

No 113.

nants, did publickly put him in the stocks; for which insolence and riot upon an apparitor and minister of justice, Dalswinton being cited before the sheriff, he procured an advocation to be passed and signed; whereupon Mr Alvis, as sheriff-depute, gave in a complaint to the Lords, representing the foresaid matter of fact, and how his sheriff-mair was insulted in the execution of his office, and that processes for vindicating their jurisdiction, and securing their servants, and punishing insults against them, belonged to the sheriff in the first instance, as the King's ancient lieutenant for securing the peace and tranquillity of the country, and that the Lords could advocate no more such causes to themselves, than they can judge in criminal actions; and though he might have proceeded notwithstanding of the advocation, as being impetrated by mistake, yet he had that regard to the Lords' authority, that he sisted procedure, till he applied to their Lordships to recal the advocation as surreptitious and unwarrantable. *Answered*, That the said pretended sheriff-officer came into his chamber, and thrust open the door in a very rude and uncivil manner, and could shew no warrant or commission; so he had no reason to look upon him otherwise than as a fellow come to affront him. And the advocation being now passed, whether right or wrong, could not be summarily recalled, but discussed *via ordinaria*, by calling for it at the minute book, and getting it enrolled; the suspensions and advocations being now very far advanced in the outer-house. THE LORDS found they were not judges competent to riots, batteries, and bloodwits in the first instance, but only when they came in before them by suspension or reduction; and therefore recalled the advocation as illegal and irregular; and the stop being thus removed, allowed the sheriff to go on, reserving always to Dalswinton his remedy by suspension, if he thought himself wronged.

Fol. Dic. v. 1. p. 496. Fountainhall, v. 2. p. 354.

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In a process for aliment at the instance of a woman against her alleged husband, the defender denied the marriage, and the pursuer offered to prove it. Though this was an incidental question, the Lords refused to sustain themselves judges; but stopped the

1710. December 29.

Mr JOHN INNES against ANNA CAMERON.

Mr JOHN INNES, son to Sir A. Innes of Coxtton, having conversed several years with Anna Cameron, as his wife, and begot two children on her, and she being with the third, he deserts her, and denies any marriage to have passed betwixt them. She being reduced to straits, before she pursues a declarator of adherence, she raises a summons of aliment against him *medio tempore* for L. 50 Sterling, for each year bygone and in time coming. *Alleged, imo*, This summons has been originally blank, and not designed for an aliment; because, by the act of sederunt in 1672, aliments are enumerated among the privileged summons to pass on six days, whereas this is upon 21 days warning, and so cannot have the benefit of a summary enrolling; and though it be a *libellus nominatus*, and well known in law, yet it is not so much as backed "a summons of aliment." *Answered*, She opposed her summons fairly libel-

led as alimentary, seen, returned, and enrolled; and if it be executed on more days than law requires, that is your advantage of having the larger *induciae*, and can never furnish you with an objection of nullity. The Lords repelled this first dilator. *2do, Alleged*, This was a preposterous process, for aliment pre-supposing marriage as a necessary consequence thereof, the marriage must be first cognosced and declared before the Commissaries of Edinburgh, as the sole privative judges *in prima instantia*, ere any process can be sustained for aliment; and the act 55th, 1573, prescribing the manner of prosecuting for adherence, does clearly suppose, that the marriage must be first proved before the Commissaries. And if it were otherwise, these impudent common prostitutes will catch improvident youths in their snares, and then pursue for aliments without instructing a marriage; which lewd practices ought to be discouraged; and the Commissaries' instructions, inserted in the books of sederunt in 1666, clear this point, that they are the judges competent to marriages, divorces, adherences, and bastardies; and thus aliment being only the effect, marriage, its cause, must first be proved to exist and have a being. *Answered*, She will instruct her marriage in due time, which, though irregular, by an Episcopal minister, and without proclamation, yet a precognition being taken by the minister and kirk-session of the Canongate, where she was questioned as a fornicator, witnesses were examined, who deponed they were present at the marriage; but all now needful is to instruct cohabitation by the space of three years, and they being reputed man and wife, which she offers to do; and such interim aliments have been often sustained, as in the case of Mrs Cook against Johnston of Corehead, No 113. p. 5905.; and Lyon *contra* Gordon, son to the parson of Rothimay, Div. 8. *h. t.*; and *l. 24. D. De ritu nupt.* says very charitably, "*In libera mulieris consuetudine non concubinatus sed nuptiae intelligendae sunt*;" and the 77th act of Parliament 1503, declares a woman shall be kenne'd to her terce, where she dies *in possessorio* as a wife, till the contrary be proved. THE LORDS likewise repelled this dilator, and found she ought to have an aliment, she proving cohabitation, and their being held and reputed man and wife; and, in order to state the *quota* of the modification, allowed her to prove the value of his fortune and estate.

N. B. Lord Fountainhall has observed, that, on the 13th February 1711, an appeal was given in by Anna Cameron, because the Lords had altered their interlocutor, and stopped her process of aliment till she cognosced and instructed her marriage before the Commissaries of Edinburgh, as the proper judges thereto.

Fol. Dic. v. 1. p. 496. Fountainhall, v. 2. p. 616.

* * * Forbes reports this case.

1711. *January 25.*—IN a process of aliment at the instance of Anna Cameron against Mr John Innes, as being held and reputed her husband, the Lords stop-

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process until
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No 114. ped the process of aliment till the marriage betwixt them be proved before the Commissaries of Edinburgh: Albeit it was *alleged* for the pursuer, That where a consequent of marriage is concluded in a summons, and the marriage denied, the Lords are in use to allow such a proof of the marriage as the nature of the things admit of, without any previous constitution or prejudicial process before the Commissaries of Edinburgh; as in declarators of bastardy, or *ultimus hæres*, or in a pursuit for a terce; and consequently in this action of aliment, where the pursuer's marriage is denied by the defender, the Lords should allow it to be proved even *in prima instantia*, though the question was never tabled before the Commissaries: For albeit a direct declarator of marriage or adherence is more proper before the Commissaries, the Lords are most competent to judge in this pursuit, whereof the conclusion is a civil interest or effect arising from marriage, and to determine the proof of marriage, in so far as necessary to support either defence or reply: In respect it was *answered* for the defender, That the Commissaries of Edinburgh being established judges competent to cognosce marriage in the first instance, though liable in subordination, to be regulated by instructions from the Lords; the pursuer's libel which imports marriage to be proved or inferred from qualifications, must be remitted to the Commissaries, proper judges in the first instance of marriage, which is the foundation of the libel, and all the consequences thereof: *2do, Non sequitur*, that because the pursuer of a bastardy, or *ultimus hæres*, (who needs not to libel marriage) is not put to prove it in a prejudicial process before the Commissaries, therefore such a previous trial is not necessary to the pursuer of the present aliment: For bastardy, &c. is not (as aliment) the effect or consequence of the marriage; but on the contrary, marriage excludes the libel of bastardy, &c.: And when marriage is admitted to be proved before the Lords, by way of defence for excluding bastardy, that defence respects only held and reputed married *de præterito*, which proof would not infer an obligation upon the parties to adhere, in order to which an *individua vitæ consuetudo* must be tried by the *judices Christianitatis*: Nor is there any contingency betwixt this, and the process of a relict for her terce, whose cohabitation with the defunct till his death without being questioned, entitles her to a terce, act 77. Parl. 6. James IV. without further proof of marriage; whereas, the pursuer's marriage is here denied by the defender in his own lifetime, and requires to be positively proved before the Commissaries, in order to aliment her.

Forbes, p. 487.

No 115.
The Lords
are not judges
of perambulations and
molestations

1711. December 4.

The MARQUIS of Annandale *against* Sir PATRICK MAXWELL.

THE Marquis of Annandale having some lands lying contiguous to Sir Patrick Maxwell of Springkell's lands, the marches whereof were debateable and