

No 98.

this bond, though then a minor, he cannot crave the benefit of reposition; and it has been so decided in the Parliament of Paris, and elsewhere. *Answered*, That if an advocate (which is more than a writer) should *ex errore facti* give bond, or enter into any other transaction to his prejudice, when minor, he will be restored; and this benefit is only denied him when he errs *in jure*; and so *Pirezius* determines it *ad tit. cod. Qui et adversus quos in integr.* and in the decision 7th December 1666, between Fairholme and Sir George M'Kenzie, *voce* MINOR, he, though then a student of law, was reponed against a bond wherein he had signed cautioner, in his minority, for his father; but the ground there was, that his father could not legally authorize him *in rem suam*. THE LORDS found Lafreis's being in a writer's chamber did not exclude his reason on minority and lesion; but the LORDS ordained the charger to depone that the articles of the account were at the common usual rates, and not exorbitant.

Fol. Dic. v. i. p. 393. Fountainhall, v. i. p. 723. & 792.

1711. July 19.

The Lady KINFAUNS and LYON of Auchterhouse, *against* The Laird of KINFAUNS, her Husband.

No 99.

A lady being advised by her physicians to go to the baths in England for her health, her husband procured declarations from other physicians that medicine used at home might as probably recover her.

He was required by instrument to furnish her with money for her journey, but having refused to do so, she borrowed the money and granted bond for it. Found that the bond was null, as

MISTAKES falling in betwixt Charteris *alias* Carnegy of Kinfauns, and his Lady, daughter to Carnegy of Phineven; and she falling tender, took the advice of some physicians, who declared her distemper had a tendency to a palsy, and that it was fit she go to the warm baths in England, or to the waters of Aix-la-Chapelle in Germany. This being signified to her husband, he consulted other physicians, who attested the use of medicines at home might as probably recover her, and so refused to comply with her going abroad. Upon which diversity of opinions, he is required by way of instrument to furnish money for her journey; and on his declining it, Phineven her brother, and Auchterhouse, who married her sister, advance her 2000 merks to carry her on her journey, and take her bond for it; and thereupon intent a process against the husband for paying that money, so profitably advanced, and likewise for an aliment in time coming: And *primo loco* insisted for the 2000 merks. *Alleged* for Kinfauns, the husband, the bond is null, granted by a wife *vestita viro*. Next, though a man is *jure naturæ* bound to aliment his wife; yet, if she causelessly desert and withdraw, his obligation ceases; which she has done these twelve months bygone, taking up her residence with her brother and brother-in-law, and then going not to the baths, but to London, contrary to the advice of Dr Pitcairn and others the best physicians; and all this done only by bad influence and counsel, without the least provocation or *sævitia*, libelled against the husband toward her. And this may be *pessimi exempli* to allow wives to borrow

money at every caprice, especially when inhibited : For though merchants may furnish them necessaries conform to their quality, yet the reason of the *senatus-consultum Velleianum* hinders their borrowing of money, either to oblige themselves or their husbands ; and Auchterhouse was *in pessima fide* to lend her, for this would undermine and disturb the quiet of the conjugal society, which is the foundation of all the other great societies in the world, which are but composed of this ; for this but encourages the wife to withdraw ; and the creditor's concourse fortifies her in her separation and aversion : And if a wife withdraw (which the English lawyers call eloping) no law will oblige the husband to maintain her, when he is willing to take her home and provide all necessaries for her recovery, which he has many times offered to do. *Answered,* They did not so much found on the bond, (which alone cannot bind the husband without his consent) as on the onerous cause for which it was granted ; for a man by all laws, divine and human, is bound to maintain his wife conform to his estate ; and under aliment is comprehended not only ordinary entertainment, cohabitation and apparel, but likewise extraordinary expenses of physicians salaries, and for drugs and medicaments when she is sick ; and if the cure cannot be perfected at home, one of his rank is bound to send her to the baths, God in his providence having afforded so good a remedy within this isle as the baths, where many in her circumstances have been cured ; and both his character and estate should bear the charges of so necessary a duty, and refund the furnishers of the money towards her journey, as being *utiles negotiorum gestores* ; it being notour that where wives contract for necessaries, the furnishers have action against the husband ; and her subscription in a merchant's count-book constitutes the debt. *3tio,* Though borrowing money by a wife differs from the furnishing her with necessaries, yet if her health require her undertaking a long journey, the one must be paid as well as the other ; seeing without the money one cannot travel to the baths ; and in case of the husband's absence, or unjustifiable refusal to advance the money when required, she may lawfully borrow it from such as, seeing her circumstances, and the husband's cold indifferent and unnatural carriage, will from the principles of compassion lend. And as to her deserting, that was a stretching of the word ; for she only left her own house to wait on her sister, the Lady Auchterhouse, being in child-bed, and there she fell sick, which cannot be construed a deserting or forsaking her husband or his family : For the l. 48. *D. De reg. jur.* says well, *brevis reversa uxor, nec divertisse videtur.* THE LORDS found the bond null, as given *stante matrimonio* without her husband's consent, and that where a man is willing to aliment his wife, she cannot crave a separate aliment, unless she prove *sevitium* or maltreatment ; and that she cannot desert his family ; yet if her sickness require it, and his fortune can bear it, he is obliged to promote the cure, though it be by going to the baths, or other medicinal water : And therefore sustained the process at her instance against her husband, in so far as the money was necessarily advanced to her journey to England. But the se-

No 99.
being granted *stante matrimonio* without the husband's consent ; and that she could not desert her husband's family ; but that if her sickness required it, and his fortune could bear it, he was obliged to promote the cure, tho' it should be by going to the baths ; and therefore sustained the process at her instance against her husband, in so far as the money was necessarily advanced for her journey to England.

Where the husband is willing to aliment his wife in his own family, she is not entitled to a separate aliment unless she prove *sevitium* or maltreatment.

No 99.

cond inspection that fell in, was the quantity borrowed, which was alleged to be exorbitant, and noways suitable to his condition, he having liferents and other debts affecting his estate. THE LORDS remitted to the Ordinary to try the circumstances, and to restrict and modify the same if he saw cause.

December 13.—THE LORDS, on a new report, resumed the consideration of the case mentioned 19th July 1711, betwixt Kinfauns and his Lady. There though the bond was found null, yet what was advanced for her necessary use was sustained. Now, it came to be debated, if her going to the baths was necessary towards the recovery of her health. Here, (as happens in many cases where the doctors differ) there were contrary testificates under several physicians hands produced; some thinking it necessary, and others that the cure might be as well performed at home. Dr Cheyne's letter, who attended her at the bath, was very particular as to the good success they had. But this is to justify wives unwarrantable desertion and wandering by the event, nor does it prove the necessity of such a dangerous journey, for who knows but she might, by the application of suitable means, have done as well at home? Neither is the recovery very apparent. And though it be turned somewhat common to go to the baths, yet many things now are turned pretty frequent in wives demands, that are neither necessary nor fit, upon the emendicate assertions of physicians yielding to the caprice of some, not without contempt and contradiction of the husband's inclinations. *Answered* for the Lady, That the husband's obligation to care for his wife in sickness is founded in nature and humanity, (not to speak of Christianity) and though *regulariter* this is only to provide for her at his own residence, yet if these medicaments will not do, he is not to grudge her going to mineral waters. Yea, the Lords have found where wives are inhibited, yet the husband is liable for necessaries furnished to them, though abroad, as far as it would have cost them if they had staid at home with them in their own house, as was decided No 97. p. 5879, Campbell *contra* Ebden, where it is observed, the like had been done before betwixt the Earl of Monteith and his Lady, No 95. p. 5879.; as also, 6th July 1677, Allan *contra* Countess of Southesk, Div. 6. § 1. *b. t.*, where she had carried her son the heir of the family with her. See also the 11th December 1629, Gordon *contra* the Earl of Galloway, *voce* MINOR. THE LORDS thought it dangerous to subject a husband to all the proposals of a wife, who seldom wants costly advisers and flatterers; yet having balanced all circumstances here, they found her journey necessary towards her recovery, and when her husband refused money, she might borrow. For put the case she had gone by sea, and was carried in by pirates to Dunkirk, behoved he not to have ransomed her? But the difficulty was as to the sum, for the journey would require all that and more, yet his fortune could not allow it, it appearing from the sequestration of his estate by his creditors, that he had only 2300 merks at present. Some urged that the terms of payment might be divided; but the plurality thought the most they could in

these circumstances modify to her was only the half of his own aliment, viz. 1150 merks, for which sum they decerned. No 99.

Fol. Dic. v. 1. p. 393. Fountainball, v. 1. p. 662. & 686.

* * * Forbes reports the same case :

IN the process at the instance of the Lairds of Auchterhouse and Phinhaven, and the Lady Kinfauns, against the Laird of Kinfauns, her husband, for payment of 2000 merks contained in a bond, granted by the Lady to the two other pursuers, and advanced to her (after her husband had refused when required by way of instrument to furnish her) for defraying the charges of her going to the hot baths in England, by the advice of physicians, as necessary for her health,

Alleged for the defender ; The bond is null, being granted by his wife, *stante matrimonio* without his consent ; and so could not oblige herself, and far less her husband.

Replied for the pursuers ; The rule in law, that a wife's obligation cannot bind her husband or herself, suffers an exception in cases where she is trusted with necessaries, either in her husband's absence, or when he unreasonably refuseth to furnish her ; so that, as a wife could oblige her husband in such cases, her obligation given for what is advanced, is binding. *V. G.* Her subscription to a merchant-account for necessary furnishing, will afford action against the husband, as obliged to provide for her. And the furnishing medicaments to a wife, or following out necessary remedies for preservation or recovery of her health, is a debt upon the husband, arising from the same obligation as her daily maintenance, under which these are comprehended.

Duplied for the defender ; Albeit a wife may contract debt for her necessary aliment, yet she cannot borrow money for her supply. There is a great difference betwixt the case of a merchant or apothecary, furnishing goods or drugs in the course of their trade to a wife, according to her condition and quality, and the case of one who lends money to her, which may be dissipated and misapplied, and the husband notwithstanding remain bound to such as furnished her with necessaries ; nor doth a wife's signing a count-book prove of itself, but the merchant must instruct the furnishing *aliunde*.

Triplied for the pursuers ; If furnishing necessaries to a wife doth effectually oblige the husband, for the same reason the advancers of money to her, obviously necessary for the charge of a journey in order to her cure, must bind them. For though usually at home, goods are furnished, and remedies applied before payment, yet it is as necessary to advance money to a wife when the nature of the thing requires it, as to make a journey. *Concesso enim jure, omnia concedi videntur, sine quibus jus illud expediri non potest* ; and to deny the advance of money in order to a journey to the baths, is to refuse the remedy itself.

No 99.

THE LORDS found the bond null, but found the libel relevant for repetition of the sums advanced, in so far as the same was necessary.

Forbes, p. 529.

No 100.

1744. July 25. COUNTESS OF CAITHNESS *against* The EARL.

THE Countess of Caithness pursued the Earl her husband for an aliment. *Answered* by the Earl, That if she would return to her family he was willing to aliment her; but as there was no separation *a mensa et thoro*, she could not claim a separate aliment. THE LORDS found the claim incompetent *in hoc statu*. See APPENDIX.

Fol. Dic. v. 3. p. 281.

No 101.

1756. January 25. CRAMOND *against* ALLAN.

MARJORY CRAMOND pursued her husband for an interim aliment, while she pursued a separation on the head of maltreatment. *Answered* for the husband, *imo*, That she was a drunkard and a frequenter of bawdy-houses; and, *2do*, that he was willing to receive her home. THE LORDS decerned an interim aliment to her for carrying on her process. See APPENDIX.

Fol. Dic. v. 3. p. 282.

1780. December 12.

SAMUEL MITCHELSON, senior, Writer to the Signet, *against* SOPHIA, LADY CRANSTON, and MICHAEL LADE, Esq; her Husband.

No 102.

Money advanced for aliment of a family, for which a voucher is taken from the husband, becomes the husband's debt, and the creditor has no claim against the wife, altho' she succeed to a separate estate.

LORD CRANSTON had a considerable estate, both in England and Scotland, and his Lady, after her marriage, succeeded to an estate in the West Indies, which had belonged to her father, and to the liferent of which she was entitled; but, after this succession opened to Lady Cranston, Lord Cranston's affairs became so much involved, that his Creditors brought a judicial sale of his Scots estates.

During the dependence of the sale, Lord Cranston was much pinched for money; his family resided then in Edinburgh; and Mr Mitchelson, from time to time, advanced sundry sums for the use and aliment of the family; for which, on settling accounts with Lord Cranston, in May 1771, he took his Lordship's bill.

The price at which Lord Cranston's Scots estates sold fell short of paying the debts preferably secured upon them. The English estate was so settled, as