

1665. *January 30.* GEORGE BAPTIE *against* CHRISTIAN BARCLAY.

CHRISTIAN BARCLAY having pursued George Baptie before the Commissaries of Edinburgh, for solemnizing marriage with her, because he had got her with child, under promise of marriage, as was instructed by his bond produced, obtained decret against him; he suspends, and raises reduction, on this reason, that his bond was vitiated *in substantialibus*, by ocular inspection; *2dly*, That it was conditional, so soon as he was in readiness; *3dly*, That the charger threatened she would drown herself, for preventing whereof he had granted this bond; *4thly*, That after the granting thereof, she had carried herself unchastely, and born another bairn; albeit it cannot be alleged that ever he cohabited or conversed with her at all after this bond; which, as it would dissolve the marriage though it were solemnized, *multo magis* should it hinder the solemnization. The charger *answered* to the *first*, Oppones the bond, wherein albeit there be three or four words delete in that place thereof obliging him to solemnize, yet the acknowledgement of the child's being gotten under promise of marriage is clear and sufficient by itself; To the *second*, There is nothing alleged that the suspender is not in readiness; To the *third*, *Non relevat*, there being neither *vis* nor *metus*; To the *fourth*, *Non relevat*, because there being a second child born after this bond, which constitutes the essentials of a marriage, the child is presumed to be the suspender's, *nam pater est quem matrimonia monstrant*, and it cannot be alleged or proven that the child belongs to any other or that the charger used any evil carriage with any other.

THE LORDS having considered the case, found that the presumption was not sufficient, unless it had been a formal marriage, and therefore ordained the charger to instruct the second child was the suspender's, and if there had been any familiarity betwixt them since the bond.

*Fol. Dic. v. 1. p. 563. Stair, v. 1. p. 261.*

\* \* \* Gilmour reports this case:

1665. *January.*—GEORGE BAPTIE gives a ticket to Christian Barclay, acknowledging that a child she had brought forth was his, under promise of marriage, whereupon she pursued him before the Commissaries of Edinburgh for adherence, and obtained a decret, whereof he raised suspension and reduction, upon this reason, That she being a taverner, loose, and of a very lewd life too, he could not deny but that he had carnal dealing with her, and was persuaded she had dealing with diverse others also, though upon him she fathered the child; and, long after the birth of the child, she did most subtly and falsely exprobrate and affirm upon him, that he had made a promise, and, upon a certain day, came to him on the streets, and told him, she would presently go and drown herself, if he would not subscribe the ticket, which he simply was moved to do, though he was content to make faith, that he had never given her such

No 26.

A woman prosecuted for fulfilment of a promise of marriage with one to whom she had been with child. Plead ed, She had had a second child to another. Answered, The child must be presumed to belong to the defender. Found that she must prove this, to found on it.

No 26. a promise ; afterwards he ever still more and more abhorred her, and never used her company ; meantime she brings forth another child, long after the ticket ; so that, granting he had truly made a promise as the ticket bears, she has forfeited the benefit thereof, by her after whoredom, which would be a lawful ground of a divorce, if they were lawfully married, and far more ought it to be a ground to impede the solemnization of a marriage, or adherence. It was *answered*, That *copula*, and the ticket under his hand, bearing the promise, made a *validum et ratum matrimonium*, and any child got thereafter, the law presumes to be in the marriage, *filius enim est quem nuptiæ demonstrant*, unless the pursuer can offer to prove her an adulteress with another ; in which case he may pursue a divorce, and so it was found by the Commissaries. *Replied*, That though the ticket did bear a promise and *copula*, yet the marriage was not *legitime* solemnized, nor did there any cohabitation follow ; and therefore she afterwards playing the whore, and bringing forth a child, unless it could be made appear that he did cohabit, or any otherwise converse with her, (so that it might be at least probable that he had dealing with her), that presumption of the law in this case cannot have place.

THE LORDS, before answer, ordained the defender to condescend, whether or not she can make it appear, that ever she conversed with the pursuer after the subscribing of the ticket, or was in his company, and when, and where.

*Gilmour, No 137. p. 99.*

No 27. 1674. July 23. EARL OF KINGHORN *against* HAY.

THE Earl of Kinghorn having apprised Dronlaw's lands, obtained decret of mails and duties. Dronlaw raised suspension on this reason, That by transaction and agreement betwixt the Earl and him, the Earl had bought his lands at seventeen years purchase, and was to be satisfied of the apprising by a part of the price. It was *answered*, That there being nothing reduced in writ, *est locus poenitentiae*, and the Earl doth resile. It was *replied*, That such verbal agreements may be resiled from *ubi res est integra* ; but here it is not ; for it being a part of the bargain, that Mr Robert should purchase the right of his superiority, that the Earl might hold the lands of the King, he had done it, and paid 6000 merks therefor ; likeas the Earl was infest upon his superior's resignation. It was *duplicated*, That the Earl offered to repone and to make new resignation.

THE LORDS found, That the matter was not intire, and that the Earl could not resile.

*Fol. Dic. v. 1. p. 562. Stair, v. 2. p. 281.*