

1715. December 13.

WAUCH *against* SMITH.

Wauch pursues Smith for damage, for not putting her in possession of a house conform to agreement. In which process a woman witness was offered to be adduced for proving the agreement; which woman had been allowed to be examined by several interlocutors; but, upon a reclaiming bill, a hearing was allowed; in which it was alleged, that women are not admitted to be witnesses in civil matters by the law and practice of Scotland, and especially the second statute King Robert I. Ch. 34.

It was answered: That the statute of Robert I. was in desuetude in several particulars, especially with relation to women-witnesses, who are in many cases received; and generally the statute of Robert I. has its rise from the canon law, as in that clause, That laicks are not admitted witnesses against clerks; and the canon law has not the same authority now as at that time. And here, *2do*, There is a speciality in the present case concerning the setting of a tenement within a burgh, in as far as it is known, that the taking or setting of tenements within burghs are generally by women, who are best acquainted with the conveniencies requisite for lodging of families. *3tio*, It is universal practice to admit women-witnesses for proving the conditions of setting of houses in Edinburgh; which common custom was ground sufficient for the pursuer to rely upon the bargain made in presence of a man and a woman of good faith, in which also earnest was interposed, which is a plain matter of fact.

It was replied: The statute of King Robert is very plain, and is the rule observed in all the other cases therein mentioned, except in the last article thereof concerning laicks and clerks. It is true, that the general rule concerning women witnesses has by custom admitted several exceptions; but all these are in cases where the nature of the thing falls most properly under the cognition of women, or where there is no opportunity to have choice of witnesses. But, to admit witnesses in the case of a paction, where the parties had it in their power to adhibit writ or choice of witnesses, were wholly to enervate the rule; for the speciality offered is of no weight, because, albeit women be very often and fitly employed in contracts of location of tenements within burgh, which are as binding when made by women as men; yet it must be habilely proved, that there was a set or contract of location entered into, when the same is alleged to be made by women, as when made by men. And if the paction had been made betwixt two men, then doubtless the probation of paction must have been by writ or habile witnesses, which are not the less necessary, if the paction was made by or with a woman. And, as to the custom of the Bailie-court, it was neither instructed that there was such a custom, nor is it relevant, if it were instructed; and the Lords could not properly admit it to probation that there is such a custom, nor ought the Lords' decisions to be influenced by such custom without foundation of law, if it were proved.

No. 151.

Women not habile witnesses to prove the letting of a tenement.

No. 151. "The Lords found a woman-witness not habile to prove the set of a tenement within burgh."

*Dalrymple, No. 153. p. 212.*

1715. December 13.

MUIRHEAD *against* REID.

No. 152.

Women received as witnesses to prove an account of necessaries furnished out of a shop.

Mr. James Muirhead and his spouse, pursues Isobel Reid and her husband, for an account of brandy and other necessaries furnished out of the pursuer's shop, which was offered to be proved by women witnesses, who, the defender alleged, were not habile by the statute of King Robert I. and constant practice, conform to which the opinions of my Lord Stair, my Lords Dirleton, Sir James Stewart, and all other lawyers agree; and so it was expressly found, 21st July 1675, Wilkie *against* Morison, No. 76. p. 16975. though the point to be proved was a domestic affair, viz. the lending of a bed by the mother to the daughter-in-law living under the same roof.

It was answered for the pursuer: The rule is acknowledged, which is founded both on law, on the opinion of all the authors cited, and all other lawyers; but that rule hath many exceptions, especially where the point to be proved is such as falls most properly under the cognition of women, as a woman's bringing forth a living child, or where *ex natura negotii* there is *penuria testium*, and where the few witnesses that can be had are only women-witnesses, which is the present case; for here the particulars libelled were furnished out of a shop kept by the pursuer's wife, in which there were no men apprentices, nor other men adhibited to any business in the shop, but only the woman in the house where the shop was kept; and such persons as dealt with the pursuer's wife, seeing no man present, and buying in the ordinary way, without ready money, must be understood to submit to such a manner of probation as possibly could be had. And, as to the decision, it is single; and since that time women have been generally received, where there was no place for choice of witnesses.

"The Lords repelled the objection against the women witnesses."

*Dalrymple, No. 154. p. 214.*

1716. November 21.

No. 153. DUNBAR of Thundertown, and Others, *against* INNES of Dunkintie.

In a process of improbation of a disposition granted by Innes of Durkland to the defender Innes of Dunkintie his nephew; the paper, being signed by four witnesses, whereof two were dead and two alive; and the pursuers, upon several alleged circumstances in fact, having craved to be allowed to insist in the indirect