

No 11.

Some of the Judges expressed their disapprobation that the cause came before the Court in that shape, as they did not approve, in questions of this kind, to discuss separate relevancies, and would have preferred judging of the whole upon a proof before answer. They were, however, clear, that no action could be sustained in this country for the breach of a simple promise, unless something had intervened, such as bespeaking clothes, &c. in expectation of the marriage. It was also observed, that the defender's drawing back was no injury to the pursuer's character, and that the alleged calumny was of a trifling nature, and not to be regarded.

THE LORDS allowed a proof.

Lord Ordinary, *Monboddo*.
Clerk, ———.

For Johnston, *J. Fergusson*.
For Pasley, *A. Ogilvie*.

R. H.

Fac. Col. No 62. p. 188.

1785. June 16.

JANET BUCHANAN *against* FRANCIS MACNAB.

No 12.

A young woman, debauched by a gentleman in whose house she lived, found entitled to damages.

JANET BUCHANAN, while residing in the house of Mr Macnab in the quality of humble companion to his sister, was by him got with child. Before this event, as he acknowledged, her character had been unblemished; nor did she yield to his embraces without a considerable degree of solicitation.

In an action of damages, brought by her before the Commissaries of Edinburgh, Janet Buchanan

Pleaded; A man having debauched an unmarried woman, is obliged either to marry her, or to provide her with a suitable dowry; Exod. xxi. 7. *et seqq.*; Perezus, ad Cod. lib. 9. tit. 13. § 3; Mathæus de Crim. lib. 48. tit. 3. Viewing an intercourse of this sort as a breach merely of moral duty, the woman is not free from blame; but it is the man who is the aggressor, and who is indeed to be considered as principally guilty. To him the event is not immediately productive of any patrimonial damage; whilst the woman, who suffers the irretrievable loss of reputation, is thereby at once precluded from obtaining in future an honest livelihood. To compel the author of these evils to save the woman from poverty or prostitution, to place both parties on a more equal footing, and by these means to check, in its origin, a connection so hurtful to society, are objects equally of justice and public utility.

The protection due to the pursuer from the person by whom she was seduced, contrasted with the many solicitations which he used, tends strongly to confirm the present claim. If, in pecuniary rights of the most trivial concern, breach of trust is ever accompanied with an obligation to restitution, it never can be imagined that our law has here neglected to provide the means of redress. Nor are precedents wanting, in which the Court of Session has inter-

posed in similar circumstances; 1st December 1749, *Linning contra Hamilton*, No 9. p. 13912.

Answered; A court of equity has power to interpret, or to give a just effect to legal contracts. But from an act illicit in its nature, even though preceded by an express agreement, no action can arise in favour of the offending parties. Surely then an obligation will not, in the present case, be implied in equity, to which, if grounded on a special paction, a court of equity would refuse its sanction. *Dict. voce FACTUM ILLICITUM.*

Nor indeed could such an exercise of equitable jurisdiction be defended on principles either of justice or true policy. On the part of the man, it is true, the first advances are made to an intercourse of this kind; but is not the woman equally culpable, who does not instantly discourage those advances? The consequences, too, of an illicit amour, far from countenancing a claim like the present, ought to have a quite different tendency; since it is from these alone, in a very high degree, that female chastity derives its safety.

A demand of the nature of that here urged, if at all admissible, is to be restricted to the case of a *stuprum fraudulentum*, where undue arts have been joined to seduction, or where some expectation of marriage has been given; or at least where it has been reasonably founded on the equal rank of the parties. Such, in a striking degree, were the circumstances in the case of *Linning contra Hamilton*, in which it is, at the same time, to be remarked, the Judges were far from being unanimous. Nor ought those regulations which are to be found in the Mosaical law, and in the latter constitutions of the Roman Emperors, to be observed by the modern nations of Europe, where the situation of women is so very different.

The Commissaries found no damages due; but the question having been brought into the Court of Session by bill of advocation, the Lords, chiefly moved by the situation of the pursuer when seduced by Mr Macnab, reversed their judgment.

THE LORDS remitted the cause to the Commissaries, with an instruction to find damages due.

Lord Ordinary, Swinton.
Maconochie.

Act. Wight, Rolland, J. Boswell.
Clerk, Menzier.

Alt. Lord Advocate, Erskine.

Fol. Dic. v. 4. p. 228. Fac. Col. No 258. p. 326.

1787. March 7. CHARLES MAXWELL against JAMES MONTGOMERY.

MAXWELL, without bringing a process of divorce, having instituted against Montgomery an action of damages, on account of the latter's having corrupted the wife of the former,

No 13.
An action of
damages on
the head of