

**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.*

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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:

Albeit it was alleged for the pursuer, That Linn's servants could not be received, partly, because their master who furnished the cask would be liable for damages upon the event of its being proved insufficient; partly, because they themselves might happen to be liable as intrusted by their master in furnishing and dressing up the cask: No. 127.

In respect it was answered for Gordon; That there is no way to prove the sufficiency of any cask but by the person through whose hands it comes; and if such an objection were sustained, no merchant, apothecary, or tradesmen, could ever prove their accounts, and delivery of goods to their customers or employers; therefore servants are frequently received as witnesses in causes concerning their masters.

*Forbes, p. 25.*

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1706. June 18. ISOBEL BIRREL *against* MARY FERGUS.

No. 128.

In an action of reduction at the instance of Isobel Birrel, as heir to Agnes Birrel, of a disposition granted by the said Agnes to William Fergus her husband *stante matrimonio*, upon the granter's revocation, against Mary Fergus, heir to the said William; the Lords refused to admit before answer, several women (who as creditors to the wife, or as representing her creditors, had received payment of their debt from the husband) to depone as witnesses for instructing the onerous cause of the disposition; seeing women are inhabile witnesses in all civil causes, except where, *ob penuriam testium*, they are necessary, as about the birth of a child.

*Forbes, p. 108.*

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1706. June 26. ANDERSON *against* GORDON.

No. 129.

A man who had got a woman with child, having thereafter at a communing with her friends, promised to pay a sum of money to one of them for her behoof, she being on the other hand to give him a declaration, That he was under no promise of marriage to her; the Lords found, That this was not a naked promise, but of the nature of a bargain, and therefore proveable by witnesses; and it being objected against that friend to whom the money was promised for her behoof, That he being a party could not be admitted, the Lords nevertheless admitted him as a competent habile witness, he being a communer, and so the fittest person to declare the terms.

*Fountainball.*

\* \* This case is No. 379. p. 12234: *voce* PROCESS.