These witnesses ought to have been rejected, because they stand in so near a relation to the pursuer; it being a fixed principle in law, that such persons are not to be admitted as witnesses, because, ob animi affectionem, seu sanguinis charitatem, they are justly suspected of partiality. It is true, that near relations are admitted in proving the real act or ceremony of marriage; because it is presumed such only are called on that occasion; but, in the case of habite and repute, there can be no such presumption.

Answered: If it is true, as is acknowledged, that near relations are always admitted to prove the actual solemnization, much more ought they to be received here, where it clearly appears all along by witnesses, beyond exception, that it was intended by parties their behaviour as man and wife should, for reasons of conveniency, be concealed, and not divulged for a season; consequently, it is impossible the matter can be proved otherwise than by such witnesses as were admitted into their secrets; more especially as it is not pretended that the proof should rest alone upon their evidence, but only that their testimonies may be brought in aid to concur with others who are unexceptionable, and whose depositions already emitted bear express reference to the presence and knowledge of the witnesses now in question; and the defender seems to mistake the case, when he pretends,

No. 165. that the pursuer lays the ground of her process upon habite and repute only; seeing the chief *medium* she founds upon is commixtion and repeated formal declarations (of which several instances were condescended upon) acknowledging her to be his lawful wife, which is not only a presumption, *juris et de jure*, of a previous actual marriage, but a consent *de præsenti*, and so takes in all the requisites thereof. It is certain, no set form of words is necessary or essential thereto, but that any deliberate consent of parties to take one another, is sufficient to establish that contract; especially if commixtion follows, a circumstance that shows their consent was serious; so that it is not easy to comprehend why relations ought not to be admitted in the present case, in like manner as where the marriage is gone about by ceremonial rites. Indeed, where such a contract is endeavoured to be established by habite and repute, or notoriety, and not from any actual declared consent, there the law will be more scrupulous in admitting witnesses; because, in these questions, there can be no penury; but that does not apply to the point in hand.

The authorities quoted for the pursuer, were, Lib. 4. Tit. 18. Decret. Greg. 9. Mascardus de prob. vol. 3. con. 1024. Ant. Gabrielus Lib. 6. conclus. 11. Sanches de matr. Lib. 3. Disp. 71.

And for the defender, 9th February 1709, Forbes, No. 137. p. 16718; Mascard. de prob conclus. 1024; Huber. Tit. De. test.

The Lords refused the bill of advocation.

C. Home, No. 107. *p.* 171.

1741. *January* 16. GEDDES *against* PARKHILL and BAILLIE.

No. 166.
Dealing with a witness after citation.

Found, that the showing to a witness, after he was cited, a paper, upon which he was adduced to depone, not in the presence of the Judge, was illegal and unwarrantable; and the persons guilty thereof were fined in 40 shillings Sterling to the poor, over and above the expense of the application.

No judgment was given as to the witness himself; but it seemed to be the opinion of the Court, that the testimony he had emitted was not to be rejected; though one of the Lords took notice of a case where the adducer of a witness had done no more than shown him the interrogatories upon which he was to be examined; yet, when the cause came to be advised, that fact having been discovered, the oath of the witness was not allowed to be read.

N. B. In all such cases, the effect as to the witness depends on circumstances.

Kilkerran, No. 1. *p.* 594.