

Partly injured be content and do not complain Stewart Answers to Drillet. Double
 dit. Marriage.

1^o Impuberty, that is when the Partys are under the Age of Consent, which is
 14 Years in Men and 12 in Women, is another ground upon which Marriage may
 be annulled. For this Cause, Kenn was divorced in England.

In Scotland, the Cognition of this Declaratory Divorce belongs to the Commission
 of Edinburgh. Mackenzie inst. lib. 1. tit. 6. s. 17. In England, if Issue is joined upon
 the Lawfulness of a Marriage, it must be tried by the Bishop in his consistory
 Court. For which Purpose, the Courts of Law write to him to certify the Legality
 of the Marriage: and then give judgment according to that Certificate. For after
 the Empire became Christian, Princes had so much Honour for the Bishops,
 whose ^{the} they were converted, that they gave them jurisdiction in particular Causes
 of which Marriage was one because it was always celebrated in face Ecclesie.
 Euseb. Can. 104. Tho' that be now disused among Persons of any Rank or Note.
 If a Man is divorced by Reason of Fertility, it doth not bastardize the Issue
 by another Wife: for he may be habilis and inhabilis at different Times.
 And tho' there should be afterwards a Divorce from that second Marriage, the
 Children by the second Wife during the Coverture, or (as we say) stante matrimonio
 were adjudged legitimate. Seeing tho' that Marriage was voidable, it continued a
 Marriage, till it was dissolved 5 Rep. 90. Moor 225. Dyer 179. A Sentence of
 Divorce for Impuberty, might be repealed after the Death of one of the Partys
 upon this ground, that the Partys lived together after the Marriage till both
 were of the Age of Consent.

A Sentence of Divorce cannot be given after the Death of either of the Partys
 because the Marriage is then determined and the Consequence would be only to bastardize
 the Issue. 4 mod. rep. Kinds vers. Harris. Yet where a Man after his Wife's Death
 marries her Sister by whom he hath Issue, tho' the Marriage could not be declar'd
 void after the second Wife's Death, the Issue may be determined, and the ~~husband~~
~~husband~~ husband punished as an incestuous Person.

A Sentence of Divorce *ex causa subsequenti*, whereby a Marriage once good is dis-
 solved upon an emergent Cause, might have been pronounced by the old Roman Law
 upon the mutual Consent of Partys: as the Marriage was contract'd by *mutuo con-*
sentu l. 43. ff. ad l. pub. de adult. l. 9. C. de repud. But Justinian tolerates that only
 where both Partys agree to separate, that they may live a single and chaste life
 Nov. 117 cap. 10. The Law of Moses doth indeed ~~also~~ tolerate a Man to put away
 his Wife for trivial Causes. But this is restrained by the Gospel Precept Matthe
 5. 32. 19. 9. i Corinth 7. 15. The Canon Law and the popish Church allow of no
 Divorce *vinculo matrimonij*; where the Marriage once effectually ~~sub-~~ ^{is} ~~is~~
 cause with them it is a Sacrament. But they indulge upon some certain Occasions
 as for Adultery, or propter *sevitiam* Separation *a mensa et thoro*, from Bed and
 Board. Which Separation is of the Nature of a temporary Divorce for Bed and
 Board belonged to the Essence of Matrimony. In so far as the Bond thereof
 is

is a conjugal Promise, solemnly made between a Man and his Wife, that
 each of them will live together according to God's holy Ordinance, notwith-
 standing Power by or Infirmitie or such other Things as may happen during
 their Lives; and Separation from Bed and Board, doth plainly break that Part
 of the Bond, whereby they are tied to live together at Bed and Board. Besides
 the Doctors of that Church have by their canonical Distinctions made it easie
 to avoid Marriage in such a Case. The ancient Laws of England agrees with
 the Canon Law in this Point Coke i Inst. 235. a. 3 Inst. 89. May 100. 100. Co.
 the Canon Law in this Point Coke i Inst. 235. a. 3 Inst. 89. May 100. 100. Co.
 Eliz. 900. Moor 605. 603. But in later Times, a total Separation from
 the very Bond of Matrimony, hath been indulged there for Adultery, in par-
 ticular Acts of Parliament: as in the Case of the Marquis of Northampton
 5 Edw. 6 whose Wife had been convicted of Adultery. So that by the Law of
 England a Separation from Bed and Board is granted in the ecclesiastical
 Courts, upon due Proof either of Adultery or Cruelty, whether on the Part of the
 Husband or Wife: but a Divorce, as allowed by the Roman Law, which is a total
 dissolution of the Marriage, is not permitted in England without an Act of
 Parliament.

The Law of Scotland according to the divine Law allows of ~~no~~ Divorce from
 the Bond of Marriage 1^o For Adultery 2^o For willful Desertion. But neither
 of these do ipso facto annul Marriage, if the Party injured please to continue
 the same: they are only just grounds whereupon such a Person may get it annul-
 led and free of that bondage. See Stewart lib. 1. tit. 4. s. 7.
 The Law of God allows Marriage to be broke for Adultery. For if it be not law-
 full for a Man to put away his Wife and marry again, except in the Case of Fornica-
 tion Matthe 5. 32. 19. 9. Then a contrario it must of Necessity follow that
 if the Wife be put away for Fornication the Husband by the Genos of Christ's
 Words is free from her. The Exception confirms the Rule and infer's Conceit
 to put away a Wife in the Case of Fornication; as from this Exception, except
 ye repent ye shall all likewise perish Luke 13. 3. it follows, that if by the grace
 of God they did repent, they should not perish; and from this Exception, none
 were in the House except we twain i Kings 3. 18. it is most consequential, that
 they too were. Such Exceptions proceeding from natural Equity are tacitly
 implied in Laws, tho' pronounced in general Terms, This is the Voice of Reason
 too: for the two being divided by Adultery, are no more one Flesh which is
 the Essence of Marriage; and it were inconvenient, to oblige the innocent Per-
 son either to live with the Guilty, or to live under a Temptation of commit-
 ting the like Sin. The ancient Fathers of the Church were also of Opinion,
 that the Bond of Marriage was actually dissolved by Adultery, especially where
 the Woman was an Adulteress: because thereby the End of Marriage viz. to
 ascertain the Issue, is destroyed; and the Contract is no more than a mutual
 transferring the Right to each others Person in Order to that End. Adultery
 is a Crime which doth not dissolve Marriage ipso facto, but for which the Par-
 ty injured may crave to be divorced. For if the Party injured renounce the In-
 jury