No 10.

Pleaded, in a reclaiming petition, The proof ought not to be allowed, becaufe nociny is only where the hufband expofes his wife for gain. 2*do*, It was not alleged he expofed her to any of the perfons with whom fhe committed the adulteries libelled, or which he alleged were proven. And 3*tio*, The acts condefcended on, if true, appeared to have been done out of indifcretion, and the invitations made only in jeft.

Anfwered, The man who proftitutes his wife, is unworthy of the vindication of the law, whether he do it from gain, or from any other motive; and this is the opinion of Sir George Mackenzie, title Adultery; and was found, February 1692, Lauder againft his Wife;* and he who once does this, and thereby vitiates her mind, ought to be repelled from getting free of her ever after.

The practices condefcended on could be intended for no other purpofe than by familiarifing her with lewdnefs, to expofe her to actual adultery; and therefore ought to be looked on as lenociny.

THE LORDS refufed the bill.

Act. *Fergufon*. Alt. *R. Pringle*. Clerk, *Forbes*.

Fol. Dic. v. 3. *p.* 19. *D. Falconer, v.* 1. *p.* 88.

No 11.
A wife obtaining divorce for her hufband's adultery, has right to her jointure as if he were dead, but fhe cannot demand back her portion.

1761 *January* 13. Mr JAMES JUSTICE *againft* Mrs MARGARET MURRAY.

BY marriage articles betwixt Mr James Juftice and Mrs Margaret Murray, the lady, in confideration of L. 500 Sterling of tocher paid to the hufband, was fecured in a liferent-annuity of L. 100 Sterling. Of this marriage feveral children were procreated, who all died in infancy. In Auguft 1749, Mrs Juftice obtained, from the Commiffaries of Edinburgh, a decree of divorce for her hufband's adultery; in confequence of which fhe was put in poffeffion of her liferent-annuity. But it did not occur to her or her relations, that fhe was likewife entitled to demand reftitution of her tocher, till the year 1751, when fhe brought a procefs, for that purpofe, againft Mr Juftice, her late hufband, libelling upon the decree of divorce, and concluding for repayment of her tocher. She obtained a decree in abfence; but being diffident of her claim, fhe made no demand upon the funds which had been appropriated by Mr Juftice for payment of his debts.

In the year 1758, Mr Juftice brought a procefs, before the Court of Seffion, againft his late wife, for reducing the faid decree in abfence. The cafe being reported to the Court, the Judges fuftained the reafons of reduction, and reduced the decree. And what chiefly weighed with the Court, was a folemn judgment given, 8th February 1734, in a cafe precifely fimilar, Ifobel Anderfon againft

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* *See* General Lift of Names.

Welsh of Locharret, her late husband, and his creditors, (No 9. *supra.*) She had obtained a decree of divorce against her husband, in the precise terms of that obtained by Mrs Justice. She was put into possession of her liferent-annuity of 700 merks; and demanding, over and above, restitution of 6000 merks her tocher, it was found, that the decree of divorce did not entitle the pursuer to her tocher, and the husband was assoilzied.

No 11.

In a reclaiming petition for Mrs Justice, her counsel insisted upon the authority of the Roman law, particularly Novell. 117. cap. 8. § 2. where Justinian enacts, That the husband convicting his wife of adultery, shall be acquitted of the *donatio propter nuptias*, and shall likewise retain the *dos* as his own property. On the other hand, that the husband convicted of adultery, shall not only make good to the wife, the *donatio propter nuptias*, but likewise return the *dos* to her. And it was said that this law was generally followed *moribus hodiernis*, for which Voet's authority was quoted, *ad Leg. Jul. de Adulteriis*, § 11. With respect to the law of Scotland, the act 55th Parl. 1573 was appealed to, declaring, That the person divorced for non-adherence, shall lose the tocher *et donationes propter nuptias*, which must equally hold in the case of a divorce for adultery. Balfour in his Practics, page 99, lays down the same doctrine; and the same has been followed in practice from the beginning, which is made evident from the tenor of a decree of divorce before the Commissaries, declaring, where the husband is the adulterer, 'That he hath amitted and lost the dote and tocher, and all other 'goods and gear brought with the pursuer, or any way pactioned to be paid to 'him *causa matrimonii, nomine dotis, et propter nuptias*; and that she is entitled 'to the jointure provided in her contract of marriage, in the same manner as if 'he were naturally dead.'

In answer to this reasoning, it was *urged*, That where the tocher, as in the present case, is paid to the husband in ready money, it sinks among his effects, and has no longer any existence *qua* tocher. And, therefore, the wife who obtains the divorce, can have no claim either at common law or in equity. That she has no claim at common law, is clear from the effect given to divorce by all writers, ancient and modern, which is, that it gives the same benefit to the innocent party as if the guilty party were naturally dead. Hence, upon divorce for the husband's adultery, the wife is entitled to enter upon her jointure; but she has no claim to get back her tocher, because she has no such claim upon her husband's death. Neither can such claim be founded on any rule of equity; especially as the maintenance of the children, whatever be their number, lies upon the husband. And in general, as there can be no reason for giving the wife more by her husband's adultery than by his death; so there can be no justice that she should have her jointure, and also that very tocher which was the price she paid for her jointure.

There is a further consideration that ought to weigh in this case. A tocher, as now established in practice, becomes part of the goods in communion, a share of which accrues to the wife upon dissolution of the marriage. This share may

No 11.

be more, or may be less, than the tocher. But whatever it amount to, it is what the law allots the wife, in place of restoring to her the precise sum of the tocher. This share the pursuer has already got or may get; and to demand the tocher over and above, is in effect demanding twice payment.

How comes it then that we have adopted the Roman law upon this point? for that we have adopted it, must be admitted from the authorities urged on the part of the defendant. The answer to this question makes it necessary to open up a curious article in the history of our law. By the Roman law, the property of the *dos* was not transferred to the husband. He had only the use of it *ad sustinenda onera matrimonii*; and, upon dissolution of the marriage, it returned to the wife. It did so by death; and, upon the principle above laid down, the same must have happened where the marriage was dissolved by the husband's adultery. The same must happen in Scotland with respect to every right similar to the Roman *dos*; as, for example, the rents of the wife's land-estate. The rents belong to the husband during the coverture; but supposing a divorce by the husband's adultery, he loses his right, and the possession returns to the wife.

That the form of the Roman contracts was early adopted in Scotland, appears from the *Regiam Majest.*; in the second book of which, cap. 15. § 4. it is laid down in so many words, 'That the marriage being dissolved, the tocher returns 'and pertains to the wife; likeas the gift for the marriage returns and pertains 'to the husband.' And that the same form continued in practice, is vouched by Balfour, and by the act 1573, above quoted. Nor is it difficult to account for this practice. Marriage, among our ancestors, was held to be a sacrament; to the celebration of which the priest was necessary. And as learning, at that time, was confined to the clergy, the practice was certainly introduced by them from the canon law, which, in that particular, is the same with the Roman law. This explains, in a satisfactory manner, the authorities quoted for the defender; all of which, without exception, proceed upon the ancient law, and are perfectly just according to it. How long the form of the Roman contracts continued with us is uncertain; but that our present form has been established in practice above a century is certain. The authorities, therefore, quoted for the defender, which appear to be weighty at first view, are not applicable to our present form of marriage-articles. And it is remarkable, that from the altered practice, there is not to be found one authority, *pro* or *con*, except the decision of Locharret in the 1734, which is undoubtedly well-founded upon the present form of marriage-articles.

The Court, notwithstanding, altered, sustained the claim, and assoilzied from the reduction. The plurality of the Judges went no deeper than the Roman law and the old authorities, not adverting to the change of system with respect to marriage-contracts. But the case having again been brought under review, in a reclaiming petition for Mr Justice, and answers for Margaret Murray, the Court returned to their first interlocutor, reducing the decreet in absence.

Fol. Dic. v. 3. p. 19. Select Dec. No 172. p. 233.