

1693. February 10.

JEAN GRAHAM, and JOHNSTON her Husband *against* LOCKHART, relict of James Graham, vintner in Edinburgh.

No 275.

THE LORDS found apparent heirs might call for count-books, in exhibitions *ad deliberandum*, as well as other papers; and that the relict having paid debts, and by mistake taken discharges instead of assignations, she might pursue a cognition of these debts before the Commissaries of Edinburgh; and that the Lords never used to advocate such causes from them, as having a peculiar style not known in any other court; but if they committed iniquity, then the Lords could redress it in a suspension.

*Fol. Dic. v. I. p. 505. Fountainball, v. I. p. 558.*

1699. July 20.

MARY LYON *against* JAMES GORDON.

ANSTRUTHER reported Mary Lyon against James Gordon of Techmuiry, son to the parson of Rothemay. It was a pursuit for aliment, on this ground, that she being his cousin-german, and he a widow, he invited her to take the government of his house, and oversight of his children, and then enticed her to his bed, under assurance of marriage by a writ under his hand; and, after they had cohabited several months as man and wife, he seized on her papers and letters, and turned her away. *Alleged*, No aliment due, unless she had been uncontrovertedly his wife; and he altogether denies any promise of marriage, or converse with her, which must be first proven in a competent judicatory before the Commissaries of Edinburgh. *Answered*, The presbytery having taken notice of the affair, she has adduced probation there, of their cohabitation, and his subsequent bad treatment; and, however the Commissaries be judges *prima instantia* to declarators of marriage, and processes of adherence, yet it is not so privative but the Lords are also competent thereto, who are called the King's Great Consistory by the act of Parliament 1609; and if there arose any question if children were lawfully begotten, and so capable of succession, there is no doubt but the Lords would sustain themselves judges to such a process. Yet the Lords here superseded to give answer to the aliment, till she first pursued an adherence before the Commissaries, who are the most proper judges to the *vinculum matrimonii*, where the parties are alive. Some moved to have trial taken before answer in this same process, of the conjugal acts; but it was carried *ut supra*.

No 276.

A woman claiming aliment as a wife, in the Court of Session, must first prove her marriage, if denied, before the Commissaries, and not incidentally in the action.

At last, on a bill, the Lords allowed her to prove, before answer, the robbing of her papers, and to infer damages, &c.

No 276.

1701. July 29.—In the cause, mentioned 20th July 1699, Mary Lyon against Gordon of Techmuiry, the probation being led, came to be advised this day; and the LORDS found it proven, that though he never owned her for his wife, yet they were generally habit and repute by the neighbourhood as married persons, and that he seized on her trunks and goods, which they thought sufficient to make him liable in an yearly aliment to her, though it might not amount to declare the marriage, or oblige him to adhere, which was not proper before the Session, but only competent for the Commissaries of Edinburgh; therefore, they modified yearly 200 merks, to be paid by him to her during her lifetime, and for her bygone expenses decerned him to pay her 200 merks more, and that presently; for the Lords thought, as he deserved to be punished for abusing her, so, on the other hand, women who prostitute themselves are not to be encouraged nor rewarded.

*Fountainball, v. 2. p. 62, & 122.*

1706. February 14. KER against CALDERWOOD and HAMILTON.

No 277.

Commissary's decret *cognitionis causa*, upon the extract of an apparent heir's renunciation, produced by a procurator compearing for him, sustained, altho' it did not bear expressly the apparent heir to have been cited in the process.

KER of Moriston against Thomas Calderwood in Dalkeith, and Hamilton of Eldershaw, reported by Rankeillor. This was a competition in the ranking of the Creditors of Home of Eccles. Moriston *objected* against the other two adjudications, that they were null, *imo*, Because their decret *cognitionis causa*, on which their adjudication proceeds, does not bear that the apparent heir was cited to the process, though a citation be one of the most essential parts of a pursuit, and *juris naturalis*, God himself not pronouncing sentence against Adam till he called him. *2do*, The decret is taken before an incompetent judge, viz. the Commissary of Lauder, against their injunctions. *Answered* to the *1st*, Though the decret do not specially bear these words, that he was lawfully cited, yet it is clearly implied in the production, mentioning the executions in general; likeas it is supplied by his compearing and producing a renunciation to be heir. To the *2d*, *Primus actus judicii vel est judicis approbatorius vel declinatorius*; but so it is, the defender appearing did prorogate and homologate the jurisdiction; and though, in the case of Weir of Blackwood, *infra* Div. 19. *b. t.* a registration in the Commissary's books was rejected, yet, to cast such decreets, would overturn many securities in the nation. THE LORDS remembered, in the case of Dewar and French, No 12. p 241. a decret was annulled for not mentioning the charge to enter heir, though it was now produced of a date anterior to the raising of the summons; but they thought this case not alike, and therefore repelled the objections, and sustained the decreets *cognitionis causa*, and of adjudication.

*Fountainball, v. 2. p. 323.*