

making forthcoming the goods demanded upon an antecedent claim of debt, but will not touch the person. The principal object is to affect the man, not his goods.

PRESIDENT. I will only touch upon what I have heard from the bench, as I did not hear the bar. There is no such thing as a declarator without a party contradictor. If any inconveniency here to the pursuer, it is from her own fault in not marrying regularly. She may prosecute her action in Ireland, where the defender resides. In this she will have every assistance from the judges, in this country, for bringing forward her evidence. As to the parallel between moveables and an immovable estate, *arrestum jurisdictionis fundandæ causa* gives only an attachment with respect to the goods: the proprietor of the goods still remains an alien. An alien cannot succeed to an estate in this country: If he purchases an estate, he becomes an absolute citizen of Scotland. But attachment of moveables makes him not a citizen of Scotland.

On the 1st December 1772, "The Lords remitted to the commissaries, with this instruction, that they sustain the objection of declinature. But, in respect of the new objection, stated by the pursuer, that the defender was within Scotland at the time of executing the summons, they also remitted that point to the commissaries to be tried by them."

*Reporter*, Kennet; and afterwards hearing in presence.

*Act.* G. Wallace, Sir John Dalrymple, A. Lockhart.

*Alt.* J. Boswell, Ilay Campbell, J. Montgomery.

*Diss.* Auchinleck, Coalston.

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1772. December 1. ALEXANDER M'KENZIE *against* DEWAR and DUNCAN  
M'FARLANE.

#### HERITABLE AND MOVEABLE.

A process instituted, *stante matrimonio*, upon a bond bearing interest that was due to a woman at the time of her marriage, has not the effect to render the sum moveable *quoad* the husband, and affectable by his creditors-arresters.

[*Fac. Coll. VI. 90; Dict. 5778.*]

PITFOUR. The raising summons, and even obtaining decret, will not vary the nature of the debt. There are some old decisions which may seem to speak a different language. They proceed upon presumptions of intention, which are exceedingly arbitrary. I never liked those decisions.

KAIMES. Intention is the prevailing rule, but is not to be extended beyond what is necessary.

COALSTON. When a woman pursues for payment of a debt heritably se-

cured, she may either intend to re-employ the money, or to gift it to her husband. *Donatio non presumitur* ; therefore she must be presumed to have meant to re-employ it.

GARDENSTON. The strongest evidence of intention would not do: an assignation to the husband would have been infinitely stronger than the action, and yet the assignation would have been revocable as long as the money remained unpaid.

PRESIDENT. In so far as the wife uplifted, and did not employ, the money, if extant, would be moveable; not so to what has not been uplifted.

On the 1st December, 1772, the Lords preferred the wife; altering Lord Alva's interlocutor.

*Act.* Ilay Campbell. *Alt.* A. Bruce.

1772. December 4. JUSTICES OF PEACE OF CLACKMANNANSHIRE *against* The  
MAGISTRATES OF STIRLING and THOMAS CAMPBELL.

#### HIGHWAY—JURISDICTION.

Omission of the requisites in Act 1669, c. 16, previous to an order of the Justices of the Peace, for the change of the road, fatal to the proceedings.

[*Faculty Collection*, VI. 101; *Dictionary*, 7619.]

HAILES. I have no doubt of the upright and public spirit of the Justices; but their public spirit must be limited by law. There is nothing more apt to check public spirit than statutes, yet this can only be remedied by more statutes. I think that the present road, properly widened and repaired, may be just as good as the rest of the roads of the country. I also doubt how far the Justices can turn about a road more than 200 yards because it thereby becomes shorter to some of the inhabitants of the country. This is no reason, for that it must always happen from the nature of the thing.

GARDENSTON. The Act, 1669, ought to be liberally interpreted. If the old road *cannot well be continued*, there is a discretionary power of alteration. I doubt, however, of the application of the maxim to this case. The suspender offers ground sufficient to make the old road wide and safe: the new road cuts his property unmercifully in pieces.

PRESIDENT. I do not dispute the powers of the Justices, but here they have been too precipitate. The law requires that, first of all, the damage should be ascertained, instead of leaving this to be adjusted after the damage is done.

JUSTICE-CLERK. Public utility is not apparent in this case: As the Justices may turn about the road *a fortiori*, they may widen it. They have turned the road without attempting to widen it.

COALSTON. The powers of Justices of the Peace are liberal, but not arbi-