

all concerned may complain from the beginning ; and, if they do not, they will be held as having acquiesced.

[It seems as good an answer to say, that it is at least a presumption, that the Court will repeat the judgment between A and B which it gave between B and C, if the cause is the same, and that no man in his judgment will try a question that he has almost a certainty of losing with costs.]

AUCHINLECK. Anciently, when valuations were introduced, it was not thought that in 1774 there was to be such a struggle about "who should pay most." This alteration in the disposition of men requires attention. If the decision in all cases was left to the Commissioners of Supply, there would be great injustice committed. They are not *kinless, rascally*, as was said of Oliver's judges. I therefore think we should go on as we have done formerly. The parties are able and willing to seek redress in the House of Peers. If they do so, I shall be well satisfied ; but I would rather wish to have a good Act of Parliament for cutting off those rascally votes.—[He added, in a half-whisper, "in which I myself am concerned."]

On the 10th March 1774, "the Lords sustained the jurisdiction of the Court, and also found it competent to the freeholders to make the objections."

Act. D. Rae, Ilay Campbell. *Alt.* H. Dundas, A. Lockhart. Hearing in presence.

1774. *March 11.* EMELIA FRASER *against* ALEXANDER ABERNETHY.

ALIMENT—HUSBAND AND WIFE.

Interim aliment allowed to a married woman pursuing a divorce.

MRS Abernethy insisted in an action of divorce against her husband for adultery. She applied to the Commissaries for an interim aliment ; they refused it : she presented a bill of advocation. Lord Pitfour, without hearing the other party, remitted to the Commissaries, with an instruction to give L.30 in name of interim aliment. Abernethy reclaimed, and pleaded that it is the practice of the Commissary Court to give a wife an interim aliment, when defender, because innocence is presumed, and for the same reason to refuse it when she is pursuer.

PITFOUR. I gave a speedy judgment here, to save time at this late hour of the Session. I perused the writings before the Commissaries, so that I was master of the argument. I considered that, if I erred, the party had an opportunity of reclaiming. The lady is a woman of an excellent character, Lord Strichen's niece, and, according to the report of the country, has met with very bad usage.

[This was, one way or other, the most extraordinary argument that I ever heard from the bench. Lord Pitfour ought to have reported the case.]

GARDENSTON. If the practice of the Commissary Court is as represented, it is high time to correct it.

AUCHINLECK. In the last cause before us, the man pleaded *remissio injuriæ*, because the woman had not left his house. Here the woman has left the man's house, and he will not aliment her. Thus, if she stays, the objection will be, You have forgiven me ; if she goes, she must starve.

HAILES. Innocence is presumed. This is a presumption of law ; but it is also a presumption of law that what one undertakes to prove, is true, in questions of relevancy. These are no more than unimportant axioms. The short conclusion on the case is this, A woman cannot be obliged to live with the man from whom she concludes to be divorced ever since a period already past. If she cannot live with him, she must either be alimented *extra familiam*, or no woman will have it in her power to obtain justice against her husband.

On the 11th March 1774, " the Lords refused the petition after having heard parties, and adhered to Lord Pitfour's interlocutor."

Act. H. Dundas. Alt. Al. Abercrombie.

1774. June 21. ROBERT STEPHEN *against* GENERAL ABERCROMBIE.

MEMBER OF PARLIAMENT.

[*Folio Dict.*, III. 411 ; *Dictionary*, 8676.]

HAILES. I am satisfied that the determination given in this case is not inconsistent with the determination given in the *Forfar* case. In the *Forfar* case the Court did not approve of the proceedings of the minority, but they saw that those proceedings had been ratified by a general meeting, and therefore they sustained them. Thus the present question is entire, and there is no judgment of the Court either one way or other. Yet I think that the proceedings of the minority may in general be supported. The Commissioners were ordered to proceed in the division. The majority would not, but the minority did ; so that all that we have is one division made according to the injunction of the Court. The majority ought to have proceeded to a division, if not on the Duke of Gordon's *data*, yet on their own *data* : instead of that they threw away their votes, and agreed to sist procedure ; which is just the reverse of what they were bound to do. They overshot themselves. I suppose that next time they will be more on their guard. It is said that the majority not only sisted procedure, but sustained objections, and that the minority ought to have considered the objections as sustained, and then proceeded accordingly, notwithstanding the sist. But how could the minority split the judgment : it was a judgment not tending to expedite matters, but to delay. Had the majority considered that the sustaining the objections was an effectual part of the judgment, they would have proceeded to act upon the footing of the objections being sustained ; that is, they would have divided upon their own *data*. Besides, what is the meaning of sustaining objections which do not appear from the minute. They would not divide the valuation of the parish of Ruthven,