

No 6.
 junction, are
 unhabie to
 fucceed as
 heirs to their
 parent.
 Act 20 Parl.
 1600.

forefaid fum, and accordingly had granted them this bond, whereupon they now purfue.—It was *alleged* for the defender, That he could not be liable by virtue of the refignation contained in his right, becaufe it was only conceived in thefe terms, that he fhould have power to burden the lands with 4000 merks, at any time during his lifetime, without the addition of thefe words ‘*etiam in articulo mortis*,’ which in law did only import, that he might burden the lands when he was in his *liege pouftie*; whereas it was offered to be proven, that the bond granted to the purfuer was *in lecto ægritudinis*.—It was *replied*, That by our law, difpofition of lands, or burdening the fame on death bed, were only prohibite in prejudice of lawful heirs; whereas the difpofition was fo far from being granted to him as apparent heir, that he was gotten in adultery, after a fentence of divorce betwixt Manderfton and his wife, upon her bringing forth of the fame defender during her co-habitation with the deceased Archibald Douglas of Lumfdean, and fo his right fell within the 20th act, 16th Parliament, King James VI. declaring that children gotten in adultery, after divorce, were not capable of fucceffion, albiet they fhould be married after the fentence of divorcement.

THE LORDS did repel the defence, in refpect of the reply; and found, That the difpofition made to the defender being in prejudice of John Douglas, who was the only lawful apparent heir, being affected with the refervation forefaid, the bond made to him and his mother, albiet granted on deathbed, was obligatory, and that fuch refervations, rights, and difpofitions, made to ftrangers, might be made effectual by bonds granted *in lecto*. And whereas it was duplied, that the defender’s father and mother did co-habit by the fpace of twenty years, and that it was offered to be proven that he was married, whereby he was legitimate; THE LORDS would not fuftain the fame; becaufe, though it were proven, yet the marriage was null, and the defender incapable to be an heir by the forefaid act of Parliament.

Fol. Dic. v. 1. p. 23. Gosford, MS. No 274.

1681. July 15.

CREDITORS of WATSON of Damhead *against* MARION CRUIKSHANK.

No 7.
 Converfe as
 man and wife,
 held to be
 paffing from
 divorce. Co-
 habitation
 fufficient pre-
 fumptive evi-
 dence of con-
 verfe.

THE Creditors of Damhead purfue reduction of a decret of divorce by the Commiffaries of Edinburgh, divorcing Marion Cruikshank from John Watfon of Damhead, her husband, for his adultery, upon thefe reafons: *imo*, That the Commiffaries committed iniquity in repelling this defence, That after the acts of adultery, the wife co-habited with her husband as man and wife, which imported her paffing from any prior injury known to her, feeing adultery doth not difolve marriage *ex pacto*, but is a crime upon which the party injured may desert the injurer, and crave to be divorced; but if the party injured, renounce or difcharge the injury, there is no place to crave divorce upon thefe acts of adultery; and the wife’s co-habitation, after thefe acts were evidently known, imports a renun-

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