

1703. *December 14.* MACKTELLINA WALRAVE DE NIMMEGUEN *against* SIR T. LIVINGSTON, Viscount of Teviot.

MACKTELLINA Walrave de Nimmeguen pursues Sir Thomas Livingston, Viscount of Teviot, her husband, for an aliment, craving £500 sterling for by-gones since he withdrew from her, to enable her to pay the debts she had been necessarily forced to contract, and £400 sterling for a yearly aliment and subsistence in time coming.

ALLEGED for the Viscount,—Aliment cannot be due *de præterito*; for that is past, and she is already alimented, and it must be presumed out of her husband's means, (though he at present nowise acknowledges the marriage;) and it is of a most dangerous consequence for a wife to take on debt at her pleasure, so as to make her husband liable. And if she have any creditors, if she be a married woman, then no action can lie against her; let them pursue him, and he will give them an answer. *2do*, No aliment can be claimed *pro futuro*; because a wife must depend on her husband's allowance and discretion; and such a preparative would embolden wives to divert and make separation, and then bring in a claim of debt against her husband; unless the wife could subsume, on cruelty and maltreatment, that she could not safely cohabit with her husband; whereas, here, any want she fell under was due to her own restless unaccountable humour, whereby she refused to settle at Rippon, which he had appointed for her, but would vague and wander from one place to another, contrary to his express commands; which put him not only to serve inhibition against her, according to the law of Scotland, but likewise to raise a process of jactitation in the English forms, being a declarator of immunity and freedom of being married to her, and concluding a prohibition of her asserting herself to be his lawful wife, which was pursued before the Bishop of London's official.

ANSWERED,---That cohabitation and alimenting are natural duties incumbent on husbands to their wives; and though one already alimented is not to be alimented over again, yet the husband must indemnify her, in so far as she has contracted debt to supply her necessities, and must liberate and exoner her of that expense; and not only common sense and honesty, but even the principles of honour, conscience, and law, oblige a husband to this. And cruelty must not be restricted to beating: there may be many other sorts of *sævitia*, as to question her marriage when she is in the natural possession of her matrimonial state, fully acknowledged by his factories and letters; is it not maltreatment, if the husband's affection be drawn away by criminal rivals. And the Lords did modify a considerable sum for by-gones to the *Duchess of Gordon* against *the Duke*, and likewise a yearly aliment in time coming; *supra*, 8th June 1697: and Dury observes the like remarkable case, 23d July 1629, *Lady Buchanan* against *the Laird*. And foreign lawyers are clear, where a woman is controverted to be a lawful wife, she must, *medio tempore*, during the dependence and trial, be alimented, except in the case of adultery: So Pontanus and Colerus, in their several tractats, *De Alimentis*, that though *maritus diffiteatur eam esse suam uxorem, omnino tamen alenda est donec de veritate conjugii constiterit, et expensas solvere obstringetur quas interim dum a marito abfuit fecit*; and they assign several grounds on which she may warrantably withdraw, viz. *si maritus domi concubinam alat, si crebra sævitia utatur, &c.*

The Lords thought a wife was to be regulated by her husband's orders where to live, and he was not always bound to take her alongst with him ; as appears in ambassadors, merchants, skippers, soldiers, whose wives staid commonly at home, sufficient maintenance being left and allowed them ; and that they ought not to follow them without their consent ; but, in respect of the special circumstances of this case, they recommended to some of their number to endeavour to cause pay her bygone debts, and to settle somewhat upon the lady yearly in time coming ; and to deal with the Viscount for that effect.

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1703. *December 15.* JOHN CALLANDER of CRAIGFORTH *against* GEORGE MOIR of LECKIE.

GEORGE Moir of Leckie, and John Callander of Craigforth, make a wager, by which Craigforth gives Leckie a bond for 500 merks, and Leckie gives him another bond for 100 guineas, in case Leckie shall not be lawfully married betwixt and Whitsunday 1696. Leckie marries Seton of Touch's daughter before that term ; but it is a clandestine private marriage, without proclamation of banns, and not by a Presbyterian minister of the present established church-government. Craigforth charges on the bond for the 100 guineas : Leckie suspends, that the condition did not exist, seeing he was married before the time prefixed in the bond, and so it is *ipso jure* null.

CALLANDER ANSWERED,—That the condition was, If he should be lawfully married ; which he could not subsume, being latent, without proclamation, and not by a minister authorised by the present established church-government ; and that he inserted the word *lawfully* into the bond, of purpose to prevent all cavilling, hallucination, and guessing, lest they should make a clandestine private marriage : and, to prove this, he offered to adduce the minister, and other instrumentary witnesses in the bond, to take off all ambiguity, and to clear the meaning of parties, as the Lords have often done *ad rimandam veritatem*, and to clear the import of doubtful clauses in writs : in *Clavage's case* against the *Lady Aldy*, in *December 1681* ; *Brown* against *Laurie*, in *February 1676*.

REPLIED,—*Lawfully* married relates not to the solemnity and form, but to the essence of the marriage ; now, it cannot be denied but in this sense his marriage is lawful, seeing his children will succeed, and his wife get her jointure ; and *lawful* here signifies only that he should marry none prohibited by law, or within degrees defended, as it is understood in the 15th Act of Parliament 1567, out of the 18th of *Leviticus*. And where writ is interposed, there is no room for witnesses, which were to make their frail memory judges in such cases ; which were of very dangerous consequence.

Some were for giving the money to the poor, but the plurality were for trying, before answer, what the parties meant by these words, "lawfully married," and to examine the comuners thereon ; for the Lords thought, though witnesses cannot be examined to take away writ, yet they may explain it where it is ambiguous and doubtful.

The word *orderly* married would have been more clear.

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