No. 165.

that the pursuer lays the ground of her process upon habite and repute only; seeing the chief *medium* she founds upon is commixtion and repeated formal declarations (of which several instances were condescended upon) acknowledging her to be his lawful wife, which is not only a presumption, *juris et de jure*, of a previous actual marriage, but a consent *de præsenti*, and so takes in all the requisites thereof. It is certain, no set form of words is necessary or essential thereto, but that any deliberate consent of parties to take one another, is sufficient to establish that contract; especially if commixtion follows, a circumstance that shows their consent was serious; so that it is not easy to comprehend why relations ought not to be admitted in the present case, in like manner as where the marriage is gone about by ceremonial rites. Indeed, where such a contract is endeavoured to be established by habite and repute, or notoriety, and not from any actual declared consent, there the law will be more scrupulous in admitting witnesses; because, in these questions, there can be no penury; but that does not apply to the point in hand.

The authorities quoted for the pursuer, were, Lib. 4. Tit. 18. Decret. Greg. 9. Mascardus de prob. vol. 3. con. 1024. Ant. Gabrielus Lib. 6. conclus. 11. Sanches de matr. Lib. 3. Disp. 71.

And for the defender, 9th February 1709, Forbes, No. 137. p. 16718; Mascard. de prob conclus. 1024; Huber. Tit. De. test.

The Lords refused the bill of advocation.

C. Home, No. 107. *p.* 171.

1741. *January* 16. GEDDES *against* PARKHILL and BAILLIE.

No. 166.
Dealing with a witness after citation.

Found, that the showing to a witness, after he was cited, a paper, upon which he was adduced to depone, not in the presence of the Judge, was illegal and unwarrantable; and the persons guilty thereof were fined in 40 shillings Sterling to the poor, over and above the expense of the application.

No judgment was given as to the witness himself; but it seemed to be the opinion of the Court, that the testimony he had emitted was not to be rejected; though one of the Lords took notice of a case where the adducer of a witness had done no more than shown him the interrogatories upon which he was to be examined; yet, when the cause came to be advised, that fact having been discovered, the oath of the witness was not allowed to be read.

N. B. In all such cases, the effect as to the witness depends on circumstances.

Kilkerran, No. 1. *p.* 594.