

millscroft has only two, Weir and Davidson, wholly open to great exceptions; and have taken a vast liberty to make him perfectly rational that day; which neither his physicians nor any other present could see but themselves.

Gilmillscroft ALLEGED,—He would have proven much more, had not the Lords confined him to the man's condition the day he signed it, with the day before and the day after. Whereas, if he had been allowed to adduce witnesses who saw him from the commencement of his sickness, they would have told that he called for a former disposition he had given him, but it was abstracted and put out of the way; at which he declared himself very angry.

The Lords having balanced the testimonies, found judgment as much proven as was sufficient to sustain the disposition; and assoilyied Gilmillscroft from the reduction of it, as if he had been insensible at the time.

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*February 29.*—Campbell of Gairclach gave in his protest against James Farquhar of Gilmillscroft, and the interlocutor *supra*, 16th January 1712.

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1711 and 1712. JEAN LESSLY, Lady Innernytie, and BLAIRHALL, *against* ANDREW NAIRN, her Husband.

1711. *February 27.*—MISTRESS Jean Lessly, Lady Innernytie, and Blairhall, pursue Captain Andrew Nairn, Dunsinnan's brother, and her husband; libelling his many rude maltreatments and barbarous cruelty to her, whereby she was forced to withdraw; and concluding an aliment to be modified to her out of her own jointures he possessed *jure mariti* by her.

ALLEGED,—*Omnis libellus generalis est irrelevans et ineptus*; maltreatment is not sufficient to infer the conclusion, unless the acts of severity were condescended on.

ANSWERED,—This was forborne from a regard both to his honour and her own; and she would condescend *in termino* when she came to lead the probation and interrogate her witnesses.

The Lords found she must give in a special condescendence of the deeds she complains of, that he might have liberty to object.

Whereupon she having made a particular condescendence, she was allowed to prove the same, and he to adduce what alleviation he could for extenuating or exculpating himself. Then he objected, That no acts of maltreatment could be admitted to her probation but what were subsequent to the 15th of May last; because, by a declaration under her hand, and ratified before the baron-court, she acknowledged that she had given him grounds of just offence, and that she would live more quietly with him in time coming; and that she should intent no process against him that did either touch his person, estate, or reputation. So that being a full amnesty, pardon, and reconciliation, no preceding injuries can be now tabled or insisted on against so final a settlement betwixt them.

ANSWERED,—In such expiscations all must come to the trial; and preceding severities to that paper must be conjoined, to give the Lords a full view of the *sevitia* and intolerable cruelty, *ut juncta juvent*. *2do*, By his breaking the con-

ditions he has clearly forfeited any benefit by it ; for it expressly bears,—He always being dutiful, and providing her and the family in all necessaries. Wherein he has grossly failed ; though it was to be done out of her own.

REPLIED,—It is the interest of all states and well regulated governments, that the citizens live in amity together, especially married folk ; *interest reipublicæ matrimonia concordantia non rumpi* ; and where faults have been on both sides, it is better to throw a mantle over them, than to rip up sores to the discredit of both ; and therefore legislators have wisely introduced several ways to sopite such unnatural differences. Thus *dissimulatione tolluntur*. L. 11, sect. 1 *D. de Injur.* says well, *Si quis injuriam dereliquerit, id est passus statim ad animum non revocaverit, postea ex pœnitentia remissam injuriam recolare non potest. Yea, nuda voluntate et per anni lapsum, extinguitur.* So that if it be once passed from *vel dissimulatione, transactione, nudæ voluntatis declaratione, vel temporis silentio*, it cannot afterwards be renewed nor insisted in. Such rancour and ruptures are not to be kept up, and therefore no acts preceding the 15th of May can enter into this process.

The Lords thought all his miscarriages might be proven, notwithstanding of that agreement, which lasted so short while, and which it seems he had violated himself ; and that, by all the law in the world, she was to be maintained with a part of her own.

Then she craved a modification to be given her *medio tempore*, during the dependence of this process of aliment, for present maintenance and subsistence for her and her servants, till she led her probation ; and to defray the expense of the process.

ALLEGED,—There could be none, since he was willing to cohabit and take her home. But she answered, she could trust his kindness no more, having such sad experience of it, and no security ; so law could never oblige her, after such usage, to enter his doors again.

The Lords modified two thousand merks to be paid her in the *interim*. And it being started whether execution should be against him or the tenants of the liferent-lands, they ordained it to pass against the husband : and allowed a conjunct probation of the rental, and the debts affecting the same.

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1712. *January 19.*—UPON mistakes, they having separated, she pursues for an aliment out of her own jointure-lands, in respect she could not cohabit through ill treatment. And a probation being adduced, and advised this day, it was ALLEGED,—That his scurrilous railing language against her was more than compensated by the like or worse epithets she gave him. As for her want of clothes, or suitable provisions for maintaining herself and servants, it was time for her to complain when she proved her requiring and his denial. *3tio*, Most of the facts condescended on were prior to May 1710, at which time they entered into an agreement ; and she, by a declaration under her hand, had passed from all preceding miscarriages.

ANSWERED,—Her declaration was conditional, providing he carried dutifully to her, and provided her conform to her quality in time coming ; but by the probation it appeared he had failed even since that time. Besides, it was of the nature of a donation *inter virum et uxorem*, and so revocable, in so far as extended to her returning back on her jointure. And if a man prove such a viper and barbarian to the wife of his bosom, it is but just he forfeit his *jus mariti*.

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The lady, in the vacance, had led some witnesses before the Bailies of Edinburgh, on pretence they were removing out of the kingdom, and would not stay till the session sat down : and who loaded Captain Nairn with much cruelty and insolence to her. He had likewise taken a precognition before the justices of peace, wherein some persons of no good fame had deponed about the Lady Innernytie's consulting with them for poisoning her husband. But they being taken by no warrant of the Lords, but brought in ultroneously, they were both laid aside, and nothing advised but the depositions taken before themselves. Where the difficulty occurred, that there was a list of debts, with their instructions, amounting to £400 or £500 sterling, given in, and by an aliment to her they would be visibly lesed ; for they run a double hazard both of his death and hers ; and in both events they lost their debts ; and so much the rather were the creditors to be considered in the modification, that it was alleged several of the debts were originally hers, and only corroborated by him ; and so she was more obliged to see them paid by the ties both of law and honour.

When the Lords came to state what should be the quota of her aliment, during their living apart, a variance arose on the rental ; the Captain making it only £1700 free rents, and the lady more than thirty chalders of victual. Some proposed to halve it betwixt them ; others thought twelve chalders of victual sufficient to her, and even that to be subject to a proportion of cess ; but, in regard it was not clear if any of the debts were my Lady's, contracted in her viduity, nor was the rental fully agreed on, therefore they remitted it to an Ordinary to adjust these matters of fact, before they proceeded to modify a quota.

Among his other points of maltreatment, one was his keeping misses in the house. It was started if this fell directly under that category, seeing bad usage relates more to beating, &c. Yet it was thought to be a maltreatment of the worst kind ; and is one of the fatal consequences of unequal marriages betwixt a young man and an old woman, which are seldom attended with tranquillity or a blessing,

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1712. *January 31.* ROBERT COLVIL, Minister at Glenluce, *against* WILLIAM BIGGAR of WOOLMET.

WILLIAM Biggar of Woolmet being debtor to sundry persons in considerable sums, and, amongst the rest, to Mr Robert Colvil, minister at Glenluce, he convenes his creditors, and, with their consent, grants an absolute disposition of his estate in their favours ; who pitch on five of themselves to be trustees, who are infest for the behoof of the whole, and empowered to sell the lands, if not paid before Whitsunday 1708 ; and in the mean time to apply the rents for paying their annualrents *primo loco*, and their principal sums so far as it would go : and upon this they gave him a supersedere of all diligence, both personal and real. Mr Colvil, wanting three or four years' annualrent, and thinking the trustees minded themselves more than they did him, raises an adjudication.

Against which Woolmet OBJECTED,—The craving this adjudication was more humour than interest ; for he had very fairly denuded himself of his estate, both real and casual, both to prevent the creditors casting out needless expenses, in