

loch for the fourth ; to the effect it may appear whether or not the lands the defender possesses be the just fourth part of the whole lands.

*Vol. I. Page 180.*

1682. *March 25.*

ANENT TOCHER.

It was argued amongst the lawyers :—Whereas, by our custom, when a marriage dissolves within year and day, we re-integrate all things, and give back the tocher, and the wife gets no jointure, unless there is a child born ; it was thought more just and reasonable to give the woman (who is devirginated) her election whether she will take back the tocher or will betake herself to the jointure and liferent.

*2do*, It was argued ; where a marriage dissolves within year and day, and no bairn is procreated within that time, but, before the marriage, there was a child procreated, and which was legitimated by the marriage ; *quæritur*, if he will gain the tocher or courtesy by this. Some think he will ; because such a child, *fictione juris*, is held in all respects as born *in legitimo matrimonio* ; and, though this seems to encourage and bestow privileges upon uncleanness, yet it does gratify it no farther than the subsequent marriage does. Yet that of the return of tochers being *ex jure consuetudinario* with us, it ought not to be extended *ultra proprium suum casum* ; and the words of the custom seem to run against his gaining of the tocher ; seeing the child is not truly, but only *præsumptione juris*, born after the marriage.

*3tio*, It was doubted among the advocates,—where, by a contract-matrimonial, a tocher is appointed to return to a wife's heirs and executors, why a husband may not crave, though the marriage be dissolved, and his wife was not an heretrix of lands, to liferent the said tocher by the courtesy of Scotland, as he would liferent her lands ? Though it has not yet been done, yet nevertheless some thought it might be so extended by the Lords *a paritate rationis*.

*Vol. I. Page 181.*

1682. *March 28.* ROBERT GIBSON *against* GEORGE HANDYSIDE.

ROBERT Gibson, merchant in Edinburgh, against George Handyside, clerk to the Weigh-house in Leith, and James Livingston, his cautioner. The Lords, from the probation, found it was not proven to be the custom of the tackmen of the Weigh-house of Leith, to accept of precepts or decreets against these who have goods lying there, in part-payment of the tack-duty which the clerk of the said Weigh-house accounts for to the tacksman. *Vol. I. Page 181.*