

1787. *March 9.*WILLIAM JARDINE *against* BARBARA DE LA MOTTE.

No 13.
To what
effect reci-
mination
pleadable in
the action of
divorce.

IN an action of divorce, at the instance of Mr Jardine against wife, the latter resorted to the defence of recrimination; and the Commissaries allowed a proof, before answer, of that plea.

Against that interlocutor, the pursuer presented a bill of advocation, in which he prayed, That the cause might 'be remitted, with an instruction to the Commissaries, either to repel the defence of recrimination altogether, or at least to find, That it was not admissible by way of exception.'

THE LORD ORDINARY, in respect the interlocutor of the Commissaries was before answer, refused the bill; but remitted the cause to them, with this instruction, That they allow the defender to repeat her counter process of recrimination in this process.

This judgment was, by both parties, understood to imply, that the plea of recrimination could not be received in bar of the action; but, on the contrary, that it could only be considered as a foundation for a reciprocal decree of divorce; a consequence which the defender chose to decline. The defender, therefore, reclaimed; and

Pleaded: Conjugal infidelity does not of itself annul marriage. It is no more than the ground on which the injured party may claim divorce; Erskine, b. 1. tit. 6. § 43. But a person against whom the accusation is reciprocal, is not entitled to the name or the rights of the *injured party*. 'Viro atque uxore,' says Papinian, 'mores invicem accusantibus, causam repudii dedisse utrumque pronunciatum est: Id ita accipi debet, ut ea lege, quam ambo contempserunt, neuter vindicetur: paria enim delicta mutua pensatione dissolvuntur;' l. 39. ff. *Solut. matrim.* This recrimination, therefore, is, in the words of Lord Bankton, 'a good defence against divorce for adultery;' b. 1. tit. 5. § 6. para. 128.

Answered: The effect of the defence of recrimination has never yet been precisely determined. But the uniform practice of the Commissary-court, in refusing to sustain that plea as competent, except in the way of counter process, seems to indicate that it cannot be urged in bar of action, and that its only operation is with respect to pecuniary consequences. Such, for example, was their proceeding in the noted case of Campbell of Elderline in 1726.* Indeed, it appears inconsistent, that the adultery of one of the parties should be a sufficient foundation for divorce, while that of both should secure the continuance of the matrimonial connection. The authority of the Roman law has been misapplied. At every period of that law, either of the parties might make a divorce at pleasure, submitting only to the *pœna discedii*, which was the loss of part of the *dos*, or *donatio propter nuptias*. Instead, therefore, of a plea in bar of divorce, the text quoted refers to one in bar of that pecuniary penalty. See *Heinec. ad leg. Jul. et Pap. Popp.* The opinion of Lord Bankton seems to have been occasioned by the same misapprehension of this text.

* See General List of Names.

' THE LORDS remitted to the Lord Ordinary, to remit to the Commissaries, with an instruction to allow the defender to repeat a counter process of recrimination in the process of divorce, and to allow a proof before answer; but under this qualification, That stating the defender's recrimination, in the shape of a counter-action, should not prevent her from pleading the pursuer's guilt, when proved, as a total bar to his obtaining a decree of divorce, nor him from pleading his answers thereto.'

No 13.

Lord Ordinary, *Justice-Clerk.* *Act. Maclaurin.* *Alt. Dean of Faculty.*
Stewart. *Fol. Dic. v. 3. p. 19.* *Fac. Col. No 332. p. 510.*

* * * Compare the following case from Balfour, with the above.

1561. *March 26.* BARBARA LOGAN *against* ROGER WOD.

THE husband has just action and cause of seeking parting and divorcement, gif his wife committis adulterie, be committing the use of her body, to ony other man, induring the time of the marriage. Bot the husband may not part with his wife, or seek to be divorcit fra hir, be resfoun of adulterie committed be hir, gif he in likewise, hes given the use of his bodie to ony uther in adulterie, and efter the committing thereof, na wayis was reconcilit to his wife thereanent.

Balfour, (MARRIAGE) p. 99.

No 14.
Effect of re-
crimination.

* * * Compare the following with Nos 9. and 11.

1540. *December 18.* JANET AUGHINLECH *against* JAMES STEWART.

QUHEN ony man and his wife are *simpliciter* partit and divorcit be the authority of the Judge Ordinar, for adulterie, or ony other trespass committed be the man, the hail tocher-gude, and all that was ressavit be the man fra the woman, by vertue of the matrimonie contractit betwix thame, aucht to be restorit to the woman, with the proffits thair of, efter the giving of the sentence of divorce betwix thame.

Balfour, (MARRIAGE) p. 99.

No 15.
Ought the
tocher to be
restored?

See *PIRIE against LUNAN*, 8th March 1796, *Fac. Col. No 210. p. 496.* under the Title *Forum Competens* in this Dictionary; where it was found, That an action of divorce might be pursued before the Commissaries, although both parties resided in England, they being natives of Scotland, and having been domiciled there, at the time of their marriage.