

No. 124. there was no hazard in a bowman, who is less exposed to influence than other menial domestic servants ; 2do, Kilmarnock, the adducer, was willing to give his oath, that he had not put him away *eo animo* to capacitate him, but because he had no more use for him, and that he was a necessary witness ; and Sclater, the witness, was ready to deponè there was neither design nor concert betwixt his master and him. The Lords, in this special case, allowed him to be received, but appointed him to be called on a new citation. Some were only for taking him *cum nota*, because they thought it near to the case of a moveable tenant rejected from witnessing on that head, and his master giving him a tack with design to habilitate him ; which would not be sustained.

Fountainhall, v. 2. p. 186.

1704. July 11.

STIRLING *against* HAMILTON.

No. 125.

A cause was advocated from the Commissaries, who had admitted a father, brothers, and sisters as witnesses, in proof of a private marriage.

Fountainhall.

* * * This case is No. 15. p. 372. *voce* ADVOCATION.

1705. January 5.

ANNE CHALMERS *against* ALEXANDER BROWN, Servant to the DUKE of QUEENSBERRY.

No. 126.
Women witnesses in matters regarding marriage.

Anne alleging she was lawfully married to the said Alexander, he raises a process of scandal and defamation (called by the English lawyers a libel of jactitation) before the Commissaries of Edinburgh, to hear herself discharged from claiming him to be her husband, and a declarator, that he was a free man, and at liberty to marry whom he pleased. To obviate this, she raised a counter-process of adherence, and offered to prove their marriage, and that he owned her for his wife since ; and that she bore him a child, which he caused baptize by the curate at St. Martin's in London, and registrated as lawfully begotten ; and produced a testificate under the hand of Mr. James Cruickshank, Minister, bearing that he had married them in August, 1700 ; and craved he might be examined on the verity of what he attested ; and likewise she adduced one Christian Godskirk who was present at the celebration of the marriage, and craved that both she and the minister might be examined thereupon. Answered, As for Mr. Cruickshank, he has taken such latitudes in-giving antedated testificates in sundry cases of marriage, that no trust can be given to his testimony ; and for canvelling the faith of this produced by Mrs. Chalmers, they produce a bond subscribed a year posterior to the testificate

for £20 Sterling, wherein she designs herself relict to William Elliot, merchant, and not wife to Brown: Likeas, Cruickshank is deposed by the Presbytery of Dalkeith for sundry immoralities, and likewise disowned by the Bishops, and those of that communion; and as for Godskirk, no women witnesses can be received in matrimonial cases, particularly to prove the celebration of a marriage, where the parties contracting may bring as many men witnesses along with them as they please, and if they do not, *sibi imputent* if they succumb in the probation. The Commissaries, in respect of the objections against Cruickshank, the Minister, superseded examining him till the probation was closed, and then they would consider if there was a necessity of taking him; and as to Godskirk, refused to allow her or any women witnesses for proving the actual celebration of the marriage, but declared they would admit them to prove cohabitation, and being reputed man and wife, and his owning and acknowledging her to be such, and the child to be his lawfully begotten child, and the recording its name as such, and any other matrimonial conjugal deeds subsequent to the marriage. Anne thinking herself lesed by these two interlocutors, raises an advocacion to the Lords, not to lift and take away the process from the Commissaries, who are the peculiar proper Judges to such cases *in prima instantia*, but only to get instructions from the Lords to the Commissaries for regulating their proceedings, and to remit it with such directions; and she insisted, *1mo*, That she had a visible prejudice by delaying to examine the Minister, for she knew not the men present at her marriage, being brought there by Mr. Brown and the Minister; whereas, if he were allowed to depone, she would get light and information of their names and residences, that she might cite them. Answered, He who has given such a testificate will not be nice in concealing the witnesses names, so she may come to the knowledge of that without his deponing. Then she urged, a sentence of deprivation cannot incapacitate him from being a habile witness, for even others than Ministers can join persons in marriage, in which consent is the essential ingredient; and that being declared before any, with co-habitation and conjunction, makes up a valid marriage; and this being a latent clandestine marriage, such variety and choice of witnesses cannot be expected as in those formally and publicly contracted. As to the second point of women witnesses, matrimony by the Canon law is expressly privileged to be proveable by witnesses *ob favorem matrimonii, et ad evitandum scandalum et delictum*; the conjunction ought rather to be presumed lawful than fornicarious; and so it is by Zoesius determined, *Ad Tit. Decretal. De Clandestin. Desponsatione*; Zanches *De Matrimonio, et Mascardus de Probat. conclus. 1023. et Cap. 22. et 23. extra de testibus*; and Dirleton in his Doubts, *voce Women Witnesses*, page 225. though he says, that in 40 or 50 processes that have been before the the Commissaries since the Reformation for divorce upon adultery, women witnesses had never deposed in any of them, yet this is only a negative argument, and he thinks *ubi constat de corpore delicti* by a child's being procreated, there women may be very habile witnesses; and the Lords found so in the divorce pursued by the Earl of Monteith against his Lady, 1st and 2d of January, 1684,

No. 126. No. 94. p. 16684.; and if they be receivable in a divorce, then *a fortiori*, and much more, *ad sustinendum matrimonium*. It was answered for Alexander Brown, That to allow women to prove the actual celebration of marriage, whores might by mutual testimonies provide one another of very good husbands, and false wives and children palmed upon the best estates, which might be of dreadful and disastrous consequence; but our law has secured us better, our ancient statute of King Robert I. which is the standard of witnesses hability, Cap. 34. expressly rejects women; and our decisions refuse them in cases more favourable than this. Vid. July, 1675, Wilkie, No. 76. p. 16675.; and 27th November, 1678, Tait, No 82. p. 16678.; and lately in Mr. Middleton's case against Cunningham of Enterkin, women witnesses were refused to prove one's age. By the Roman law, a woman might not so much as be a witness in a testament; and the Canon law, Cap. 10. De Verb. significat. enacts the same; and though some Canonists differ in opinion, yet that is only to support their bastard-sacrament of matrimony. When the Lords came to advise these points, some proposed that the Lords ought not to interpose in the case, because the Commissaries being sole privative Judges *in prima instantia* to marriages, no advocacy should pass of such matters, nor instructions be given them till they have finished the process by a sentence, and then the Lords might in the second instance revise and rectify their decreets in a reduction; but the 6th act of Parliament in the year 1609 being read, making the Lords the King's great consistory, and giving them power to advocate from the Commissaries, that was laid aside; though the act about the jurisdiction of the Admiralty in the year 1681 was likewise urged as a parallel. Then the Lords entered on the reasons, and found by plurality, that the Commissaries had done no wrong, neither in delaying to examine the Minister, nor in refusing women witnesses to prove the celebration of the marriage; and therefore found no need of instructions in this case, but remitted it simply back to the Commissaries.

Fountainhall, v. 2. p. 255.

1705. July 11.

MY LORD INVERURY *against* JAMES GORDON, Merchant in Edinburgh.

No. 127.

An artificer's servants admitted *cum nota* as witnesses for their master to prove sufficiency of a piece of work sold by him and wrought by them.

In the action at the instance of the Lord Inverury against James Gordon for the price of a parcel of Florence wine sold by him to the pursuer, and £80 Scots of damage, upon this head, that the wine had run out through the insufficiency of the cask furnished by Gordon. John Linn, cooper, who furnished the cask, was called for his interest; and a conjunct probation being allowed to both parties as to the insufficiency of the cask, and if thereby the wine was lost, and by whom the cask was furnished, or agreed to be furnished; James Gordon's servant was received as a witness for him *cum nota* to prove the terms of the bargain, and John Linn's servants were allowed also to deponé *cum nota* for proving the condition of the cask: