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compassion is considerably weakened. By accepting of their offer of purchasing her husband's liferent on her disposing of part of the fee, she can obtain an immediate livelihood. The case of Lisk against her husband's creditors, was thought to have been erroneously decided; and an appeal was entered against it, but a compromise afterwards took place in consequence of what passed in the House of Peers, after the cause had been begun to be pleaded.

The Court, with only one dissenting voice, refused the desire of the petition.

A reclaiming petition was refused, (27th May 1794,) without answers.

For the Petitioner, *M. Ross, Fletcher.* Alt. *Tait.* Clerk, *Home.*

R. D.

Fol. Dic. p. 3. 289. Fac. Col. No 114. p. 253.

S E C T. III.

The Wife if maltreated may withdraw, and be entitled to a Separate Maintenance.

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1594. June 18.

HOWIESON *against* RAE.

HOWIESON having obtained a decret of adherence against Rae, his wife; and having charged her, under the pain of horning, to adhere, she suspended, *alleging*, that she durst not adhere *propter sævitiã mariti*. In respect whereof, he was ordained to find her caution to treat her lovingly, as became a husband to treat his wife, she making faith that she dreaded bodily harm.

Fol. Dic. v. 1. p. 394. Haddington, MS. No 413.

1697. June 8.

DUTCHESS of GORDON *against* The DUKE.

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What amounts to such maltreatment, as to entitle the wife to withdraw.

WHITELAW reported the bill of advocation, given in by the Dutchess of Gordon against the Duke, her husband, of a process of adherence, pursued by him against her, for deserting and withdrawing, with this design, that if she did not return to cohabit, he might from thenceforth be free of any aliment she could claim during the separation occasioned by herself. The *first* reason was, The Commissaries had committed iniquity, in sustaining process at the Duke's instance for adherence, and repelling her defence, founded on the 55th act 1573,

which requires four years absence of the party deserter, before any such action can be sustained; for it were unreasonable, on every mistake arising betwixt man and wife, to allow such remedies, seeing *l. 48. D. De reg. jur.* says that *brevi reversa uxor, divertisse non videtur.* Answered for the Duke, That the act of Parliament cited, did not concern simple adherences for redintegration of a marriage after the rupture, but only adherence as a step in order to a process of divorce, in which case only *quadriennium est expectandum*; and *Beza de repudiis et divortis* shews, by the custom of Geneva, they must wait ten years; and so did the famous Galeacius Carracciolus, Marquis of Vico; but if a party pursue an adherence only to cement domestic differences, it were hard to allow the obstinate perycacious person to absent three years and eleven months, and then return, and that no legal compulsitor could force them sooner; for as a husband's rigour and severity is not to be countenanced on the one part; so to favour the humourous caprices of wives on the other side, might be of as dangerous consequence. THE LORDS did not decide this point, but thought, generally, this process of adherence did not fall under the compass of that act of Parliament, and that the husband, in this case, was not bound to wait four years; but they demurred how far (abstracting from the municipal laws of this nation) such processes may be sustained from the principles of the Roman or common law. The next reason of advocacy, was the mal-treatment the Dutchess met with; for though it be a wife's duty to live with her husband, yet there may be cases making a wife's withdrawing excusable, not as a perpetual desertion, but only till reasonable terms be procured by the mediation of judges or friends. The condescence made by her, of her Lord's bad usage, ought rather to be buried than recorded among so near relatives, and of so great honour and quality; therefore the general heads are only to be touched, such as the refusing to allow her money for her necessary uses, as mourning at the Queen's death; the debarring her from the oversight in educating her children, especially her daughters when young; the shutting the doors of his lodging and keeping her out at night, and thrusting away the coachman for opening the same; his scandalous and familiar converse with one Mrs Needhame, her waiting woman, and protecting her after the Dutchess had discharged her the house, &c. The Duke *alleging*, The articles of this condescence, as they were false and calumnious, so they were altogether irrelevant to sustain her desertion, or to elide the process of adherence; the Commissaries repelled these articles, whereby the Dutchess conceived herself aggrieved, and so craved the cause to be advocated from them. Some of the Lords thought the cause might be remitted with these qualities and directions, that a competent time might be allowed to the Dutchess to return from Flanders, where she is now in a convent, and that the Duke may transmit such a sum as shall be thought reasonable to pay her debts, and bear the charge of transporting her home. Others moved for passing the bill of advocacy. But it was judged most suitable, in so tender and delicate a case, to try an amicable settlement.

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between so near relations, before they should give their decision *in jure*: And accordingly the LORDS named some of their number to try an accommodation, in regard the affair nearly concerned the honour of both parties; therefore the Lords removed all parties, except the advocates employed, &c. conform to the licence given by the act 26th Parl. 1693, appointing the advising causes with open doors; which is the first time I saw it practised in the Session, though the occasion has frequently occurred in the criminal court, where rapes, blasphemy, bestiality, or the like, are pursued, The Dutchess founded on a late practise of the Commissaries, whereby they rejected a process of adherence, pursued by Mr Patrick Reid preacher, against Elisabeth Ogilvie his spouse; but the disparity between the cases was alleged to lie in this, that Mr Patrick's wife had obtained a decret of aliment at Privy Council against him, proceeding on a probation of his cruelty, and hazard in cohabiting with him; whereas there was no such probation or modification of an aliment against the Duke.

The designed agreement taking no effect, the Lords resumed the case; and finding the Commissaries had done iniquity, they passed the Dutchess's bill of advocation.

1698. February 25.—IN the action of aliment pursued by the Dutchess of Gordon against the Duke, her husband, (as above-mentioned) his defence was, I am willing to take her home, and entertain her at bed and board according to our quality; and it was never allowed a wife to say, I'll chuse rather to live separately, and take an aliment, when her husband is willing to cohabit; neither are the pretences of serving an inhibition, or every mal-treatment, sufficient to excuse a wife's running away, unless she cannot live in safety, but be in hazard of her life; and *modica castigatio* is connived at, though amongst persons of such high rank never to be used. And *Statuta David. II. cap. 16.* give instances thereof, where husbands were assoilzied in such cases, as Sir George M'Kenzie shews, in his pleading for Captain Hardy against the Lady Rossyth his wife. *Answered*, Wives would be in a hard taking, if nothing would justify their separation, but their being in hazard of their lives; for, when they are *sub manu et potestate mariti*, they should be in freedom and honour, as well as safety; and any ferocity or *savitia* in the temper of the husband may afford a reasonable excuse, till he gives new proofs of the redintegration of his affection, and better behaviour; and they condescended on several acts of rigour and narrowness wherewith the Dutchess was treated. THE LORDS, before answer, whether she should return and cohabit, allowed a joint probation; the Dutchess, to prove the acts of severity and mal-treatment condescended on, and the Duke to prove he furnished her sufficiently, and all the other alleviations insisted on; and, in the mean time, modified L. 800 Sterling to be paid by the Duke for her present subsistence, and discharged any suspension to be past of the same. Some of the Lords moved to give her a year of her join-

ture, to which she is by her contract provided, being £. 1200 Sterling to help to pay her necessary debts; but the Lords thought not fit to go to that extent.

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June 15.—In the process of alimant pursued by the Dutchess of Gordon against the Duke, mentioned 25th February 1698, one Mrs Kendal being adduced as a witness to prove the Dutchess's mal-treatment, the Duke objected, That women witnesses are inhabile nisi in casibus quibusdam exceptis, whereof this was none, as in crimine perduellionis, in puerperio, &c. And Statuta Robert. l. cap. 34. exclude them totally, and so does P. Farinaccus de testibus, seeing varium et mutabile semper femina, as Virgil has it. *addo*, This witness had declared what she could say, and had called the Duke an ill husband, which was *proditio testimonii*, and partial counsel: So at most, though she could purge herself, she must be only admitted *cum nota*. Answered, Women are habile witnesses to prove clandestine acts wherever there is *penuria testium*, or things are transacted *intra privatos parietes*, as this mal-treatment was; and her signifying what she knew is no objection, else nobody should know whom to cite as witnesses to prove any point; unless they have instigated or advised the process, and offered their service. The Lords repelled both the objections, the witness purging herself of malice and partial counsel, and found them habile witnesses in such cases. See WITNESS.

Fol. Dic. v. 1. p. 394. Fountainball, v. 1. p. 773. & 829. v. 2. p. 3.

1700. February 23.

COOK against JOHNSTON.

JEAN COOK, daughter to Mr Patrick Cook minister at Prestonpans, having obtained a decret of adherence against Johnston of Corehead, on these qualifications of marriage; that he had suited and courted her as his wife, and given her tokens; that he had cohabited and conversed together for some time as man and wife; and, *3tio*, That she had born him children which he had owned. Of this decret he raises suspension and reduction, on these reasons, *1mo*, The Commissaries committed iniquity in sustaining these qualifications relevant. *2do*, In finding them proved; for the material witnesses she had adduced were only women, who are inhabile in law, and only deponed on hear says. *3do*, He offered to prove, that during the time she pretended to be married to him, she was guilty with another man, and as that would in law dissolve the marriage, though it had been formal, public, and solemn, so much more must it defend him from adhering to or taking home a whore, where the marriage was only inferred by stretches, presumptions, and occult converse. The Lords thought the 2d reason relevant, and would not put him to raise an action of divorce; but seeing this might be obtruded against all adherences, therefore they repelled it, unless he paid in a sum to her for her alimant *medio tempore*, and

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In an action of adherence, the defence that since the marriage the pursuer had cohabited with other men was sustained.