

force, 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.

No 10.

Pleaded, in a reclaiming petition, The proof ought not to be allowed, because nociny is only where the husband exposes his wife for gain. *2do*, It was not alleged he exposed her to any of the persons with whom she committed the adulteries libelled, or which he alleged were proven. And *3tio*, The acts condescended on, if true, appeared to have been done out of indiscretion, and the invitations made only in jest.

Answered, The man who prostitutes his wife, is unworthy of the vindication of the law, whether he do it from gain, or from any other motive; and this is the opinion of Sir George Mackenzie, title Adultery; and was found, February 1692, Lauder against his Wife;* and he who once does this, and thereby vitiates her mind, ought to be repelled from getting free of her ever after.

The practices condescended on could be intended for no other purpose than by familiarising her with lewdness, to expose her to actual adultery; and therefore ought to be looked on as lenociny.

THE LORDS refused the bill.

A&. *Ferguson.*

Alt. R. *Pringle.*

Clerk, Forbes.

Fol. Dic. v. 3. p. 19. D. Falconer, v. I. p. 88.

No 11.

A wife obtaining divorce for her husband's adultery, has right to her jointure as if he were dead, but she cannot demand back her portion.

1761 *January 13.*Mr JAMES JUSTICE *against* Mrs MARGARET MURRAY.

By marriage articles betwixt Mr James Justice and Mrs Margaret Murray, the lady, in consideration of L. 500 Sterling of tocher paid to the husband, was secured in a life-rent-annuity of L. 100 Sterling. Of this marriage several children were procreated, who all died in infancy. In August 1749, Mrs Justice obtained, from the Commissaries of Edinburgh, a decree of divorce for her husband's adultery; in consequence of which she was put in possession of her life-rent-annuity. But it did not occur to her or her relations, that she was likewise entitled to demand restitution of her tocher, till the year 1751, when she brought a process, for that purpose, against Mr Justice, her late husband, libelling upon the decree of divorce, and concluding for repayment of her tocher. She obtained a decree in absence; but being diffident of her claim, she made no demand upon the funds which had been appropriated by Mr Justice for payment of his debts.

In the year 1758, Mr Justice brought a process, before the Court of Session, against his late wife, for reducing the said decree in absence. The case being reported to the Court, the Judges sustained the reasons of reduction, and reduced the decree. And what chiefly weighed with the Court, was a solemn judgment given, 8th February 1734, in a case precisely similar, Isobel Anderson against

* See General List of Names.