

No. 93. Answered : The like objection was repelled, January, 1682, in the case of Hay of Murie against Phinhaven, No. 91. p. 16683. ; and here the witnesses are secured by wadsets from the defender's father, and they are the defender's own people, viz. his bailie, his grieve, and his clerk, who will not readily depone against their master in any thing that is not true ; besides, intromission with heirship is of difficult probation.

The Lords repelled the objection, February, 1682, and thereafter adhered to their interlocutor.

*Harcarse, No. 785. p. 221.*

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1683 December 1. MONTEITH against MONTEITH.

No. 94.  
Women ad-  
missible as  
witnesses in  
the occult  
crime of  
adultery.

On a bill given in by the Lady Monteith against the Earl, who was pursuing a divorce against her before the Commissaries of Edinburgh for her adultery, and offering to prove it by women witnessees, and she complaining of this as illegal ; the Lords on the Register's report ordained this point to be heard in their own presence, if women could be received as habile witnesses *in causa matrimoniali, ad ejus dissolutionem?*

1684. January 1. & 2.—The bill of advocation presented by the Countess of Monteith against the Lord, in the case mentioned 1st December 1683, was this day debated in presence and decided against her ; and the Lords found that the Commissaries had done no wrong, and therefore allowed them to take women as witnesses to prove her adultery, providing they be of integrity and above all exception ; and remitted it back to the Commissaries.—Registers were sought, and about fifty processes of divorce were found recorded since the reformation of religion, (I believe none will doubt but there have been more adulteries than fifty committed since that time,) and in none of them were women adduced as witnesses ; which though a negative argument, yet concludes this much, that there can be little necessity urging us now to allow such a probation, which has not been used in 120 years space ; and though the edict *de testibus* be *permissorium*, admitting all except such as are secluded and prohibited, yet we can subsume that women are rejected a *testificando* with us, Cap. 34. statut. 1. Roberti I. And Craig, Lib. 3. feud. Dieg. ult. shows our masculine nation hath always reprobated the testimony of women witnesses, in this imitating the feudal law, Cap. 34. Lib. 2. feudor. where feminine testimonies are reprobated ; and it is remarkable that Gothofred in his notes there, says even women among the Romans were repelled *a testimonio dicendo in divortii*, which was *actus legitimus et solennis* with them ; and this comes precisely home to our case in hand. The Emperor Leo also, among his equitable laws, by Novel. 48. discharges women from witnessing. The canon law does also expressly debar them as inhabile witnesses. See also Mascard. de probat. voc. femina et matrimonium ; et Phil. Decius ad L. 2. D. De Reg. jur.

De. <sup>i</sup>is quorum mulieres sunt incapaces ; et Accursius ad L. 9. D. De. stat. hom. ubi. recensentur 15 casus in quibus conditio feminarum est pejor viris—And for women witnessing, see Menoch. de arbitr. jud. quæst. cas. 525 ; Cavalcanus De testibus fol. 10 ; et Cod. Fabrian. eod. Tit ; Carpzov. Jus consistoriale in matrimon. et Zacch. Quæst. medico-legal. Lib. 2. By the old Roman law women were reputed *in perpetua tutela*, and so were no more admissible than pupils ; which yet holds jure Saxonico :—Causæ matrimoniales sunt causæ graves, et in jure æquiparantur causis criminalibus. The dissolution of a marriage is a cause drawing much fatality and scandal after it, so in the opinion of all lawyers cannot be proved *nisi per testes omni exceptione majores*. Yet in James Bonnar's improbation lately, and in sundry other falsehoods, pursued only *quoad effectum civilem, non criminalem*, the Lords have received women as witnesses *ex officio* : But neither Commissaries nor other inferior Judges can examine *ex officio*. Our Craig cites a good saying of Cato, date fræna impotenti sexui, mox dominæ sunt evasuræ ; uti impudens illa Carsania in L. 1. § 5. D. De postulando.—Let not women become masters of our lives, nor of our honours and reputations, which are yet dearer to us. *1mo*, Modesty and shamefacedness debar them ; *2do*, The œconomic employments within doors are enough to take them up ; *3tio*, Their passions of love, anger, hatred, revenge, are high and boiling, and ready to transport them to great extremities ; and may be induced to depone against an innocent Lady, in the hopes to succeed her in her nuptial bed. There were also many things urged why women should be received ; that *jure Romano* in many cases they were allowed, as *in codicillis*, &c. and in all occult cases and crimes, *viz. in puerperio, partu supposito et infanticidio* ; and adultery uses to be managed as occultly as any of these. But Mascardus *voce testes, conclus. 1366*, affords a good distinction and solution to this ; where things are occult and secret *tam habitu quam actu*, so that they are done commonly in the presence of none but women ; there women, *et testes alias inhabiles admittuntur* ; but if it be such a latent act *in quibus* though *actu* no men intervene, yet a *communitur accidentibus* they may happen to be as well present as women, as in adultery, there men only are receiveable.

The next day a petition was given in for Ross of Auchlossan, who was named in the libel as one of those with whom she had perpetrated the adultery, craving the Lords would explain whom they meant by witnesses above all exception ; and that the Earl might be ordained to prove his marriage with the Lady, before they could infer adultery with her against a third party, (whose Lady was also interested to see him vindicated.) This was refused ; for cohabitation was thought enough, and being *habitus tentus et reputatus* her husband ; yet the Lords recommended to the Commissaries to notice these points.

1684. January 8.—The Lady Monteith, whose case is mentioned 1st current, having presented a new bill of advocation against the Earl, that the Commissaries had again committed iniquity, *1mo*, In repelling this defence, that the pursuit of adultery by the common law prescribes in five years ; and where we have no sta-

No. 94. tute law of our own, the Roman law is our rule; *2do*, In repelling this, that they were reconciled, in so far as he established an aliment upon her by order of Privy Council; *et dissimulatione tollebatur injuria*. Answered, Though Papon in his Arrests, Lib. 24. Tit. 12. and Carpzovius in his Criminals, show that the Parliament of Paris, and the Imperial Chamber of Germany having sustained the quinquennial prescription of the action of adultery, not pursued within that time, yet our law has admitted no such thing (for 20 years was the ordinary term for prescription of other crimes in the Roman law,) but on the contrary, at circuit courts, adulteries twenty or thirty years old are pursued; and as to the reconciliation, it neither amounts to one express nor implied; for the lawyers condescended on some tacit acts of husbands condonations, and remitting the wrong, by taking home their wives and cohabiting with them, after they knew their guilt; yet there is no such act here, but only a mere compliance with a judicial sentence, giving the Lady an aliment *medio tempore* till he should obtain a divorce against her; this he could not hinder; and so it was not passing from his *vindicta privata* at all. The Lords repelled these reasons, and found no iniquity done; and therefore remitted it back again to the Commissaries: But they having refused a diligence against any out of Edinburgh, for proving her objections against the witnesses whom the Earl was to adduce, as infamous and base persons, &c, the Lords rectified this and allowed a competent time for that effect. The Lady had two defences farther, *1mo*, That the Earl himself was guilty of adultery, and so her's *mutua compensatione tollebatur*; yea he had committed bigamy in marrying another; *2do*, That he could not question her, because he had been *leno* or pimp in suborning men to offer to abuse her. But *dubitatur* if this will excuse any farther than *quoad* these men, or even as to other?

1684. July 17.—The decret of divorce is pronounced by the commissaries of Edinburgh at the Earl's of Monteith's instance against his Lady, (*vid.* 8th January 1684,) upon probation of her adultery, by the testimony of women and others; and sustained her defence upon his retaliation, by his being likewise guilty of the same crime; but refused her a commission to examine witnesses, who either would not or could not appear; of which she complained; as also she raised a reduction of the said sentence of divorce, on this ground, that they had committed iniquity in sustaining the libel generally thus, that she had lien with Ross of Auchlossan and Mr. Fielding, and divers others; and that the witnesses having deponed as to neither of the first two, the libel was not relevant as to divers others; unless it had condescended on them; and likewise that the witnesses were *mala fama*.

However, on the 4th of August 1684, the Earl having raised a criminal libel against her, at the Justice Court, and she not being able to find caution, was forced to retire out of the way, and so was denounced fugitive. And he having composed with the Marquis of Montrose's tutors, and made himself a naked liferenter, and also agreed with Ross of Auchlossan not to pursue him for bigamy, and given him and Mr. Æneas M'Pherson 5000 merks; he caused the King's Advocate, in his own name, and the Lady's, raise a libel against him as being guilty of adul-

tery, and bigamy in marrying Catharine Bruce, Blairhall's sister, before he had obtained his divorce. Which is merely done of collusion and design to get an absolutor for lack of probation; and therefore the Lady's lawyers appeared and disclaimed the pursuit, (though she had once been consulting with the King's Advocate in order to the raising a libel against her Lord,) and craved the diet might be deserted, but prejudice to raised new letters against him for the bigamy when they saw it.

1684. *November 10.*—The Lady Monteith's process against her Lord, for bigamy with Katharine Bruce, mentioned 17th July 1684, was called; and she not insisting, the Lords of Justiciary found they could not force her to insist, but only deserted the diet *in hac instantia*.—But they fell upon this new invention; that my Lord Monteith should raise a process of declarator before the Criminal Court against the King's Advocate, and his late Lady, (now denounced fugitive on his decret of divorce for her adultery,) to force them to insist in that action of bigamy, with certification if they do not, he shall be assoilzied and they never heard afterwards to pursue. This seemed a rational method, though new in criminals, but not in civil, founded on L. 5. C. De ingenuis manumiss.

*Nota*, There were two things complained of in this Criminal Court, as very prejudicial to pannels; *1mo*, That the King's Advocate should be permitted to examine witnesses on a precognition, who will certainly be so far partial and concerned, as to have them loading the pannel all that may be; for this task should be left only to the Justices; *2do*, That he should be allowed to stay within with the Criminal Lords, when they are advising causes, when he is a party *ratione officii*; this he is not allowed in the Session, when the Lords advert to it.

*Fountainhall, pp. 248, 256, 257, 298, 308.*

\* \* This case is reported by Harcarse :

The Lady Monteith having advocated a process of divorce, at the instance of her husband the Earl against her, from the Commissaries of Edinburgh to the Lords of Session, upon this reason of iniquity, That the Commissaries sustained women-witnesses for proving the crime of adultery, which was the reason of the divorce;

Alleged for the Earl: That by the civil law women were habile witnesses in all civil causes, except in testaments, (as being *munus virile*) and by the canon law are not simply repelled as inhabile, but *non facile admittuntur*; because, as the law *De verb. signif.* phrases it, *varium et mutabile testimonium sæpe producunt mulieres*. And though by the criminal law they are not regularly admitted, yet in some crimes, *propter immanitatem sceleris*, and in *criminibus occultis quæ sunt difficilis probationis*, they are received. And Julius Clarus, *prax. criminal. Dieg. 24.* asserts it as his own, and the common opinion of others, That women are admitted to bear witness in *criminibus civiliter intentatis ad effectum civilem*, such as divorce is. And though by the act 34. of the second statutes of King Robert, women are repelled *a testificando* that is only in the way and manner they are repelled in the ca-

No. 94. non law. Again, by our custom, which is *lex non scripta*, women are allowed to witness both in civil and criminal cases, where there is *penuria testium*, as in *puerperio*, where women only use to be present; therefore, for the like reason, there is a necessity for allowing any kind of witnesses, male or female, to prove acts of adultery which are *difficillimæ probationis*, and usually carried on by the means of women. And if the statute of King Robert, and the act 11. of King William were strictly interpreted of a simple inhability, a great many witnesses should be cast, which in all times, by the current of decisions, have been allowed. *E. g.* by the said statute, clerks are declared inhabile witnesses against laics, *et e contra*; lame persons also, and such as have any bodily infirmity, those in prison, and several others, are also declared inhabile witnesses.

Answered for the Lady: Wherein the canon law differs from the civil law, especially in ecclesiastic causes, such as divorce, and the probation thereof, we rather follow the canon law than the civil; and by the former, women seem to be simply repelled *a dicendo testimonio*, not only upon a politic consideration, that they may not be withdrawn from their domestic affairs, but even *propter fragilitatem sexus*; which hath been so little controverted, that in all the processes of divorce for 120 years, it appears not that ever a woman was so much as offered for a witness, which could not but have happened in some case or other, had women been looked upon as habile. And if by the canon law they were excluded from bearing witness in divorce, they ought far less to be admitted with us, to prove a crime inferring divorce; because the effect of divorce, by the canon law, was not so dangerous and prejudicial as it is with us, where it not only infers *separationem thori*, but also dissolves the marriage-tie so as at least the innocent party may marry again. And seeing by King William's statute, which is authentic law, women are simply repelled, *ubi lex non distinguit, nostrum non est distinguere*. Again, many things are admitted for the public interest's sake *ne crimina maneat impunita*; and for the national safety, as in treasons, &c. which should not be drawn to consequences in cases of private interest. Nay, at most, if women were admitted to prove adultery, they ought to be received *cum nota*, or to adminiculate a probation by men-witnesses, but not to make a total probation.

Replied: Wherever women are allowed to be witnesses, they are sustained equally habile as men. And as two women-witnesses will be sustained as sufficient probation in treason, &c. though no man had deponed in the matter, *multo magis* ought they to be admitted for a civil fact. And, though *testes singulares in actu generico reiterabili*, are not usually sustained to infer capital or corporal punishment for the crime of adultery, yet such a probation might have the civil effect of divorce.

The Lords found, That women-witnesses, *omni exceptione majores*, ought to be allowed, and admitted in a process of divorce *ad civilum effectum*, and remitted the cause to the Commissaries of Edinburgh.

\* \* This case is also reported by P. Falconer :

No. 94.

There being a bill of advocation given in by the Countess of Monteith against the Earl of Monteith, in an action of divorce depending against her, upon this reason, That the Commissaries did sustain the adultery to be proved by women witnesses ; it was alleged for the Countess, That by the Chap. 34, Statute 2, Robert I., Women were excluded from being witnesses ; and by the Canon law, C. Forum. 10. Decretal. Gregor. De Verborum Significatione, they were excluded, as being *natura inhabiles*. It was answered for the Earl, That by the civil law they were witnesses, and, notwithstanding the text in the Canon law alleged, yet they were witnesses *habiles* in atrocious and latent crimes, such as adultery, otherwise that crime should go unpunished, without any legal probation, women being most conversant in trocking about that crime. It was replied, That not only was it the positive law of the nation, That women should be excluded from being witnesses, but likewise the uncontroverted practise of the nation ; and in all the divorces since the institution of the Commissaries of Edinburgh, there was never a woman adduced to be a witness in a divorce. It was duplied for the Earl of Monteith, That it can never be instanced, that *in foro contradictorio*, women were rejected in the like cases. The Lords remitted the cause to the Commissaries, and found, that women, *omni exceptione majores*, might be received as habile witnesses, in respect of the occultness of the crime.

*P. Falconer, No. 74. p. 49.*

\* \* Sir P. Home also reports this case :

The Earl of Monteith having pursued a divorce against his Lady before the Commissaries of Edinburgh for adultery, and the libel being admitted to probation, and the Earl having adduced women witnesses for proving of the adultery, who being admitted by the Commissaries, the Lady gave in a bill of advocation to the Lords, upon this reason, That the Commissaries had committed iniquity, in allowing women witnesses to be received to prove the libel, because by our law women cannot be admitted witnesses *ob imbecillitatem et fragilitatem sexus*, Cap. 34. Stat. 2. Robert I., concerning those that are not to be admitted witnesses ; and amongst the rest, women are expressly excluded from being witness : As also, it is clear by the constant practice of this kingdom, That women are not admitted witnesses even in matters of the meanest concernment, except only in the case of *puerperii*, where women are admitted witnesses to prove that there was a child born and heard cry, to give the husband the benefit of the tocher or courtesy of Scotland, because at such a time women are only in use to be present. And Craig observes, That by our law, *sexus virilis excludit feminam a testimonio*, and as this is clear from our own law and practice, so the common law is most express, That women cannot be received witnesses, Cap. Forum. 10. Decretal. Gregor. De

No. 94. verb. significat. testes autem considerantur conditione vita et natura, conditione si liber non servus, nam sæpe servus metu dominantis testimonium supprimit veritatis, vita si innocens et integer actu, nam si vita bona defuerit fide carebit, natura, si vir non femina, nam varium et mutabile testimonium semper femina producit. Answered for the Earl, That by the civil law women are admitted witnesses in all cases, except in testaments, and by the common law it is the general opinion of lawyers, That women may be received witnesses *in causa matrimonali*, and albeit it be a general rule in our law, that women cannot be admitted witnesses, yet that does not hold *in criminibus occultis et domesticis*, especially in such crimes, *quæ nec habitu nec actu veritas habere potest*, as in the case of theft, adultery, or the like; and *in omnibus atrocioribus*, as in the case of treason, murder, or falsehood; in which cases the law allows witnesses that are otherwise *inhabile* to be admitted, such as servants or women. By our law and practice, women witnesses are admitted in such cases. Replied, That albeit by the civil law, women in many cases were admitted witnesses, yet they were not allowed to bear testimony by the Canon law, as is clear from the foresaid Canon; and it is a certain principle, that when any thing is statuted by the Canon law contrary to the civil law, the Canon law is always to be followed, and is derogatory to the civil law, especially in things ecclesiastic, and matters of conscience. And particularly it is provided by the Canon law, That in the case of marriage, no witnesses to be received but witnesses beyond all exception, Cap. 1. De consanguin. In causa matrimoniali cum sit gratissima non quibus licet testibus fides adhibenda est, sed circumspectis omnique exceptione majoribus; and these are said to be witnesses beyond all exception, quibus nihil potest omnino opponi, and therefore *inhabile* witnesses such as women cannot be admitted; and as women witnesses will not be allowed to prove marriage, albeit never so privately and clandestinely done, far less ought they to be received to dissolve a marriage, which is so sacred a tie, that we have our Saviour's command for it: "That whom God has conjoined, let no man put asunder." And if there be any of the Canonists of the opinion, that women witnesses may be received in the case of a divorce, that was by the Canon law a divorce had only the effect quoad separationem mensæ vel thori sed non vinculi matrimonii; whereas the effect of a divorce by our law, is *quod solvitur vinculum matrimonii*, and therefore in such a case no witnesses ought to be received but those that are beyond all exception, and not women or others who are excluded from bearing testimony by the law; and albeit, in occult and atrocious crimes such as treason, theft, or murder, the law allows sometimes women witnesses or other *inhabile* witnesses to be admitted, that is only in the case where the crimes are pursued at the instance of his Majesty's advocate, *ad vindictam publicam*; but such witnesses are never allowed to be admitted when these crimes are pursued at the instance of a private party only for a civil effect for their own private interest, and *vindictam privatam*; and the reason of the difference is, because the law indulges many things when any action is pursued, *ad vindictam publicam* for the public good, such as the punishment of treason, murder, or the like, it being the interest of all nations that such crimes should be

punished ; and when the action is at the instance of his Majesty's advocate for the public interest, it is not presumed that he will seduce or corrupt the witnesses ; which reason does not hold, when the action is at the instance of a private party to a civil effect for their own private interest, and who are more suspected to endeavour to seduce or corrupt the witnesses, especially women, who *ob imbecillitatem et fragilitatem sexus*, may be easily induced to depone falsely. And if any case can be instanced either by the common law, or by our practice, that either women, or other inhabile witnesses, were admitted in occult, domestic, or atrocious crimes, it is only in such cases, *ubi constat de corpore criminis*, such as in the case of theft, where it is evidently made appear that the thing is stolen ; or in the case of murder, where a person is found killed in a house. But it can never be made appear from the common law, or our practice, that in such cases, *ubi non constat de corpore criminis*, as in this case of adultery, where it is not alleged there was a child born, that women, or other inhabile witnesses, should be received ; and as to the case of falsehood, it can never be sustained by our law or practice, that women witnesses are received. And it is the opinion of all lawyers, and it is evident from our practice, that in any case that can be sustained, that women, or other inhabile witnesses, have been received in occult, domestic, or atrocious crimes, even when the pursuit was at the instance of his Majesty's advocate for the public interest, yet they were never received as the sole probation, but only to adminiculate the testimonies of men or other probation for the farther clearing and proving of the crime ; and as the lawyers says excellently well, that *testes inhabiles admittuntur tantum quando concurrunt cum alio habili et fidei digno, tunc enim habitas unius supplet inhabilitatem alterius* ; and therefore seeing women witnesses were never admitted as the sole probation for proving any crime, albeit pursued *ad vindictam publicam*, far less ought women to be received witnesses in this case, where the pursuit is only at the instance of a private party, and to a civil effect ; as also, women witnesses can never be received, especially in this case, because if need were, it is offered to be proved, that the Earl, or some other person in his name, and upon his account, has been endeavouring to suborne, corrupt, and seduce these women to depone against the Lady, and promised them money, or other good deed ; and it is a certain principle in law, that it is presumed the women witnesses now adduced by the Earl have been suborned, seeing he offered to suborne other women to be witnesses, as is clear from Muscred. De Probation conclus. 1341. num. 6. and the other lawyers by him there cited ; and the reason in law is, *quia semel malus semper præsumitur malus in eodem genere mali* ; and therefore seeing the Earl, or others in his name, has been endeavouring to suborne and seduce other women witnesses to depone against the Lady, and this is a matter of universal concernment, for if it be allowed that women witnesses be received in such cases, it would lay a foundation to raise a discord and division in families ; for whenever a husband should take up a prejudice against his wife, or the wife against the husband, (seeing ordinarily discords betwixt such near relations are the greatest) they will leave no means unattempted to loose themselves from the persons against whom they have a prejudice ; and it were an easy matter for any



No. 94. person that had a mind to take such indirect courses, to seduce or suborne two or three women, who through the imbecility and weakness of their sex, might be easily persuaded to depone upon acts of adultery against the most innocent person in the world. The Lords remitted the cause to the Commissaries, and found, that women, *omni exceptione majores*, were habile witnesses in the case of divorce for adultery.

*Sir P. Home MS. v. 1. No. 605.*

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No. 95. 1683. *January.* PEARSON *against* WRIGHT.

Found that a tenant, who possessed only a house and yard, was admissible as a witness, although he had no tack.

\* \* This case is mentioned by Sir P. Home, in Paip against Newton, No. 143. p. 9012. *voce* MINOR.

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1684. *February 28.* ERSKINE *against* ROBERTSON.

No. 96:  
A witness adduced at the instance of several parties having a joint interest, was rejected, being son-in-law of one of them.

A servant hired by the day may be a witness.

Mary Erskine, relict of James Hair, against Thomas Robertson, merchant in Edinburgh, and Robert Miln, for repairing her damage in demolishing a tenement lying in the kirk-heugh belonging to her. The Lords, on Castlehill's report, before answer, grant commission to him, and my Lord Drumcairn, to visit the house, and to examine witnesses and workmen anent the condition of the house, if it was ruinous *vitio intrinseco* the time of the alleged damage, and what condition it is now in, and wherethrough the said damage, if any be, was occasioned; and if Thomas (and Robert Miln his mason) was only digging a foundation in his own ground, (*nam unicuique licet facere in suo*,) and assign the day of March next for that effect; and grant diligence to both parties to cite witnesses to compear before the said Lords at such times as they will appoint, for Thomas alleged the falling of her gavel was through fault of itself, it having only a mud foundation.

1685. *January 28.*—Thomas Robertson gave in a bill in his affair with Mary Erskine, mentioned 28th February, 1684, showing, that there was a mutual probation allowed anent the condition of that house, and whence the damage arose, and that he had taken out a diligence, but it was lost, so that the witnesses refused to come in, and therefore craving it might be renewed. The Lords granted the desire of the bill, providing he did not stop nor delay the advising of her probation, when it came in by the course of the roll, but that, he should close his probation against the same time.