

1769.

 ARTHUR
 v.
 GOURLAY.

balsamic in relieving my breast, that I am determined to return thither soon. I only wait the favourable occasion.

This letter will be delivered to you by Monsieur du Bois, my intimate friend, who goes to settle at London to paint in miniature. If you can assist him to find employment, you will do me, Sir, a sensible pleasure.

To Colonel Stewart at London.

JAMES ARTHUR,	-	-	-	<i>Appellant;</i>
JANET GOURLAY,	-	-	-	<i>Respondent.</i>

House of Lords, 9th March, 1769.

SEPARATE ALIMENT.—Where the husband offers to aliment the wife in his own house, but takes lodgings only for her, and does not eat, sleep, or stay in the same house with her. Held, that this is not adherence sufficient to exempt him from liability in a separate alimony.

Action of aliment raised by the wife in the following circumstances:—She had been originally the servant of the appellant, a surgeon, residing at the time in Glasgow; and on their connection coming to the knowledge of the public by her pregnancy, they were privately married by mutual acknowledgment and marriage lines. He left the country immediately thereafter, joined the navy, and having acquired a fortune in India, he returned to Scotland, after ten years absence. On his return, he did not wish to renew the connection; whereupon a declarator of marriage, legitimacy, and adherence, was raised by the respondent, and defended by the appellant, he denying the marriage, but the respondent finally obtained decree in that action, declaring her marriage. The present action was raised for aliment, since the 1st day of July 1757, when he left the country, amounting to £360, and £40 per annum for future aliment. She averred in the summons, that the defender (appellant) refused to adhere to the pursuer's (respondent's) fellowship and society, and discharge the duties incumbent on him as her husband, and that the future yearly aliment was to be payable to her aye and until he adhere to the respondent, and discharge all the duties incumbent upon him as her husband, and likewise the sum of £20, for the yearly maintenance,

1769.

ARTHUR
v.
GOURLAY.

education, and upbringing of her child. In defence to this action, it was stated, that the appellant (defender) had refused to adhere; on the contrary, the pursuer's conduct was vexatious, and *contra bonos mores* in this respect, for it was she who would not adhere to his society, as was evidenced and proved by a decree of adherence he had obtained in an action of adherence against her.

That, apart altogether from the extravagant aliment claimed, he had never refused to aliment her in his own house, and that she was not entitled to be alimented any other where. To this it was answered, that the action of adherence raised by him, was a mere cloak for other designs,—that both before, and while it was going on, she had repeatedly offered to come and live with him, on condition of his taking up house in a regular way, for her and the family. That, in point of fact, she had, along with her child, left her father's house in Stirling, and come to Edinburgh. That, instead of taking up house, the appellant took a room for her and her daughter, a considerable distance from his own lodging, where, instead of living in her society, he lived by himself. That the reception on this occasion was cold,—that when she offered to salute him, he would not allow it. That during all this time she staid in Edinburgh, he neither eat nor slept with her. That he sent away her child from her, and treated her with severity, and threatened to make her life miserable, and to leave for London, and thence for the East Indies; and therefore that, in these circumstances, she was not bound to adhere while such maltreatment was exercised towards her. The Commissaries, of this date, pronounced this interlocutor,—“ In respect of the defender's
“ (appellant's) admission, that he did neither sleep, eat, nor
“ lodge in the same house with the pursuer, during their
“ joint residence in Edinburgh, in the month of February
“ last, which continued three or four weeks; finds the de-
“ fender has not adhered to, or cohabited with the pursuer
“ in terms of law; and therefore finds the pursuer entitled
“ to a separate aliment; and, in order to ascertain the
“ amount thereof, appoints the defender to appear in Court,
“ against Wednesday, to be examined on the extent of the
“ funds belonging to him, in terms of the pursuer's refer-
“ ence.”—To this judgment the Commissary adhered, after a reclaiming petition. The appellant thereupon brought the case into the Court of Session by bill of advocacy, which

1769.

was refused by the Lord Ordinary. A reclaiming petition was then presented.

ARTHUR

v.

GOURLAY.

Nov. 15, 1768.

The Lords of Session, of this date, “ adhered to the Lord Ordinary’s interlocutor, and refused the desire of the “ petition.”

Against these interlocutors the present appeal was brought.

Pleaded for the Appellant.—The interlocutor of the Commissary is not founded on ill treatment on the part of the husband; for of this there is no proof in the cause, and the appellant has expressly denied every allegation of that sort, and required a proof to be allowed. It is not founded on wilful desertion, for he has obtained in the same Court a decree of adherence against his wife. All that forms the foundation of the interlocutor is, that the appellant has not cohabited with her, because he did not eat, sleep, nor lodge in the same house with her, during the space of three weeks. This cannot in law give her a right to claim a separate aliment; nor did it follow in reasoning, or common sense, that a husband has refused to cohabit with his wife, because, for three weeks, he has neither eat, slept, nor lodged in the same house with her. The interlocutor of the Commissaries is objectionable on another ground. It does not specify definitely how long the aliment is to be given,—whether it is to endure until he return to cohabit with his wife, or otherwise.—It amounts, therefore, to a decree of perpetual separation.

Pleaded for the Respondent.—A wife is by law entitled to separate maintenance, if her husband ceases to cohabit with her, or, cohabiting with her, maltreats her. If he voluntarily adheres, *bona fide*, with a serious intention of living with his wife, and enjoying the comforts of the married state, there is no occasion and no room for separate aliment; but if he declines to adhere, or if it appear that he has no serious intention of living with his wife, and enjoying her society; but, on the contrary, shuns and dislikes it, she is entitled to aliment for her own and her child’s maintenance. There is no pretext, in the present case, for holding that he had ever any intention of adhering or cohabiting with his wife: On the contrary, the whole facts of the case, as admitted, are sufficient of themselves, without any further proof, to demonstrate a contrary intention. His aversion to her society. His refusal to salute her. His taking away her child from her. His sending her victuals in Edinburgh by a common

street porter. His refusal to perform his matrimonial duties at bed and board,—were sufficient ill-usage and maltreatment, which clearly entitled her to a separate aliment.

1770.

DOUGLASS

v.

DALRYMPLE,

&c.

After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and that the interlocutors therein complained of be affirmed; and it is further ordered, that the appellant do pay to the respondent £200 costs in respect of the said appeal.”

For Appellant, *Ja. Montgomery, Al. Wedderburn.*

For Respondent, *C. Yorke, H. Dalrymple, Hay Campbell.*

Not reported in Court of Session.

SIR JOHN DOUGLASS, Bart.,	-	-	<i>Appellant;</i>
HUGH DALRYMPLE, &c.	-	-	<i>Respondents.</i>

House of Lords, 26th Jan. 1770.

ABSOLUTE DISPOSITION—TRUST.—A party disposed certain lands to his agent, in order, as he stated, to qualify him to vote in the county election, but held no written obligation under his hand to redispone. Held that the absolute disposition, together with the law agent's accounts, amounting to £1400 due him, foreclosed all idea of trust, unless this were proved by writing under the trustee's hand, in terms of the act 1696.

Action of reduction was brought by the appellant, to set aside a conveyance; or absolute disposition, granted by him in favour of Robert Dalrymple, on the ground, that it was merely granted in trust, and that he ought to be ordained to reconvey the same to him. The allegation set forth in the summons was, that having stood as a candidate for the county of Dumfries, he granted this conveyance to Dalrymple, who was his own agent, for the mere purpose of qualifying him to vote at the election,—that the price mentioned therein, £920, was never paid to him, and would have been a price quite inadequate to the value of the lands. To this the defence was stated, that the disposition was not granted in trust, for the purpose specified, but in payment of his business accounts.—That the defender, Dalrymple, had acted