

The Lords ordained Daljarroch to assign *quoad* the other two parts, with warrantice from his own fact and deed allenary; for it appeared to be collusion in him to gratify the common debtor. *Vol. II. Page 428.*

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1708. *February 21.* ELIZABETH BLAIR *against* HARY HUNTER of KIRKTON, her Husband.

ELIZABETH Blair pursues Hary Hunter of Kirkton, her Husband, for an aliment, in regard she could not live with him in safety, because of his outrageous barbarous cruelty towards her. A probation being led of the maltreatments; they were found to be very gross, by trailing her through the floor by the hair of the head, drawing his sword to her, beating and bleeding her, &c.

ALLEGED for him,—If he had been allowed a conjunct probation, he could have exculpated himself, by proving such provocations as would have made her unworthy of the benefit or protection of law,—she being Captain Blair, at the Clock-miln in the Abbey, his daughter, *mali corvi malum ovum*; and he trepanned when drunk to marry her, and then ensnared by her father in all his debts, and so rendered miserable: and if passion, drink, and weakness, did sometimes transport him, he may be excused; but in law she can have no separate aliment by deserting his house, because the most of the violent acts condescended on were in 1700, and, for many years after that, they cohabited together in a peaceable manner, and since that time she has bore him children; and so all these deeds are buried in the grave of oblivion; as is clear from the *tit. De Injuriis, sect. ult.* that *dissimulatione tollitur et abolitur injuria*; and which Vinnius, in his Commentary, does not only explain of verbal, but even of real injuries, by beating and wounding: Likeas, they are all prescribable *intra annum, si injuriam in animo suo non revocaverit*; l. 5, C. *De Injuriis*: so that Kirkton's wife had plainly forgiven and passed from all the bad usage she had met with, by living in a friendly peaceable manner, for several years together, after these outrages now complained of; so that he hath both dissimulation and the annual prescription for him.

ANSWERED,—If modesty and respect to her husband's honour had made her so long in complaining, that could never be detorted to her prejudice; especially seeing the cruelty had made late eruptions like *Ætna*; for two witnesses bore, that, in January 1707, he had debarred her from her chamber, and made her lie on straw in the kitchen, and used other deeds of violence, which must be connected with the former; and he was so furious in his temper, that it was impossible for her to cohabit with him in safety of her life. In the reasoning, it was remembered by some of the Lords, that, at the Privy-Council, in the *Lady Royston's complaint against Captain Hardy, her Husband*, who having beat him with her slipper, he held her face to the fire till her eyes were like to start out, and yet he was only imprisoned for it one night. See it in Sir George Mackenzie's English pleadings.

The Lords thought the usage in the probation incapable of any justification, and below the character of a rational man, though provocations had preceded, as they were not proven; and therefore found she was not obliged to return to his family, but ought to have a separate aliment apart.

Then the *second* question was, What should be the quota? and it appearing his estate was but small, not above 600 merks by year of free rent, incumbered with debts, and that he behoved to keep the children, they modified 250 merks yearly to her; though many of the Lords were only for 200. Some inquired what her matrimonial liferent provision was? But that not being present to show, they modified *ut supra*.  
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1708. *February 21.* WILLIAM MEL *against* CHARTERS' HEIRS.

WILLIAM Mel of Roan, merchant, and French refugee, apprehending he got injustice done him, in his process against Bailie Charles Charters' heirs, by preferring the other creditors to him, he protested for remeid of law, and appealed to the British Parliament. And one Thomas Taylor, notary, whom he brought alongst with him, refusing to give him forth his instrument thereon, he complains to the Lords, craving they may order him so to do, under certification, that he shall be deprived if he disobey; which desire the Lords granted.

I think if his instrument had been required from the clerk of Session, in whose hands he likewise took it, in justice he could not have refused him an extract thereof, though we do not yet know what will be the import of these protests.

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1708. *February 24.* SIR ALEXANDER KENNEDY *against* SIR ALEXANDER CUMMING.

[See the numerous Reports of this Case pointed out in the Index to the Decisions.]

THE Lords having ordained Sir Alexander Cumming's decret of reduction of Sir Alexander Kennedy's right to the conservator's office to be extracted, Sir Andrew thereon appealed to the British Parliament. John Vere Kennedy, his son, as conjunct with his father, claiming his right, and Sir Alexander Cumming alleging he was never owned nor acknowledged as such, neither by the royal burghs nor the Estates of Zealand,—the Lords reserved his right and possession as accords.  
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1708. *February 24.* JAMES TRONS *against* The LAIRD of POURIE.

TRONS having been his tenant, and removing from his ground to the Laird of Guthrie's lands, and being in arrear of his rent, he takes a decret against him, and poinds first his corns, and then, on another day, his horse and cattle. Trons gives in a complaint to the Lords, That both the poindings were *spreto mandato*, being after a sist of execution obtained by him on a bill of suspension.

ALLEGED,—*Non relevat*, seeing the sist was not intimated to me till long after both the poindings, the sist being on the 6th January last, and the first poinding on the 7th, and the second on the 12th of the same month, and no intima-