

N.B. In this case Mr Crosbie objected that the presentation was not offered on the Sunday, though he had formerly argued on that supposition. But upon declining a proof, [from the dread of being found liable in past expenses, and perhaps future,] the Lords proceeded to advise the cause.

1770. *November 14.* MARY JAMIESON *against* ISOBELLA HOUSTON.

ALIMENT—HUSBAND AND WIFE.

The rents of a small subject, the property of a wife separated from her husband, found to be an alimentary provision to the wife, and not attachable by the husband's creditors.

[*Fac. Coll.*, V. 128 ; *Dictionary*, 5898.]

GARDENSTON. I do not know any law which gives a wife preference to her husband's creditors, even for aliment. The nature of marriage is, that parties go together, for better for worse. If a woman makes a rash choice, she must suffer the consequences.

KAIMES. If a man turns low in his circumstances while he resides with his wife, she must suffer with him ; but here he deserts her,—L.13 is all her sustenance. When the husband deserts, a claim for aliment arises ; may not the wife, in such circumstances, retain ?

COALSTON. A husband has a right of liferent, and a right of administration ; and while he lives with his wife, the wife has no preferable right for aliment, even out of subjects originally her own. But here there was a separation : if by the fault of the husband, the wife may compete with creditors ; if by her own fault, she may not.

MONBODDO. I agree with Lord Coalston upon the general principles ; but would prefer the wife upon the specialties of the case, which imply a tacit agreement that the wife should be alimented out of her own funds.

KENNET. The husband resided in Scotland, and yet did not cohabit with his wife : this implies desertion.

PITFOUR. The wife was in possession of L.13 *per annum*. This was a small aliment which liquidates itself. There may be some difficulty in strict law ; but there is evidence, *rebus ipsis et factis*, that the husband deserted his wife, and that she should be alimented out of her little subject.

HAILES. I doubt as to this : for it seems to take for granted just what ought to be proved. There is no presumption in the law, that a husband will desert his wife maliciously ; and, therefore, it seems necessary that the cause of the separation be first of all inquired into.

ALEMORE. I see no preference that a wife has upon any particular subject falling under the *jus mariti*. In the circumstances in which she stood, she

might uplift ; but, when she is interpellated, how can her husband or his creditors be excluded ?

PRESIDENT. The specialties, in this case, are excessively strong in favour of the wife. A tacit consent may be as valid as if there had been an actual allotment of the wife's rent by way of aliment.

On the 24th July 1770, "The Lords, in respect that it is not alleged, on the part of Mary Jamieson, that Captain Houston cohabited with his wife or alimented her, preferred Isobella Houston to the sum *in medio* ;" adhering to Lord Kaimes's interlocutor.

On the 14th November 1770, adhered.

Act. Alex. Belches. *Alt.* W. Baillie.

Diss. Alemore, Gardenston, Coalston, Hailes. *Non liquet*, Ellick.

[The reason of my differing from the judgment was, that I wished for more light into the fact ; and, as some insinuations had been thrown out against Mrs Houston's character, I thought there was a propriety in inquiring by whose fault the separation happened.]

1770. November 17. JEAN JOHNSTONE *against* HUNTER JAMES FERRIER.

MINOR.

A male, under the years of pupillarity, incapable of contracting a marriage.
Effect of Inhibition after the years of pupillarity are expired.

[*Faculty Collection*, V. 130 ; *Dictionary*, 8931.]

AUCHINLECK. The maxim *malitia supplet ætatem* is an old maxim : But where is the *malitia* here ? There is a great deal of *stultitia* if you please. This woman gave the child money to buy sweeties, I suppose : she gets herself joined to him in the form of wedlock by a *Buckle-the-Beggars*, and the child returns to the country with a wife and his sweeties. Where was the *malitia* then ? Had there been any, he would have consummated directly. Instead of this, the first time he appears in the character of a husband, is lying in the same bed with Jean Johnstone, his clothes on, and his face turned to her back. Had there been any *malitia* in him, Jean would not have been in that posture : had Nash the dragoon been in bed with her, she would not have turned her back upon his *malitia*.

GARDENSTON. A marriage with Nash may be presumed : there is better evidence of that. In the course of the proof, we have much of low life and low love. Jean is a very fit wife for the dragoon : she has two husbands, one of them indeed a boy, and I suppose that he has had two or three wives since he parted with Jean. The maxim *malitia supplet ætatem*, is adopted by Lord