

Council of Scotland when in being used to mitigate the punishment of Notour adulterers, and some times charged with such adultery, without suffering them to appear before the Court of Justiciary. *McKenzie* Crim. part 1. Et. 17. 54.

A Criminal libel for Notour adultery is founded upon the Acts of Parliament aforesaid 1563 & 1581. But a libel for ordinary adultery, is grounded on the laws of God and Nature. And all libels for adultery bear that the offenders were married, and unless the Marriage be proved or Notour to the affair, they cannot be brought in guilty. *McKenzie* Crim. 55. If both the Notour and the adultery be libelled, the pursuer may be allowed to put alternative upon either. But if Notour adultery only be libelled, and simple adultery only proved, the pursuer if he took instruments upon the libel as libelled, and proved that the quality of Notour adultery should be proved, ought to be allowed and brought in Not guilty. By the Jury. *McKenzie* Crim. 510. Because simple and Notour adultery are different; and the simple adultery being libelled, the pursuer might possibly either know or suspect against it, which would not have excluded Notour adultery, or might think himself in duty not to offer the Defences for that he knows that Notour adultery could not be proved.

In a Criminal trial for adultery, more strict and exact proof is required than in the Civil process of Divorce. For the witnesses ought to be confronted to conceive in the same individual Act. *Prosp. Garnin* de Testibus q. 64 n. 55. 156. 229. *McKenzie* Crim. part 1. Et. 17. 57. *John* part 2. Et. 26. 314. infra. And it is not sufficient that one witness swear as to one and another but at one time, and another witness as to another such Act at another time; seeing such witnesses are in effect single witnesses, and their senses do not agree in or about the same object, which is the reason of giving credit to their Testimonies. *John* part 2.

may prove adultery in general in order to a civil effect. *Prosp. Garnin* Crim. n. 150. 223. 229. *De Testibus* Crim. p. 136 n. 29. But adultery may be proved by one witness who saying this a hole saw it committed, and another who immediately thereafter looking thro' the same hole did also see it. *Prosp. Garnin* de Testibus Crim. p. 136 n. 28.

1666 *George* *Johnston*, *Wilson* Crim. p. 1. 12. Et. 26. 314. infra. Women witnesses are received for proving adultery whereas Crim. part 1. Et. 17. 57. That is, for proving ordinary adultery by Cohabitation which is an occult Act, or for proving adultery committed in a prison or bandy house where none but women were present. But women are not admitted to prove Notour adultery arising from the parties dwelling together 12 January 1674. *John* part 2. Concerning which other witnesses might be heard. Again a Decree of Divorce for adultery obtained before the Consistory of Edinburgh, is a sufficient Evidence of ordinary adultery in a Criminal suit for an arbitrary punishment; no proof being good in the one case, that would not be justified in the other. *McKenzie* Crim. 58. Because *Causa Civilis & Criminalis Equiparantur quoad probationem in ordine ad penam arbitriam*. And as the Lord of Session's Decree of Improbation of a writ is sufficient Evidence in a Criminal trial of false hood: so the Consistory Decree of Divorce for adultery should be received as good proof of that Crime. Only the Lord's Decree of Divorce, that the Court of Session may not only improve a writ as false, but may punish the false hood in some manner; whereas the Consistory Decree of Edinburgh can inflict no Criminal punishment for adultery proved before them. But a Decree of Divorce for adultery obtained before the Consistory of Edinburgh is not sufficient Evidence in a Criminal suit for Notour adultery 3 August 1598. *Hay* of *Delgaty* *Boone* *pro*