

## No 366.

an action at her instance for a separation *a mensa et thoro*, on account of bad usage, and for a larger annuity, although she had for some time accepted the one fixed by the voluntary contract, which was equal to the jointure provided to her in a post-nuptial contract of marriage.

In consequence of a subsequent disagreement, they again parted. The former contract of separation was, in March 1796, ratified by the wife, with consent of one of her nearest relations, and she thereafter accepted of two different payments, of L. 15 and L. 20 of the annuity thereby provided to her.

Afterwards, in June 1797, she brought an action against her husband, before the Commissaries of Edinburgh, concluding for a separation *a mensa et thoro*, on account of harsh usage, and likewise for an aliment of L. 200 yearly.

Mr Macculloch contended, That the action was barred by the voluntary contract of separation, and postnuptial contract of marriage. By the former, he observed, she had renounced every claim against him, in consideration of her annuity; and it was a deed, binding on both parties, especially as she alleged bad usage, which was a legal ground for a separation; Erskine, b. 1. tit. 6. § 30. And as her jointure, after his death, was fixed at L. 30, it is unreasonable that a larger allowance should be given her during his life.

The Commissaries repelled the defences, 'in so far as founded upon alleged private transactions between the parties; and before further answer, allowed the pursuer a proof of the facts stated in her libel.'

THE LORD ORDINARY on the bills refused a bill of advocacy for Mr Macculloch, complaining of this judgment; and a reclaiming petition against his Lordship's interlocutor was unanimously refused, without answers.

Lord Ordinary, *Craig*.

For the Petitioner, *Montgomery*.

R. D.

Fac. Col. No 44. p. 103.

## S E C T. XII.

## Contract of Separation upon a sufficient cause.

## No 367.

Process sustained at the instance of a wife against her husband, upon a promise to pay her a yearly aliment, he having maltreated her, and cohabited with another woman.

1626. December 21. LADY FOULIS against Her HUSBAND.

IN an action pursued at the instance of the Lady Foulis against her husband, for payment of a yearly sum of money to her, for her sustentation, conform to his promise made thereupon, referred to his oath, this action at the wife's instance against her husband, was sustained, albeit there was no action of divorcement depending betwixt them; and albeit it was *alleged* by the defender, That the wife, *stante matrimonio*, could not be heard to pursue her own husband, who in all pursuits ought to authorise her; which allegiance was repelled in respect of the summons and action, which reported that he had diverted from her, and that he had married, and did cohabit with another wife, and that he being de-

was rebel, being charged to compare before the Secret Council, for insolencies committed against her, and not comparing to answer thereto, in end by the mediation of his friends she purchased protection to him, to come and treat for the settling controversies betwixt them, at which time the said promise was made to a mediate person, to her use, and for her sustentation, and the bairn procreated betwixt them; and also the same was made to herself, for the same cause: Which case being considered in these circumstances, and being a cause alimentary, and to the pursuer, who was a stranger, it was sustained by the Lords, and the allegiance was repelled.

Act. Russel.

Alt. Lantie.

Clerk, Gibson.

Fol. Dic. v. i. p. 413. Durie, p. 251.

No 367.

1734. November 29. HOME against LADY ECCLES.

THOUGH a contract *bona gratia* is ever revocable, a contract of separation, founded upon articles of maltreatment, sufficient for a legal separation, is not revocable; and therefore a separate aliment was sustained, though above a reasonable aliment, such as a Judge would have determined. See APPENDIX.

Fol. Dic. v. i. p. 413.

No 368.

## DIVISION XI.

Marriage Dissolving within the Year, all things are  
Restored *hinc inde*.

## S E C T. I.

Terce.—Second Marriage.—Mourning.—Effect as to Postnuptial  
Contracts.—Effect as to Liferent Provisions.

1600. January.

MAXWELL against GARLIES.

IN an action pursued by my Lady Maxwell, relief of the Laird of Garlies, against the Laird of Garlies and his curators, for the profit of the conjunct-fee

No 369.