

ciation thereof, and is as effectual as if a new marriage had been contracted and perfected; and that the adultery was and is instructed by the acknowledgment of the husband, and his whore, in the kirk session of St Cuthberts, and making public acknowledgment therefore; and if any acts were posterior, they were after the libel; yet the Commissaries repelled this allegiance, unless the adultery were known to the wife by judicial acts, which no law required; but only that the wife, after knowing of the acts, co-habited; but here it is known, that the two parties made penance, and that there were two children born of the adultery, which was more than sufficient to infer the wife's knowledge. *2do*, It is offered to be proven, that the acts of Adultery whereupon this decret proceeded, were perpetrated by collusion betwixt the husband and wife on these evidences: *1mo*, That these acts were after the husband became bankrupt, and were perpetrated within the precincts of the Abbey, to which he had retired, when the husband had no livelihood, but what he expected from the wife upon the divorce; and if the witnesses were re-examined, they would acknowledge, that they were sent of purpose by the husband and wife, to see the husband and the whore in bed together; likeas the wife, after divorce, furnished the husband money for his entertainment.—It was *answered* for the wife, That the passing from the deed of adultery can only be inferred by the wife's continuing to converse with the husband at bed and board; but co-habitation in the same house is noway relevant, and as for the wife's knowledge or collusion, it is only probable by her own oath or writ.

THE LORDS found, That the wife's conversing with the husband as man and wife, after the deeds of adultery were particularly known to her, did infer the passing from divorce on these deeds; and found co-habitation a sufficient presumptive probation of the wife's converse with the husband as wife; unless the wife prove, that though she remained in the house, she withdrew from the husband's conversation, and lay in a several room from him; in which case it must be proven, that she had carnal dealing with him, at least lay in bed with him. THE LORDS did also sustain the second defence, and allowed all evidences for instructing thereof, and witnesses for proving the same.

*Fol. Dic. v. 1. p. 24. Stair, v. 2. p. 891.*

1696. February 19. IRVING *against* KER.—IRVING *against* SKENE.

THERE is a complaint given in by Mr Christopher Irving, son to Doctor Irving, *against* Elizabeth Ker, his pretended relict, shewing he had obtained a decret of the Commissaries of Edinburgh, as executor and nearest of kin, finding his first wife was forced to withdraw for fear of snares laid for her life by the said Elizabeth; and thereafter she lived many years in adultery with the said Doctor, while his first wife was still in life; and that she had embezzled his father's means, and was still disposing thereon, whereby he would be utterly disappointed; there-

No 8.

The Lords inclined to sustain a gift of escheat for adultery; though the party was not denounced to the horn, nor any sentence

No 8.  
 past in a criminal court. There was a decree of the Commissaries, finding the marriage adulterous and unlawful.

fore craving the goods might be sequestrate, &c.—*Alleged*, She had right by disposition, and was owned for his wife by the space of many years; and it was *inaudium* to dispossess her summarily, till her right was reduced.—*Answered*, By the 119th act, Parl. 1592, dispositions by the adulterers are declared void at the instance of the bairns, and there is *par ratio* for the adulterer.—Yet see Sir George M'Kenzie's observations on that act.—THE LORDS thought there was *periculum in mora*, and therefore ordained the whole goods to be inventaried, and her to depone if she has abstracted any since the date of the giving in this bill, (for as to preceding imbezlements, the Lords found the same could not be brought in here, but behoved to be pursued by way of action,) as also to find caution to make them forthcoming to the pursuer, in case he prevail; but if she fail to find caution betwixt and a prefixed day, then appoint the Magistrates of Edinburgh to sequestrate and secure the goods, and such of them as may spoil and perish by keeping, to appretiate and sell them, and deposit the price; and for the books, either to seal them up, or else to put them in a responsal man's hands, on his obligation to deliver them to any who shall be found to have best right; and the LORDS allowed this to be presently put in execution, without abiding the Minute-book and extracting, for fear of putting them out of the way *medio tempore*; even as the Lords granted warrant summarily to apprehend James Mason, the bankrupt, when he was flying, without a caption; and caused secure David Spence's goods when he broke in 1690; and put on padlocks, where a competition of creditors arises on the death of a party; or examine a party when he is on deathbed, to lie *in retentis*; or put people to find caution *judicio fisci et judicatum solvi*, where they are *in meditatione fugæ*. (See BANKRUPT.)

In this case there was cited for the relict, l. 4. § 3. *D. de condic. ob turpem causam, quod meretrici datur nequit repoti; nam turpiter facit quod sit meretrix, sed non turpiter accipit cum sit*; and Covaruvias on the Canon Law goes farther, that *meretrix potest agere pro mercede promissa*; but these are unchristian immodest citations. (See PACTUM ILLICITUM.)

1698. February 3. In the declarator of Elizabeth Ker, relict of Doctor Christopher Irving, her escheat, pursued by the Doctor, his son, against Mr Thomas Skene, as having right by disposition;—it was *alleged*, There could be no escheat upon the adultery, because the same only falls after a denunciation to the horn, and a sentence in a criminal Court; and the act of Parl. 1551, and act 74, 1563, and act 105. 1581, anent adultery, do all relate to the denunciation, or some criminal trial; but *ita est*, all the warrant of this gift of escheat was a decret of the Commissaries, finding the marriage adulterous and unlawful; and a confession of adultery emitted before a kirk session was found by the Lords, not to be a sufficient ground of escheat, 9th Jan. 1662, Baird *contra* Baird, (Stair, v. 1. p. 77. See PROOF.)—*Answered*, By the general practice, escheats have proceeded on the crimes of adultery and usury, where they are notour, without any previous sentence or conviction; and the Commissaries are very competent to judge the di-

voiced, though they cannot punish the crime; and so upon their sentence the escheat may follow: And the reason why a confession to a minister and his elders is not probative, is, because that is only *in foro pœnitentia* emitted *ad levamen conscientia* for taking away the scandal, and is not to be made use of farther, least it harden men in their sins. And reduction being also craved of a disposition, made by the Doctor to his second wife, because prejudicial to the children of his prior lawful marriage, it was *alleged*, That the 119th act of Parl. 1592; discharges adulteresses to dispone in prejudice of their lawful succession, which was *ab fragilitatem sexus*, but this does not disable the adulterer; for though *si quis comprehendit et si quæ*, yet it is not *e contra*.—*Answered*, There is the same parity of reason in both, which allows extension *etiam in statutis pœnalibus*; and the Lords had found so, 20th July 1622; Weir of Blaikwood *contra* Durhame, (Durie, p. 31. See FACTUM ILLIGITUM.)—THE LORDS thought the case singular, and new, and therefore resolved to hear it debated in their own presence.

After a hearing, the LORDS inclined to sustain the gift of escheat on these two grounds complexly. *1mo*, That the escheat in such crimes falls *ipso jure et ex lege, sine facto hominis*. *2do*, That there is a formal gift here, on her being denounced fugitive, which is conjoined by way of reply, though the declarator on it was not yet come in.

*Fol. Dic. v. 1. p. 23. Fount. v. 1. p. 712. 820.*

1734. February 8. ANDERSON *against* WELSH.

WELSH of Locharret obtained a divorce from his wife. The wife had no more than 700 merks of jointure, and five children to maintain out of it. Having brought a portion of 6000 merks, she claimed the return of her tocher.—THE LORDS found she had no right to it.—(See this case mentioned in No 11.)

*Fol. Dic. v. 3. p. 19.*

1745. February 28. MACKENZIE *against* HIS WIFE.

COLIN MACKENZIE, Chamberlain of the Lewis, pursuing a divorce against his wife, after leading the proof before the Commissaries, a defence was offered of *lenocinium* on the part of the husband, and a condescendence given in of gross indecencies committed by him towards his wife, before company, of his maltreating her, and then leaving her in company with men of low rank and rude dispositions, and of his bidding his servants, and inviting other people, to ly with her: And it was *urged*, all this behaviour was intended to corrupt her morals, that he might thereby obtain an occasion to get quit of her.

The Commissaries allowed a proof of the condescendence. A bill of advocacy was offered and refused.

No 8.

No 9.

A wife divorced for adultery, has no claim for repayment of her tocher,

No 10.

*Lenocinium*. It is a competent exception against divorce, if the husband commit indecencies towards his wife, tending to corrupt her morals; although he do not expose her to prostitution for gain.