1770. *August* 10. PRESBYTERY of PAISLEY *against* DAVID ERSKINE.

PATRONAGE.

Jus Devolutum.

[*Dictionary*, 9966.]

JUSTICE-CLERK. I am for adhering, because this very matter was formerly agitated in the ecclesiastical court; and the presbytery itself, though now insisting on a *jus devolutum*, admitted the presentation to be regular. This admission cannot be retracted by means of the appeal to the synod.

HAILES. Most of the new objections made by the presbytery were made and repelled, in the case, *February* 1749, *Hay of Lawfield* against *the Presbytery of Dunse*. The statute, 1719, is abundantly strict; yet it contains no limitation or prescription. Now, it is certain that probationers do not the oaths upon obtaining a license to preach. It follows that his Majesty's advocate may imprison the whole presbytery of Paisley, and indeed the whole clergy of Scotland, for six months, upon the presbytery's own argument; and nothing can relieve them but an indemnity: so little do the pursuers advert to the ground on which they stand.

PITFOUR. The objection is founded on a misapprehension of the statute 1719,—" or before admitted ministers." This is a plain alternative, " terms above provided :" that is, in the terms of the alternative in the former clause. [This is a benevolent interpretation; but the words of the statute will not carry it through.]

COALSTON. The whole strain of the presbytery's argument is, to lay hold of detached words, neglecting the spirit of the law. Lord Blantyre is not a nonjuror, in terms of law. He is abroad, and cannot have an opportunity of qualifying. The law has not said that a patron, who does not qualify, shall not have the power of disponing. As to the other points, of the opinion already given.

AUCHINLECK. My doubt is as to the first point. A patron forfeits his right if he refuses or neglects to qualify. Can he go beyond seas, and present under this pretext, that he has no opportunity of qualifying beyond seas?

PRESIDENT. The meaning of the law is, that the patron must take the oaths. It was rash on the part of Lord Blantyre to give in a presentation when there was a disposition granted to Mr Erskine. However, it was withdrawn within the six months, and a regular presentation offered in its room. This will do.

KAIMES. Lord Blantyre is out of the kingdom. Had no access to take the oaths. We cannot forfeit him.

On the 10th August 1770, " The Lords adhered and assoilyied."

Act. A. Crosbie. *Alt.* D. Rae.

Reporter, Monboddo.

N.B. In this case Mr Crosbie objected that the presentation was not offered on the Sunday, though he had formerly argued on that supposition. But upon declining a proof, [from the dread of being found liable in past expenses, and perhaps future,] the Lords proceeded to advise the cause.

1770. *November* 14. MARY JAMIESON *against* ISOBELLA HOUSTON.

ALIMENT—HUSBAND AND WIFE.

The rents of a small subject, the property of a wife separated from her husband, found to be an alimentary provision to the wife, and not attachable by the husband's creditors.

[*Fac. Coll., V.* 128; *Dictionary,* 5898.]

GARDENSTON. I do not know any law which gives a wife preference to her husband's creditors, even for aliment. The nature of marriage is, that parties go together, for better for worse. If a woman makes a rash choice, she must suffer the consequences.

KAIMES. If a man turns low in his circumstances while he resides with his wife, she must suffer with him; but here he deserts her,—L.13 is all her sustenance. When the husband deserts, a claim for aliment arises; may not the wife, in such circumstances, retain?

COALSTON. A husband has a right of liferent, and a right of administration; and while he lives with his wife, the wife has no preferable right for aliment, even out of subjects originally her own. But here there was a separation: if by the fault of the husband, the wife may compete with creditors; if by her own fault, she may not.

MONBODDO. I agree with Lord Coalston upon the general principles; but would prefer the wife upon the specialties of the case, which imply a tacit agreement that the wife should be alimented out of her own funds.

KENNET. The husband resided in Scotland, and yet did not cohabit with his wife: this implies desertion.

PITFOUR. The wife was in possession of L.13 *per annum.* This was a small aliment which liquidates itself. There may be some difficulty in strict law; but there is evidence, *rebus ipsis et factis,* that the husband deserted his wife, and that she should be alimented out of her little subject.

HAILES. I doubt as to this: for it seems to take for granted just what ought to be proved. There is no presumption in the law, that a husband will desert his wife maliciously; and, therefore, it seems necessary that the cause of the separation be first of all inquired into.

ALEMORE. I see no preference that a wife has upon any particular subject falling under the *jus mariti.* In the circumstances in which she stood, she