

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 allegiance, 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.

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; *1mo*, The actual solemnization; *2do*, 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; *1st*, 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; *2dly*, 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.

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.

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,