

No 10. The Sheriff repelled the defence founded on Thomson's irregularity, but allowed a proof of the bankruptcy and castration.

Wright having applied by bill of advocacy against the Sheriff's interlocutor, the Lord Ordinary refused the bill, but remitted to the Sheriff, with instruction to allow her a proof of all the facts set forth in her defences; to which interlocutor, on a reclaiming bill and answers, the Lords adhered, limiting the proof of character to three years.

Act. Charles Brown.

Alt. M^r Laurin.

J. S. Tertius.

Fac. Col. No 64. p. 110.

1770. December 21.

MARY JOHNSTON, Daughter of the deceased Mr Johnston of Selkoth, *against*
JAMES PASLEY of Craig.

No 11.

Breach of a promise of marriage, and in justification thereof writing an injurious letter, if relevant to infer damages?

MR PASLEY, when 75 years of age, made proposals of marriage to the pursuer, a young woman of 25, of a good family. His offer was accepted of; and the pursuer, with his approbation, went to visit her friends, in order to inform them of her marriage. In her absence, Mr Pasley changed his mind, and wrote to a friend and companion of the pursuer the following letter:—

‘MISS GRAHAME,

‘I cannot go out but I am dunned with poor Mally's light carriage with the tenants and others in the neighbourhood, which you cannot but know. If she behave so now, what will she do afterwards; which has given me more uneasiness than all I heard from Moffat. It is not my children, but every body will talk: I wish I may be preserved at this time of life, and not be made a speech to the whole country. I hope there is no harm done. Is all from, Madam, your most humble servant. (Signed) JAMES PASLEY.’ Dated at Barr, 4th April 1769.

The match being thus broken off, the pursuer brought an action before the Commissaries, concluding, that the defender should either celebrate the marriage, or make payment to her of L. 500 Sterling in name of damages; and, in vindication of her character, should write and deliver a palinode or recantation. The defender objected to the relevancy of these conclusions; but the Commissaries pronounced an interlocutor, assoilzieing from the marriage; and as to the damages, allowed a proof—They pronounced this judgment. “Having again considered the libel at the pursuer's instance, find the defender's having made his addresses to the pursuer for marriage, and his having thereafter resolved to break off the engagement settled betwixt them in manner libelled, and said pursuer being wronged and injured thereby, relevant to infer damages; and, *separatim*, find said defender's writing the letter libelled, and said pursuer having been wronged, injured, and affronted thereby, also relevant to infer dam-

ages, a fine, and palinode: and also find the defender having industriously propagated sundry false and groundless stories of the complainer in the neighbourhood, tending to slander the complainer, *separatim* relevant to infer said conclusions."

Mr Pasley advocated; and the cause having been taken to report upon memorials,

The pursuer, in support of her action upon breach of promise, *pleaded*; That she had not only been hurt and affronted, but had been materially injured by the defender's conduct; for as there was no man who did not feel satisfaction in thinking he was preferred by his wife to others, so there was no woman who would not be shunned by those who would perhaps have respected and courted her, if she had shewn not only that she gave a preference to another, but was slighted by the person she was willing to accept of. Though no decision upon this point had perhaps as yet occurred, the material justice of the case and analogy of law strongly supported the claim. Actions of this nature were authorised by the Roman law, Aulus Gellius, lib. 4. c. 4.; and in England, where they frequently occurred, exemplary damages for the simple breach of promise were uniformly awarded. Bacon's Abridg. v. 3. fol. 574. Lord Bankton, B. 1. T. 5. § 8.

As to the letter to Miss Grahame, so far from being an excuse for the defender's conduct, it was a glaring aggravation: it was injurious in the extreme, even though it had no connection with the breach of promise: for the malicious aspersion it contained must necessarily subject the pursuer to a patrimonial loss, as it must deprive her of the hopes of such a marriage as she might otherwise have expected.

The defender *pleaded*;

It was an established point in the law of Scotland, that a promise of marriage was not effectual either to compel the parties to solemnize it, or to make the party refusing liable in damages to the other; and even a contract of marriage imported nothing more than a resolution of parties, from which either might resile *dum est res integra*. Mr Erskine, B. 1. T. 6. § 2. Lord Bankton, v. 1. p. 106. § 2. p. 107. § 4. p. 162. § 3. Lord Stair, B. 1. T. 4. § 6. It had accordingly been the uniform practice in repeated decisions to refuse action in cases of this nature. Young against Irvine and Anderson, 21st January 1715, No 68. p. 8473.; 2d January 1685, Grahame, No 66. p. 8472.; 14th December 1675, Mercer, No 5. p. 3150.

The letter, it was said, was the gentlest way he could take to inform the pursuer that he had changed his mind. The circumstances of the case evinced, that the *animus injuriandi*, which must not merely be presumed but proved, was out of the question. McKenzie, Tit. Injur. p. 153. To constitute scandal, the injurious expression must be publicly uttered. If he had written to the pursuer herself, no action of defamation could have been founded on it; and when, instead of doing so, he wrote to her intimate friend and confidant, there could not possibly be any difference.

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-