

1762. *March 4.*ELIZABETH CLEMENT *against* SINCLAIR.

By the common law of England, the wife's adultery did not bar her of her dower, even though a divorce had followed, Coke, 2d Inst. p. 435. Upon this account, the act 13th Edward I. cap. 34. was made, enacting, 'That if a wife willingly leave her husband, and continue with her adulterer, she shall be barred for ever of her dower, unless her husband willingly, and without coercion of the church, be reconciled to her.'

Elizabeth Clement, after living with her husband for three months, deserted and lived in open adultery with another man, by whom she had a child; and being cited before the kirk-session of Crieff, she confessed her guilt, and suffered public penance before the congregation. After her husband's decease, she brought a process against his representatives, claiming the third part of his moveables, and the terce of his land. And her claim was sustained notwithstanding her adultery, which was not denied.

What moved the plurality was, That the pursuer's adultery, since there was no divorce, did not deprive her of her quality of relict, nor consequently of her legal provisions. But it was answered by those who voted against the interlocutor, That it was too limited a view of the case, to consider it merely upon the footing of common law, without considering what equity dictates. Does it not appear clear in equity, that a woman who has behaved so undutifully as a wife, ought not to be entitled to any of the privileges of a wife; and that it would be wrong, in a court of equity, to sustain a claim for making any of these privileges effectual? The English statute rests obviously upon this equitable foundation, and the same ought to obtain with us without a statute. Now that the principles of equity are ripened, there would be no occasion for such an act either in England or Scotland; though there was use for the English statute, because when it was made, equity was not known.

But further, there seems to be a good foundation for objecting against this claim, even at common law. The wife's legal claim makes a branch of the marriage-contract, by which they are mutually bound to live together as husband and wife, and by which she is entitled to be alimented during the marriage, and to certain legal claims after its dissolution. Now, if she has broke her part of the engagement, he cannot be bound to perform his part. Suppose she had sued her husband for aliment after her desertion, he certainly would not have been liable; and as little ought his heir be liable to make good her legal provisions.

*Fol. Dic. v. 3. p. 19. Select Dec. No 196. p. 261.*

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A notour adulteress, who had not been divorced, found entitled to her legal provisions.