

(Ex debito naturali.)

1789. February 9.

BARBERIE DE LA MOTTE, against ALEXANDER JARDINE.

ALEXANDER JARDINE brought a process of divorce in the Commissary court against Barberie de la Motte, his wife, on the head of adultery, and obtained a decret which he immediately extracted.

After this, an action was brought by Mrs de la Motte in the Court of Session, for setting aside this decret, as obtained upon false evidence. The Lord Ordinary dismissed this action; but a reclaiming petition was preferred, and along with it a separate petition, praying for an interim aliment, and for a certain sum in order to defray the expence of the action. In bar of this demand, it was

Pleaded: While a woman is *vestita viro*, her husband, as possessed of the whole funds belonging to both, is obliged, besides giving her a suitable aliment, to advance such sums as may be necessary for maintaining any litigation in which she may be interested. But the reason of this obligation ceases after the marriage has been dissolved by the judgment of a competent court; which, after it is final, must be held *pro re judicata*, not only until it is brought under challenge, but until it has been set aside as erroneous and unjust. Otherwise, indeed, it would be in the power of every woman, after she had been divorced for conjugal infidelity, not only to insure to herself a maintenance suitable to her husband's rank and fortune, as long as she was able to protract the litigation, first in this Court, and afterwards in the House of Lords, but also to throw upon him the whole expence attending those proceedings.

Answered: Until it has been determined, whether a marriage is dissolved or not, it cannot be said that such a separation has taken place as should deprive either of the parties of their legal rights. It surely cannot make any difference, whether the question is still depending in the Commissary Court, or in the Court of Session; or whether the judgment of the inferior court has been brought under review by a bill of advocation, or afterwards in the shape of a process of reduction. It would be singular, if, in reviewing a sentence of the Commissaries, the Judges in the Court of Session should find themselves precluded from doing what the Commissaries themselves, on reviewing their own judgments, always do: And it would be no less unjust; a wife having occasion to complain of proceedings held against her, being almost equally injured, when the means of maintaining a litigation are withheld, as when an unjust judgement is pronounced. Act 1609, c. 6.; Balfour's Practics, p. 95. (See HUSBAND and WIFE. See p. 435. of this Dictionary.

After affirming the judgment of the Lord Ordinary, dismissing the action brought by Mrs de la Motte,

THE LORDS found, 'That the pursuer was not entitled to any aliment, or to the expences incurred in the action at her instance.'

No 80.

A wife divorced, brought a reduction of the decree. She was found entitled to the expence of carrying on the reduction, and to aliment during the dependence of it; and this decreed after the reasons of reduction had been repelled.

(Ex debito naturali.)

No 80. But a second reclaiming petition being preferred, which was followed with answers, the LORDS found, 'That the pursuer was entitled to an aliment, and to the expence of the process of reduction, till the date of the final interlocutor, repelling the reasons of reduction.'

Mr Jardine reclaimed; but his petition, after being advised with answers, was refused.

Lord Ordinary, *Hales.* Aft. *Wight, Stuart.* Aft. *Lord Advocate, Blair.*
Clerk, *Menzies.*

Fol. Dic. v. 3. p. 25. Fac. Col. No 60. p. 109.

Craigie.

1741. February. CAMPBELL against His FATHER.

No 81.

Foris-familia-
tion does not
preclude the
claim for ali-
ment.

THE LORDS found that *foris-familia*tion did not exclude a claim of aliment *super jure natura.*

Fol. Dic. v. 3. p. 22. Kilkerran, (ALIMENT.) No 5. p. 22.

1710. July 20.

MR ALEXANDER BROWN of Thornydikes the Elder, against GEORGE BROWN his Eldest, and ALEXANDER BROWN his Second Son.

No 82.

Children
bound to ali-
ment their
parents.

OLD Thornydikes having, after providing George, his eldest son, in his contract of marriage, to L. 100 Sterling yearly during his own lifetime, and to the fee of the lands of Thornydikes, disposed the lands of Bassindean to Alexander his second son, in his contract of marriage; whereby the old father, denuded of all, and reduced to extreme want and misery through his exuberant fondness for his children, was necessitated to pursue a process of aliment against them: Founding his claim upon the law of nature and nations, That obligeth children to maintain their indigent parents, though they got nothing from them; and much more obligeth the defenders to allow *beneficium competentiae* to their aged father, who divested himself of his all in their favours, *L. 5. §. 2. ff. de agnoscendis et alendis liberis et parentibus, L. 1. eodem.*

The defenders did not much controvert the pursuer's title to an aliment, but each of them endeavoured to free himself of the burden, by throwing it over upon the other.

Alleged for the eldest son: He could be liable to no part of his father's aliment, till the lands of Bassindean, disposed to the second son, be first discussed; because, when the eldest son got the lands of Thornydikes disposed to him, his fa-