

denied them to be called, they being condescended on. *2do*, It was debated if he was obliged to prove that she was *tanta, habita et reputata* a bastard. Some thought not; for this allegiance that her father and mother were never married was a negative, and so needed not probation. Others contended, That the presumption stood for marriage and legitimacy; and, that one was lawfully begotten was more charitably presumed, than that he was a bastard; and that the burden of probation was in law devolved over, and incumbent on the donator to the bastardy who asserted it, and not on them who proponed and founded upon the legality and hability of the person; for *quod inesse debet inesse præsumitur*; see 25th February 1642, Crawford, No 539. p. 12636.

Fountainhall, v. 1. p. 67.

* * A similar decision was pronounced, 15th June 1670, Livingstone against Burns, No 22. p. 11972, *voce* PROCESS.

1770. February 21. HOUSTON STEWART NICOLSON *against* Mrs NICOLSON.

MR NICOLSON having brought a process of divorce against his wife for adultery, stated, *imo*, in his summons generally, That the defender had been in the practice of committing adultery with men different from her husband; *2do*, In more particular terms, "with a young man then in Sir William Maxwell of Springkell's family, of a rank and station much inferior to her." The summons, as to time and place, was sufficiently particular; but the defender objected to it on this account, and insisted, that before going to proof, the pursuer should be ordained to condescend pointedly upon the person by name, surname, and designation.

The Commissaries, on the 23d January, ordained "the pursuer to condescend upon the name and designation of the particular person pointed out in the libel as guilty of the crime of adultery with the defender in or about the house of Springkell."

The pursuer, in a bill of advocation, *pleaded*;

Adultery being a crime practised in private, and concealed from the eyes of the world, it was by the testimony of accomplices that in most cases it could be detected; and as, on the one hand, it would be hard to oblige accomplices to accuse themselves, or even third parties by name, whereby the peace of families might be disturbed; so, on the other, it would be of most fatal consequences, if the testimony of such persons were on that account to be altogether rejected.

In the proof of the adultery, it was in no degree material whether it was with one man or another, that the crime was committed. The only question was, Whether it was another person than the husband? If that fact was esta-

No 544

No 545

The pursuer of a divorce for adultery must condescend specially upon the person with whom the crime is supposed to have been committed.

No 545. blished, the proof was complete; and what was not essential to the proof could not be requisite in the summons or condescence. The summons in this case was so special in the description of the supposed adulterer, that the defender could be under no difficulty to understand what particular person was intended; and it was apparently with a view to furnish an objection to the admissibility of that person, if he was brought forward to give evidence, that the present defence in the outset of the cause was resorted to.

In the cases referred to by the defender, it was not by any order of the Court, but by the voluntary act of the pursuer, that the supposed accomplice had been specially named. The case of Alexander Cunningham, (*see* APPENDIX,) was a very singular one, and attended with many specialties; and, in the case of Martin *contra* Michie in 1668,* a contrary judgment was given, a libel in no degree so special as the present having been admitted to proof, and the Court having afterwards approved of an interlocutor of the Commissaries, which found, "That the witness is not obliged to condescend on the person's name whom he saw in the act of lewdness or adultery with the defender; but ordained the witness to be as special as he can in the description of the person, that so it may appear he was a different person from the pursuer."

The defender *answered*;

As a process of divorce for adultery, though pursued only *ad civilem effectum*, was in reality of a criminal nature, the pursuer of such an action was bound to set forth the facts in the most exact and full manner, so as to give every opportunity to the defender of redarguing the charge, or of proving circumstances of exculpation. A general charge of guilt, if the witnesses were either mistaken or inclined to perjure themselves, could not be disproved; so that it was only by a disclosure of the particular facts that the accused could maintain their defence; Mackenzie crim. tit. ADULTERY, § 8. No circumstance was more necessary to be known in the case of adultery than who was the supposed accomplice. If this was concealed, the accused went to proof under great disadvantage; witnesses might be mistaken, or, if they swore falsely, it might be impossible to detect them; but if a certain person was named, it might be in the defender's power, not only to prove an *alibi*, but by incontestible circumstances, such as sickness or incapacity, to show, that the fact alleged could not be true, or that the supposed accomplice was in reality confederated with the pursuer, and bribed to throw himself into such situations as to create the appearance of guilt.

Adultery necessarily required the concurrence of two persons; and it was an established rule in all libels of a criminal nature, that not only the matter of fact, but the names of the actors, should be set forth. In the case of adultery, there was a separate reason; by the act 1600, c. 20., the adulterer and adul-

* Not reported.

teress were prohibited from marrying together; which salutary law would be eluded, if, without naming the guilty person, a divorce could be obtained.

No 545.

The present demand was not only founded on law and reason, but agreeable to the practice both of the Commissaries and the supreme Court; no instance having occurred where an articulate condescence, so far as it was in the power of the party to give it, had not been required. In the case, 1st and 2d January 1684, Earl of Monteith *contra* the Countess, *voce* WITNESS, the pursuer was obliged to condescend upon the Christian name of Ross of Auchelossen, the gallant. In the case, 8th July 1691, Kerr *contra* Scott, and 27th February 1692, Colonel Lauder *contra* Vangent, the supposed guilty person was both named and designed in the libel. In the case, 7th December 1708, Earl of Wigton, a blank having been left in the libel for the name, the pursuer, upon an objection, was obliged to fill it up. In the cases of Locquhard and Macarthur in 1733, Macleod of Raasa in 1735, Rolland of Kinnaird in 1737, and Alexander Stewart in 1738, the persons guilty were specially condescended on. In the case of Carruthers of Dormount in 1742, the Court gave an instruction to the Commissaries to ordain the pursuer to condescend specially upon the persons with whom the adultery was committed, if known to the witnesses; and some marks, distinguishing them, if unknown to them. A similar judgment was given in the case of Cunningham in 1763; and as to the case of Martin *contra* Michie, it was no precedent upon the general point, as the husband, having been out of the country, could not have access to know the guilty persons, and had besides condescended in other respects, and, upon the whole, as specially as was in his power.*

The Court was very clear in this case; and it was observed, that if a summons or condescence in general terms was allowed, the act 1600, c. 20. would be evaded. The Commissaries' judgment was accordingly approved of, and the bill of advocacy refused.

Lord Ordinary, *Monbaddo.*For Nicolson Stewart, *MacLaurin, et alii.*For Mrs Nicolson, *Ilay Campbell.*

R. H.

Fac. Col. No. 26. p. 62.

1796. February 25.

ALEXANDER GEDDES and ALLAN CLARK *against* JEAN BULL.

ALEXANDER GEDDES and Sarah Fry were said to be married, and had an only son, Alexander Geddes junior. Before Sarah Fry's death, however, her alleged husband deserted her, and connected himself with Jean Bull, with whom he settled in Wales, called her his wife, and executed settlements in her favour, conveying to her some lands in Scotland, and his whole moveable property.

No 546.

If a title, by adjudication upon a trust-bond, be objected to upon the ground of bastardy, the pursuer must prove his legitimacy.

* None of those cases are reported, except that of E. Monteith, *voce* WITNESS.—See APPENDIX.