No. 211. ment of all the particulars which he knew respecting the cause.

The pursuer contended, that the circumstances sworn to by the witness rendered him inadmissible.

The Commissaries, "in respect of the testimony of Alexander Wardrop *in initialibus*, found him disqualified from being a witness in this cause."

The defender, in a bill of advocation, stated, that the writing had been drawn up by Wardrop, merely in the capacity of his clerk, for the purpose of being sent to his agent in the cause, and that he had no objection to its being destroyed, before the witness was further examined; and

Pleaded: A party must necessarily inquire at those who are to be cited as witnesses, what they know of the facts in the cause; and the circumstance of Wardrop's having afterwards reduced them into writing, especially as it arose from his being then the defender's clerk, cannot render him inadmissible.

Answered: The defender, by giving Wardrop the information necessary for drawing up the paper, has communicated to him the manner in which he is to shape his plea, and how he expects the evidence of this witness to bear on it. But the law is so anxious to prevent this knowledge on the part of witnesses, that it is an undoubted objection, that a witness has heard another examined, whereas Wardrop knows precisely the import of the whole evidence which the defender means to bring forward, 4th August 1778, Bogle against Yule, No. 201. p. 16777; 10th August 1785, Fall against Sawers, No. 202. p. 16777; Erskine, B. 4. Tit. 4. § 84, 86.

The Lord Ordinary on the bills having taken the point to report on memorials,

The Lords unanimously repelled the objection.

Lord Ordinary, *Craig*. For the Pursuer, *Williamson*. Alt. *Robertson*.

Fac. Coll. No. 62. p. 142.

1798. *June* 26. THOMAS HAY MARSHALL *against* ROSE ANDERSON.

No. 212. In a process of divorce brought by a husband for adultery, is the alleged adulterer a competent witness for the defender, with regard to the witness's own criminality?

Thomas Hay Marshall brought an action of divorce against Rose Anderson his wife for adultery, alleged to have been committed with a nobleman and another gentleman.

After the pursuer's proof was led, the defender proposed to adduce them as witnesses, each with respect to his own alleged criminality.

This was objected to by the pursuer, and the Commissaries sustained the objection, "in respect of the proof already adduced."

In an advocation, the pursuer contended, that his proof completely established the guilt of the defender; while she alleged, that it amounted, at most, to circumstances of suspicion, which the persons whom she proposed to adduce would be able satisfactorily to explain, without imputing perjury to the witnesses already examined; and the general question occurred, Whether persons so situated can be admitted as witnesses for the defender?

No. 212. The pursuer

Pleaded: A defender, in an action of divorce for adultery, has no occasion to resort to the evidence of a person alleged to have had a criminal connection with her, unless where there are strong circumstances of suspicion already established against her. A *socius criminis*, already almost convicted, is brought forward, therefore, to swear to his own innocence, and in circumstances where, of all others, he is under the strongest temptation to perjury. He cannot give evidence against the defender, without accusing himself, perhaps of a gross violation of friendship and hospitality to the pursuer, subjecting himself in heavy damages, or even to a criminal prosecution, besides completing the ruin of the defender, for whom, probably, he entertains the warmest affection, and whose secret he is under every obligation of honour not to divulge. If a brother, an uncle, or an agent, are, *ob metum perjurii*, inadmissible witnesses for the party to whom they are so related, the present objection is much stronger. It would be *contra bonos mores* to place a person under such temptation; 1742, Carruthers *; 18th December 1794, Bell against King *.

It is true, that he may refuse to depose, but his silence will create a presumption against the defender almost tantamount to a disclosure of her guilt.

Answered: The witnesses ought to be examined, reserving all objections to their credibility. To call them *socii criminis*, is taking for granted the point in dispute. Besides, *socii* are frequently admitted in criminal trials, as witnesses for the prosecutor, and why should they not for the pannel? In occult crimes, too, such as adultery, witnesses, otherwise exceptionable, are received; Bankt. v. 2. p. 647.; Ersk. B. 4. Tit. 2. § 26. The alleged adulterer has often been examined for the pursuer, in actions of divorce brought by the husband, although there was there the same temptation to perjury as in the present case; 6th December 1770, Stewart Nicolson, No. 199. p. 16770. affirmed on appeal, and prior cases referred to in it; viz. 1726, Campbell *; 1756, Tulloch against Falconer *; Martin against Michie *. His being adduced for the pursuer, does not diminish his affection for the defender, or his obligation to protect her. He has no patrimonial interest to induce him to swear falsely, as the evidence in the question of divorce would not avail the husband in his claim of damages; and, in both cases, there is the same presumption against her, if he refuse to depose.

The Lord Ordinary on the Bills reported the cause in memorials.

Opposite opinions were given on the Bench.

One Judge, who was against the objection, rested his opinion, partly on the circumstantial nature of the proof which had been led for the pursuer, and partly on the respectability of the persons meant to be examined; but the Court in general took up the question in the abstract, independently of either of these circumstances.

* None of these cases are in the printed Collections. (See APPENDIX.)

No. 212.

On the one side, it was observed, The pursuer and defender ought to be on an equal footing as to the witnesses who may be brought forward by them. The argument for the pursuer takes it for granted, that the guilt of the defender is already established. It would be dangerous to allow a witness to be disqualified, by a mere averment that he is *socium criminis*. It would not be sufficient to establish the objection of infamy against a witness, that there was an action in dependence from which infamy might result.

The alleged connection between the defender and the witness, is one to which the law can pay no attention. A parent and child cannot bear witness for each other; but this would not be the case if the connection arose only from adoption, although the danger of perjury might be the same. In like manner, a husband and wife cannot be witnesses for each other, but this would not hold in the case of a man and his mistress.

The defender is willing to run the risk of the presumption which will arise against her, if the witnesses refuse to depose.

On the other hand, it was said, that although persons in the situation of those now objected to, may be competently called by the pursuer, who thus waves his objection against them, and virtually discharges his action of damages, yet it would be very dangerous to admit them for the defender, their temptation to perjury being greatly stronger than in any of those cases which have been alluded to. Indeed, as the result of the question of divorce will affect the pursuer's claim for damages, the witnesses are, in some measure, parties to the action, or at least materially interested in the issue of it.

The Lords (15th February 1798) directed the Lord Ordinary to remit to the Commissaries, "with this instruction, that they sustain the objection to the admissibility of the two witnesses."

And upon advising a petition, with answers, they adhered.

Lord Reporter, *Cullen.* Act. *Tait, Jo. Clerk, T. W. Baird.* Alt. *Erskine, Ar. Campbell,* junior.
D. D. *Fac. Coll. No. 84. p. 193.*

*** These judgments were reversed on appeal.

1799. *January* 19.

JOHN CADELL *against* MR. JOHN MORTHLAND and JOHN JOHNSTONE.

No. 213.
Objection to a witness sustained, that after his citation, the agent for the person adducing him had

In the cause No. 170. p. 12375. George Aitken, who had formerly been employed in the office of the Scots Chronicle, was cited as a witness for the pursuer. When he was about to be examined, it was stated for Mr. Morthland, as an objection to him, that he had been turned off from the office for malpractices, and imputed his being so to the advice of the defender, so that he could not be considered as impartial; and it was agreed that the examination should be delayed, till the matter