

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 Yet the Lords here superseded to give answer to the aliment, till she first pursued an adherence before the Commissaries, who are the most proper judges to the *vinculum matrimonii*, where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.