No. 197. ruption. A proof at large was allowed to both parties; and Margaret Brown, daughter to John Brown one of the Bailies, being offered as a witness for the respondents to prove against the complainers that they had been guilty of bribery; the objection of her being daughter to one of the respondents was repelled, and she was allowed to be examined as to all matters which did not tend to exculpate her father from the complaint. In a reclaiming petition it was set forth, That where a town is divided into two factions in violent opposition against each other, each party having a common interest, may justly be considered as one body; and therefore that a witness who is inhabile with respect to any one of the body, must lie under a great suspicion with regard to the whole. The zeal of a party in matters of this kind, is never confined to the precise members who compose the party, but always spreads through their relations.

It was accordingly found, That as it was incompetent for the petitioners to prove their complaint by their own relations, it was equally incompetent for the respondents to prove their recrimination by their relations; and for that reason the interlocutor was reversed, and the objection against Margaret Brown was sustained.

In matters of this kind the rule seems to be, that either party may use as witnesses any of the other party or of their relations; but that it is incompetent for either party to lead as witnesses any of their own party or of their relations; reserving only to them to cross-interrogate such witnesses when led by the other party.

Sel. Dec. No. 245. *p.* 318.

1770. *January* 20. BOYD *against* GIBB.

No. 198.

In a proof of propinquity to a remote ancestor, the pursuer adduced as witnesses his two aunts, who were objected to as incompetent. Answered: From the nature of the case there must be *penuria testium*, and consequently these witnesses are necessary. The objection was repelled.

Fac. Coll.

*** This case is No. 12. p. 3989. *voce* EXHIBITION AD DELIBERANDUM.

1770. *December* 6.

HOUSTON STEWART NICOLSON, ESQ. *against* MRS. STEWART NICOLSON.

No. 199.
Is the adulterer a competent witness upon the part of the pursuer in an action

In the process of divorce Houston Stewart Nicolson against his wife, amongst several other witnesses, it was proposed by the pursuer to adduce William Grahame, an upper servant to Sir William Maxwell, and Latchimo, a negro, also a servant to the same gentleman.

No. 199. of divorce? Can a negro slave, not a Christian, be received?—Objection of relationship.—*Proditio testimonii*—and agency.

These were objected to by the defender: Grahame, in respect he was the person with whom she was charged to have committed the adultery; Latchimo, in respect he was a slave, and not a Christian.

The Commissaries, on the 4th July 1770, found, "The objection stated against the evidence of the said William Grahame not competent at the defender's instance; reserving to him, in case he thinks fit, to object to his own examination, or to the interrogatories to be put to him, and to the Court to judge of the import, &c. As to Latchimo the negro, before answer appoints him to appear in Court, in order to be examined as to the articles of his faith."

The defender advocated the cause to the Court; and in support of her objections maintained the following argument.

As to William Grahame,

1*mo*, By the charge made against him, he was implicated in the very crime which it proposed by his evidence to establish; and hence, being a *socius criminis*, by the common rule of law he could not be received. A person in that situation was not a free agent: he could not open his mouth without either condemning or acquitting himself of a crime. If he did the one, he had so plain an interest that his testimony could be of no avail; and if he did the other, it could only be in consequence of secret and unavowable reasons, which, if known and acknowledged, would operate his disqualification. M'Kenzie's Crim. Tit. witnesses, § 10. Mascardus, Conclus. 1364, No. 9. Matthæus De Crim. Tit. De Test. § 4. Voet Ibid. § 10.

2*do*, By the law of every country, infamous persons were incapable of being witnesses: Whosoever were guilty of a public crime, such as theft, robbery, and in particular adultery, were, by the operation of the law itself, stigmatized with infamy. Statuta Wilhelmi, C. 11. De his qui notantur Infamia. Voet. in Tit. De his qui not. Infam. L. 43. D. § penult. De Vitio Nupt. When this doctrine was applied to the present case, it was conclusive. The very proposition of making Grahame a witness inferred a direct disability in him to be produced as such; as the moment he accused the defender, he judicially charged himself with a crime, which, by his own confession, operated the same thing in law as a conviction, and included that infamy which furnished a solid objection to his testimony.

3*tio*, It was an established rule in law, nemo tenetur jurare in suam turpitudinem; no man was bound to accuse himself, or when adduced as a witness, to swear to any fact that had a tendency to load him with the imputation of a crime. This point was decided in the Fortrose election, where Colonel Munro, condescended on as having been guilty of the bribery charged, was found by the Court not to be receivable as a witness. The same rule applied to the present case. Grahame could not be forced to answer a single question; he had a good legal defence, which the Commissaries had indeed acknowledged; and if, in this situation, he should wave that plea, he could not fail to be regarded as an ultroneous witness, or as actuated by the most improper motives and secret influence to give his evidence, which was fatal to his admissibility.

No. 199. 4*to*, Independent of these objections, it was clearly established in law, and by various precedents, that the adulterer could in no case be examined as a witness against the adulteress. Mascardus, Conclus. 1318, No. 9. The nature of the case supposed it; for as both parties were principals, neither of them were in a situation to give fair evidence either for or against the other. In the case of the Earl of Wigton, the person condescended on as the adulterer was not cited as a witness. In the case of the Earl of Monteith, 1st and 2d Jan. 1684, No. 94. p. 16684. so far was it from being imagined that Auchlossan could be a witness, that he was charged equally with the defender, and considered in the light of a party. In the case of Carruthers of Dormont in 1742, the Court found that Bell, one of the persons charged as guilty of adultery, could not be admitted as a witness either for or against the defender: and as to the case of Campbell of Ederline in 1726, it was but a single decision, not argued upon general principles, and had been disregarded and departed from in the case of Carruthers referred to.

The pursuer answered:

1*mo*, The reason why *socii criminis* were not altogether unexceptionable in ordinary cases, did not apply to the case of adultery. The reason of their being exceptionable, in any case, was their being under temptation either to exculpate both themselves and their accomplices altogether, or else by loading their accomplices to exculpate themselves alone. This of course was a sufficient reason why they should not be adduced on the part of an accomplice, but was none for their being adduced against them. Still less were *socii criminis* objectionable in proof of an occult crime, or where there was a *penuria*: and by the practice of this country, convictions of the deepest nature took place every day upon that kind of evidence. Mascardus, Conclus, 1318, No. 33. Voet. Matthæus.

2*do*, The objection, that Grahame laboured under the imputation of being *infamous*, could not be regarded *in hoc statu*: It was as yet uncertain what he would say, or if he would say any thing; so that it was premature to state an objection which could not be verified or known whether or not it would exist till after the witness was brought forward and interrogated. If he should acknowledge the fact charged, it would then be time enough to object to his credibility; which was all the length that this objection ever could be pushed: Nor could the objection of his being ultroneous go any further, as it rested entirely upon the supposition that he was to swear to the defenders's guilt; which, as an objection to his admissibility, was incongruous and premature.

Though this objection might be stated to the credibility, it never could be sufficient, in proof of a crime of an occult and domestic nature, and where there could be no direct evidence of the crime but by the acknowledgment of one or other of the parties, to reject the witness altogether. Matthæus, Lib. 48. T. 15. De Probat. Bankton, v. 2. p. 645. 22d Feb. 1709, Taylor, No. 135. p. 16716. It was, besides, a mistake in supposing that simple adultery, which by the law of Scotland, was only punished arbitrarily, inferred infamy; far less could it be applied to the present case, where the person objected to, instead of being the seducer,

was the seduced; and though *infamia facti* might be attached to that offence, it was no objection to the admissibility of a witness, it being fixed law, that in order to establish infamy in a legal sense, the previous conviction of the crime that inferred it was required. 5th June 1623, Jedburgh *contra* Elliot, No. 41. p. 16659. 22d Feb. 1709, Taylor, No. 135. p. 16716. 21st Jan. 1671, Lord Milton, No. 72. p. 16674. No. 199.

3*tio*, The maxim founded on, quod nemo tenetur jurare in suam turpitudinem, did not imply to the case of a witness. The foundation of that maxim was, that no man could, by judicial sentence, suffer loss of life, member, or fame, upon his own confession; but as his deposition could not be afterwards founded on, and as no punishment for whatever a witness might confess could follow, he ran no risk. This maxim afforded a personal privilege only to the witness himself, which he might exercise or renounce as he should think proper; and as the party against whom he was adduced had no concern with the alleged turpitude of the witness, it was *jus tertii* to her to plead it. L. 4. D. Tit. De Testibus. Voet. in Tit. De Test. § 14. Stair, B. 4. T. 43. This distinction was a sufficient answer to the case of the Fortrose election, as the objection there had actually been stated by the gentlemen themselves proposed to be examined.

4*to*, In cases of this nature, the admissibility of the adulterer as a witness was not only agreeable to the principles of law, but to the highest legal authorities, and confirmed by practice and decisions. Mascardus, Conclus. 65, No. 14. Con. 158. By the practice of England in Doctors Commons, the *particeps criminis* was received as a witness. Governor of Carolina *contra* his Wife in 1750—Fowler *contra* Wheatly in 1757, 1758—Pomfret *contra* Pomfret in 1757—Norton *contra* Norton, and Warren *contra* Warren in 1770: in all of which the adulterer was the principal, and, in three out of the four, the only witness to the fact of adultery.

The decisions of our own courts had gone the same way: That of the Earl of Monteith was not very intelligible, and seemed to fix nothing: In that of Carruthers in 1742, the adulterer was adduced by the adulteress, and as there must always be strong reasons for refusing a *socius criminis* when brought forward by the accomplice, was on that account rejected. The case of Campbell of Ederline in 1726 was precisely in point; the witnesses having, by order of the Court, been examined upon facts of adultery committed by themselves. The like judgment had been given in the case of Tulloch *contra* Falconer in 1756; and in the case of Martin *contra* Michie in 1768, the same decision was given in respect of the uniform practice of the Commissary Court. See APPENDIX.

As to Latchimo the negro, it was objected by the defender:

1*mo*, He was a slave, had no property of his own, had no character to sustain or lose, and could not therefore be received. Slaves were mentioned as inhabile witnesses in the stat. 2. Roberti I. C. 34. and, by the Roman law, were never received but when put to the torture. Mascardus, Conclus. 1365, No. 14. and 20. Voet. in Tit. De Testibus, § 2.

No. 199. *2do*, As he was not a Christian, he could not be considered as bound by the oath administered in every case, particularly the very solemn one taken in the Commissary Court. Gilbert, Law of Evid. p. 145. Erskine, B. 4. T. 30. § 4. Mascardus, Conclus. 1363, No. 41. Voet. in Tit. De Testibus, § 2.

The pursuer answered:

1mo, There was no proper slavery known in this country; the moment a foreign slave set his foot on British ground he became free; and hence, as this person was capable both of holding property and had a name in society, he was entitled to be a witness.

2do, It was no objection to a witness that he was not a Christian: It was enough that he believed in a God and a future state; and he might be called upon to bear testimony in as solemn a manner upon the belief and articles of his own faith, as if he was a Christian. Records of Court of Admiralty, March 5th 1705, Case of Captain Green.

The Judges were unanimously of opinion, that Grahame, however much his credibility might be affected, and Latchimo, were admissible; and the following interlocutor was pronounced: "The Lord Ordinary, after advising with the Lords, refuses this bill with respect to William Grahame and Latchimo the negro being examined as witnesses in this cause; and so far remits the cause to the Commissaries *simpliciter*."

Lord Ordinary, *Hailes*. For Nicolson Stewart, *Adv. Montgomery, A. Lockhart, Maclaurin.* For Mrs. Nicolson. *Sol. H. Dundas, Ilay Campbell, J. Swinton.*

The defender having appealed against these interlocutors to the House of Lords, they were, upon 18th Feb. 1771, affirmed.

In this case objections were also stated to the admissibility of Sir William Maxwell, the brother-in-law, and Lady Maxwell, the sister of the pursuer. The objections to Sir William were, *1st*, His relationship to the pursuer, and his not being a necessary witness; *2do*, His having assisted in taking the declarations of other witnesses adduced. The Commissaries had allowed "Sir William to be examined *cum nota*; and had likewise allowed "Lady Maxwell to be adduced, reserving to the defender to put such questions to her *in initialibus* as may farther tend to support the objections to her testimony." And by the interlocutor of the Court, of the 6th December 1770, an instruction was given to the Commissaries, "That they first determine the question with respect to their allowing Lady Maxwell to be examined as a witness in the cause; and then, before determining the question whether Sir William Maxwell is to be examined, that they ordain the pursuer to give in a special condescendence of the questions on which he proposes to interrogate the said Sir William Maxwell."

The examination of Sir William was no further pushed; but Lady Maxwell having been examined *in initialibus*, the Commissaries allowed her to be examined *cum nota*, and her deposition to lie *in retentis*. This interlocutor gave rise to another bill of advocation at the defender's instance, wherein the incompetency of

Lady Maxwell's being examined at all was maintained upon the following grounds— No. 199.
1*mo*, Her relationship, being the full sister of the pursuer; whichobjection was supported by reference to the following authorities, Voet. Tit. De Testibus, § 4. and 5. Statuta Roberti I. C. 34; 16th June 1747, Gordon *contra* Gordon, No. 177. p. 16756. 19th Dec. 1752, Park, No. 190. p. 16765. 17th June 1757, Beugo, No. 193. p. 16767. Though, in some cases, an exception had been made from this general rule, it had only been allowed where, there being a *penuria testium*, the persons adduced were necessary witnesses, which, in the present instance, was not the case.

2*do*, This Lady, upon her examination *in initialibus*, admitted, that she was at a meeting of friends upon the subject at the pursuer's father's house, where it was concerted, that if the proof was thought sufficient, a divorce should be brought: That, in consequence of this, she had taken down the declarations of several persons as proper witnesses; had been present when one was examined by Sir William; and had given the examinations she had taken to her husband, who had sent them to the pursuer's father. Upon these admitted facts, and in consequence of a letter this Lady had written to the defender's father, wherein she said, "That I shall not be easy till I have attested "most solemnly by oath what I have already declared on this subject;" it was maintained that there was a *proditio testimonii*, that she had expressed her ultroneous desire to be a witness in the strongest manner; had taken a decided part, and had truly acted as an agent in the cause; any one of which circumstances were sufficient objections to her being received as a witness. 24th Jan. 1667, Drumelzier *contra* Earl of Tweedale, No. 78. p. 16677. 5th July 1699, Home, No. 116. p. 16702. Martin *contra* Michie in 1768, (Not reported.)

The pursuer answered:

1*mo*, In crimes of an occult or domestic nature, near relations were necessarily admitted to give evidence; and in the present instance, the examination of the witness objected to was more particularly required, as the crime charged had been committed in that person's house by her sister-in-law, and with one of the servants in the family.

2*do*, The witness's conduct had been entirely different from that of an agent; the facts meant to be inquired into were interesting to the family; they had happened in Lady Maxwell's own house; she was unquestionably the most proper person to make the necessary inquiries upon the subject: These inquiries were not intended or directed to discover evidence to support a cause commenced or even resolved upon, but to discover the truth; and from thence to judge whether it was fit that an action of divorce should be brought. The letter referred to could not be termed a *proditio testimonii*, but had been written under the most natural impression, and implied no more than her own justification, that she had spoken the truth, and was ready to attest it upon oath.

3*tio*, Though authorised therefore to examine this witness at large, it was only proposed to do so as to one particular fact, which could not be fully proved with-

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