

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.

No 112.

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 *preiudicium 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

No 113.

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

No 113. to carry on the process, and condescended on the person he meant, with certification, if he succumbed, they would consider the infamy, what it should import, if it be found a calumnious defamation.

Fol. Dic. v. 1. p. 394. Fountainball, v. 2. p. 92.

1728. November. LADY KIRKHOUSE *against* Her HUSBAND.

No 114.

CASSIE, elder of Kirkhouse, in the year 1715, was attainted of high treason, and his estate was adjudged to his son, upon this *medium*, that it being a tailzied subject, the father had incurred the irritancies, and fallen from his right before his rebellion. The Lady Kirkhouse, spouse to Kirkhouse elder, in her contract of marriage was provided to the liferent of 1000 merks, to take place after her husband's decease; but after the fee was established in her son, having insisted against her husband for a separate aliment, upon the head of mal-treatment, she not only obtained her son to be made liable for a separate aliment, but likewise upon a clause in the act 62, Parliament 1661, obtained, that the adjudgers upon the estate should be obliged to restrict themselves to their annualrents during the legal, that there might be room for her to affect the rents of the estate for her aliment. See APPENDIX.

Fol. Dic. v. 1. p. 394.

SECT. IV.

Whether the Husband bound to provide his Wife in a Jointure.

1686. December.

Dr BORTHWICK'S WIFE *against* The DOCTOR Her HUSBAND.

No 115.

IN a pursuit at the instance of a wife against her husband, concluding, That, in respect he had married her very young, without contract or advice of friends, and got 12,000 merks of portion with her, and had now deserted her, and was now dilapidating his fortune, he might be decerned to secure a liferent to her, and provisions to her children,

THE LORDS found, That the defender could not be so decerned; but that the pursuer must rest upon her legal provisions of terce and third.

Fol. Dic. v. 1. p. 394. Harcarse, (CONTRACTS OF MARRIAGE.) No 382. p. 99.