1707. *March 7.* IRVINE *against* SKENE.

No 21.

AN assignation by an adulteress to her adulterous son, was not found null on that score at the instance of the cedent's executor, *qua* nearest of kin, the act 119th, Parliament 1592, relating only to dispositions of heritage.

Fol. Dic. v. 2. p. 21. Forbes.

*** This case is No 19. p. 6350. *voce* IMPLIED CONDITION.

1765. *June 26.*

Sir WILLIAM HAMILTON of Westport *against* MARY DE GARES, *alias* BONAMY, and MARY BURTON HAMILTON.

No 22.
A bond of annuity was granted to a woman living in a state of adultery with the granter, and a similar bond was granted to her daughter, who was supposed to be the daughter of the granter also. The Lords found, that no action lay on the bond granted to the mother, but sustained action on that granted to the daughter.

SIR JAMES HAMILTON of Westport granted an heritable bond of annuity, for L. 40 Sterling, to Mary de Gares, *alias* Bonamy, of the Island of Guernsey, the wife of John Bonamy, of that island. He granted a like bond for L. 20 *per annum*, to increase to L. 30, upon the death of her mother, to Mary Burton, *alias* Hamilton, the daughter of Mary de Gares, by Sir James himself, as was supposed.

Upon the death of Sir James, the estate of Westport devolved on his nephew by a sister, William Ferrier, son of John Ferrier, writer in Linlithgow, who assumed the name of Sir William Hamilton.

Actions were brought by Mary de Gares and her daughter, for payment of their annuities; and Sir William insisted in a reduction, upon the ground that the bonds were null, as granted *causa adulterii*; and, therefore, *ob turpem causam*.

Answered for Mary de Gares, There is no evidence of any *turpis causa*; the bond bears to be granted for good and weighty reasons, and onerous considerations. And, allowing it to be true, that Mary de Gares lived in adultery with Sir James, it does not follow, that the bond was granted on that account. It was not given as an inducement to her to leave her husband, for it was granted long after she had left him, and probably with a view of putting an end to the connection. At any rate, the rule of the law is clear, Turpiter facere quod sit meretrix; non turpiter accipere, cum sit meretrix; l. 4. § 3. *D. De Condict. ob turp. caus.* The first violation of her chastity is an act of turpitude; but, after having taken that fatal step, there is no longer any turpitude in her receiving the wages of prostitution, which is now perhaps her only resource.

No 22. The law is still clearer, in the case of a bond of annuity granted to a woman in that unhappy situation; by placing her in a state of independence, it gives leisure for reflection and repentance, and puts it in her power once more to return to a life of decency and virtue. Instead, therefore, of being reprobated, such obligations ought to be favoured by the law; and, accordingly, a bond of this kind was sustained, 25th June 1642, Ross against Robertson, No 20. p. 9470.; a decision the more remarkable, that it was pronounced at so early a period, when less indulgence was shown to the *delicta carnis* than may be expected now.

Answered for Mary Burton Hamilton, The supposed *turpis causa* cannot apply to her. The presumption is, that she was the daughter of the husband of Mary de Gares: Pater est quem nuptiæ demonstrant. But, supposing her to be the daughter of Sir James, it not only was not unlawful to provide for her, but he was under an obligation to do it. See 7th March 1707, Irving against Skene, No 21. p. 9471.

Replied, It is not denied that Mary de Gares left her husband, and lived in adultery with Sir James. And it will be difficult to assign any other reason for the large provisions which he made to her and her daughter; indeed, the thing is clear from the words of the bond to the daughter, where Sir James gives her his own name, at the same time that he designs her as the daughter of Mary de Gares.

There is no difference between a previous corrupt bargain, and a reward given *ex post facto*; the cause is still the same. And though, where a young woman is seduced and robbed of her virginity, she may perhaps have action for any gift made to her by the seducer, as, indeed, she is entitled to damages at common law; yet, the case of a married woman living in adultery is different, her guilt being at least equal to that of the person with whom she lives.

The quotation from the civil law does not apply, being confined to the case of a common whore, who is such by profession; and, even in that case, it would seem, that, though there is no *condictio* for repetition of what is given to a whore, yet she has no action for payment: In pari casu melior est conditio possidentis. So Perezius lays down the law in his Commentary upon the title of the Code *De Condictione ob turp. caus.* Voet, under that title of the Pandects, *num. ult.* gives a clear opinion that no action lies. And, upon these principles, a bond, similar to that now in question, was found not actionable, either at the instance of the mother or of the child; 20th July 1622, Weir against Durham, No 19. p. 9469.

If this defence would be sustained, in favour of the party himself, because his turpitude is no greater than that of the pursuer, much more must it be available to his heir, who is altogether innocent.

THE LORDS found, "That no action can lie upon the bond granted to Mary de Gares, in respect it was granted *ob turpem causam*; and reduced, assoilzied,

decerned, and declared accordingly: But repelled the reasons of reduction and defences against the bond granted to Mary Burton Hamilton; and decerned." No 22.

Act. *Ilay Campbell.* Alt. *Lockhart, Crosbie.*

G. F. *Fol. Dic. v. 4. p. 26. Fac. Coll. No 11. p. 218.*

SECT. VI.

Pactum contra Fidem Tabularum Nuptialium.

1577. *January.* TURNBULL *against* HEPBURN. No 23.

THERE was one Turnbull, a young man, who, by the advice of his friends, and being interdicted, contracted himself in bond of matrimony with a young woman called Hepburn. The young man thereafter being otherways pursued, refused to fulfil the bond of matrimony with the said woman; yet had he before, by reason of his ardent love that he had to the woman, given an acquittance of 400 merks, granted to have received the same, in name of tocher good. He thereafter desired to see his acquittance decerned to have no effect, because non secutum fuit matrimonium, et non secuto matrimonio stipulatio dotis evanescit.—THE LORDS decerned it to be referred to the party's oath, if there was any real enumeration of silver made, otherwise the acquittance to be of no avail.

Fol. Dic. v. 2. p. 22. Colvil, MS. p. 262.

1633. *December.* HEPBURN *against* SETON. No 24.

SOME part of the things prestable on the bridegroom's father's side, *viz.* to possess his son in a certain number of chalders of victual, being remitted by the bridegroom himself on the very day of the contract, by a private transaction between his father and him; this was found contra bonos mores et fidem tabularum nuptialium; and, therefore, declared null.

1634. *January* 15.—BUT the son, long after the marriage, having voluntarily come to his father, and promised to adhere to the former bargain; the