

duced a party to trust him, and referred it to the Reporter to examine the circumstances, and modify as he saw cause. By Moses's judicial law, such a man was bound *stupratam aut dotare aut nubere*.

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*Fol. Dic. v. 2. p. 341. Fountainhall, v. 1. p. 728.*

1743. June 17. & 1744, January 20. STEDMAN against STEDMAN.

No 8.

STEDMAN, a shopkeeper, having obtained a divorce against his wife for adultery, brought an action before the Court of Session against the adulterer for damages. *Alleged*, That the action was not competent, unless a criminal prosecution had been first brought before the Court of Justiciary. *Answered*, That where a man is hurt in his property, he may bring a civil action for the damages, without intending a criminal prosecution for punishment of the offender, as for example, in the case of fire-raising. THE LORDS sustained the action as competent; found the defender liable in the expenses of the process of divorce, and of an appeal to the House of Lords, and of the present process; and appointed the pursuer to specify what damage he had sustained through the loss consequent to his business, and how he could liquidate the same.

*Fol. Dic. v. 4. p. 221. Kilkerran. C. Home.*

\* \* \* This case is No 72. p. 7337, *voce* JURISDICTION.

1748. December 14. ELISABETH LINNING against ALEXANDER HAMILTON.

No 9.

ELISABETH LINNING, daughter of the deceased Mr Thomas Linning, minister at Walston, brought an action of declarator of marriage before the Commissaries of Edinburgh, against Alexander Hamilton, younger of Gilkerscleugh; and as she did not pretend to have any proof of her libel by writ or witnesses, she referred the verity thereof to the defender's oath, which is in the following words; Depones, " That, after the pursuer's mother's death, who was the deponent's aunt, the pursuer was invited by the deponent's father to come and live in family with him; That she accordingly came to his family about the end of October 1744, where she continued until about the beginning of December 1746; That while she thus staid in the family, the deponent had frequent toyings with her, kissing and clapping her, and frequently told her that he loved her; That in December 1745, the deponent went one night into the pursuer's bed-room, and slipt into the bed with her, at which she seemed to be pretty much surprised, and offended; but the deponent told her that he would do her no harm; but she having ordered him to go out of the room, he, after some little stay, went out; That next morning he observing her a little pen-

Reparation awarded to a young woman against the man who had corrupted her.

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sive, asked her the cause of it; that she told him, it was because of the ill treatment he had given her, by coming into her bed; to which the deponent answered, that he would not treat her so in time coming; notwithstanding of which he frequently thereafter, both in her room and his own, pressed her to allow him the last favour; and that, when she was sitting upon the deponent's bed-side, and he in naked bed, he sometimes took her into the bed, she having her clothes on; That in general conversation about marriage, he once said to her, that two persons giving their consent to live together as man and wife, and acknowledging one another as such, was as binding as if they were married; That this conversation was occasioned by the pursuer's talking of a gentleman of her acquaintance who had fallen with child to a gentleman, who afterwards owned her for his wife. Depones, That he had frequent familiarities with the pursuer, but without actual enjoyment of her; That while he was using these familiarities, she frequently told him, that she would not yield to his embraces, unless he consented to marry her. Depones, That, about the end of May 1746, the deponent having gone to his own room after dinner, to take a nap, which he used frequently to do; as he was lying in bed, the pursuer came into his room, as she had frequently done before, and asked the deponent some trifling question; upon which he bade her sit down upon the bed-side, and thereupon he fell a-carressing her, as he had frequently done before; and then he said to her, Will you make me happy? to which she returned no answer; and thereupon the deponent enjoyed her for the first time; That after this the deponent frequently had enjoyment of the pursuer; That she sometimes came to his room, where they lay in bed together for some hours; and sometimes he went to her room, where they did the same; but that they never lay together whole nights while she staid in the deponent's father's house; That there were none residing in the house with them, under the same roof, excepting the deponent's grandmother and her maid; That during this intercourse betwixt the deponent and the pursuer, she frequently desired him to acknowledge her as his wife, and frequently pressed and teased him to do so, both before and after she fell with child, but mostly after she was with child, saying, that unless he did, he had made her miserable; but the deponent always cut her short, by refusing to go into her proposals; That one time, to put an end to her importunities, the deponent showed her a scroll of a settlement, which his father had once intended to make, which he found amongst his father's papers, whereby the deponent was to be excluded from the succession to his father, in case he married irregularly, or disagreeably to his father, or one that had not a suitable fortune; That in January 1747, the deponent employed one Mrs Simpson, a midwife in Edinburgh, to provide a room for the pursuer's in-lying, and to attend to her; but that he told the midwife nothing further, but that she was a young girl with child, who was to be brought to bed, but did not tell her name; That the deponent also desired Mr Wood, surgeon, to attend her there, she being then ill of a cold, and none but strangers about

her; and the deponent owned to Mr Wood that the pursuer was with child to the deponent himself. Depones, That the pursuer went to the foresaid room bespoken by Mrs Simpson, about the 12th of January, and continued there till April, when she was delivered of her child; That, in that period, the deponent frequently visited the pursuer, but that the visits were very short; and that one night, being shut out of his own room, he came to the pursuer's room betwixt one and two of a morning, and lay in bed with her till about eight in the morning; That the deponent, being about to go into the country about the middle of April, desired Mr Wood to provide a minister to baptize the child when brought forth, and to give money to the minister, and nurse's husband to hold up the child; That the pursuer proposed the deponent should hold up the child to baptism himself, and stay in town for that purpose; but he refused to do either. Depones, That one time before the deponent's enjoying the pursuer, when he was caressing her, he desired she might allow him the last favour; which she refusing, he went off in a pet, and went to his bed, having bolted his room-door before he went to bed; after which the pursuer came to the room-door, which being shut, the deponent asked, Who was there? to which she answered, It is I; but the deponent said, he was gone to bed, and said, he was indisposed, and would not rise; That the next day, or day thereafter, the deponent found in his room a note written by the pursuer, but unsigned, signifying, that she was the most miserable of her sex, and designed to leave the house; upon which the deponent spoke to her, and represented, that it would have a bad aspect for her to leave the house abruptly, and persuaded her not to go away, saying, that she might command his friendship, and no further; which he said so sternly, that she fell a-crying."

The pursuer finding that this oath did not prove her libel, brought a new action against the defender, setting forth, that she was corrupted by him, and concluding for L. 1000 Sterling of damages for the loss of her virginity. In the course of this process, she founded upon the oath emitted in the former process, as a sufficient proof of her libel; and the Commissaries having conjoined the two processes, found the pursuer's libel of declarator of marriage and adherence, not proved by the defender's oath; and therefore assoilzied him from the adherence; but found the qualifications of his having enticed and seduced the pursuer to yield to his embraces, proved by the said oath, relevant to make the defender liable in damages to the pursuer, and modified the same to the sum of L. 500 Sterling.

The defender brought the cause to the Court of Session by a bill of advocacy; and the Lord Ordinary having advised with the Lords, "Remitted the cause to the Commissaries, with this instruction, that they restrict the damages to the sum of L. 200 Sterling, besides the full expense of process." Both parties reclaimed, the pursuer expecting higher damages, and the defender expecting to get free of damages altogether, because there was no fraud nor im-

No 9. position on his part; but both concurring in the criminal intercourse. THE LORDS refused both petitions, without answers.

The Lords were far from being unanimous. Those who were for damages founded their opinion upon discouraging vice; and, no doubt the judgment in this case will put men more upon their guard than formerly. But then it must have a bad effect with regard to the female sex, whose chastity is an object of greater importance in society than that of the male sex; for here is a temptation to lewdness, which did not exist before. Formerly marriage was the woman's sole aim, if she was not a prostitute. But now a woman has a wider field of action. Her first view is to engage the man's affections, in order to entrap him into a marriage. If this fail, her second view, after inflaming his desires, is to yield to them; for which she is to be rewarded with a handsome portion.

*Fol. Dic. v. 4. p. 228. Rem. Dec. v. 2. No 100. p. 178.*

\* \* \* Kilkerran reports this case :

1749. December 1.—ELIZABETH LINNING, daughter of Mr Thomas Linning late minister at Walstoun, pursued Alexander Hamilton younger of Gilkercleugh, her cousin-german, before the Commissaries of Edinburgh, in a declarator of marriage and adherence, and for having the legitimaey of a child, procreated betwixt them, ascertained; and, in place of all other proof of the circumstances by her alleged, betook herself to the defender's oath; and he having emitted an oath, which her doers were conscious did not amount to a full proof of her libel, she, without desiring the oath to be advised, raised a new process for damages, on account of his having seduced her into an unlawful commerce with him; which the Commissaries having conjoined with the former process, and advised the oath, " They found the libel of declarator of marriage and adherence not proved, and assoilzied him from the adherence; but found the qualification of his having seduced the pursuer to yield to his embraces, proved, and relevant to make the defender liable in damages; and modified the same to the sum of L. 500 Sterling."

The defender having presented a bill of advocation, to which answers were put in on the part of the pursuer; and the Ordinary having reported the case, the LORDS " Remitted to the Ordinary to refuse the bill, and to remit the cause to the Commissaries, with this instruction, that they restrict the damages to L. 200 Sterling, besides the full expense of the process."

The defender reclaimed, and insisted that no such action of damages lay by the law of Scotland; That though it is a rule of the Canon Law, that *qui virginem stupraverit aut ducat aut dotet*, and also by the law of the United Provinces, and of most Popish countries; though fornication, by which they understand lying with a harlot or lying with a widow, is tolerated, at least passes unpunished; he who deflowers a virgin, is, after the example of the Canon

Law, obliged either to marry or tocher her; yet these were only particular constitutions of other countries, unknown in the law of Scotland, which was governed by different principles; as upon the Reformation, at least as early as the year 1567, the Christian Doctrine, as founded in the Word of God, was made a part of the civil constitution; and by the 13th act of the same Parliament, fornication, that is uncleanness between an unmarried man and unmarried woman, without any distinction of the condition of the woman, maid or widow, virgin or prostitute, is declared a crime, and punishable in both; with which it was argued to be inconsistent, that a right or action should arise to the one against the other, when they are in law supposed to be equally criminal.

It was admitted that action might nevertheless lie *ex dolo*, had any fraud or deceit been used, and which was said to be the case in the only two decisions that are to be found upon record on this point, viz. Hyslop *contra* Ker in 1696, No 7. p. 13908, and Castlelaw *contra* Agnew of Sheuchan, See APPENDIX., as in both there was a promise of marriage; though in Hyslop's case, Ker, the man, had in the interim married another, and so could not be decerned to adhere; and in Castlelaw's case, the adherence was not insisted on by her, and Sheuchan was rather willing to pay the L. 200 Sterling which the Commissaries had decreed; and so the adherence, which is the proper decerniture in promises of marriage and subsequent *copula*, was in effect passed from by consent of parties. But as there is no proof in this case of any such promise, or of any artificial conduct on the part of the defender, other than what is common and natural to happen where a young man solicits a young woman to an unlawful commerce, she by her compliance becomes equally guilty, and no action lies to her.

Nevertheless the LORDS "adhered."

The reasoning was not thought by any means conclusive, that because both are guilty of a sin in the sight of God, and both punishable *ad vindictam publicam*, therefore no action, as between themselves, lies to the less guilty against the more guilty. For in those very countries, wherein the law is admitted to give action to the woman, the unlawful commerce is considered to be a sin in the sight of God, and as such is punished *ad vindictam publicam*. Had the fact been, that upon the first attack on the defender's part; or even after such a short courtship as commonly prevails on a willing woman, the pursuer had complied, it might with some reason have been said, that she was equally guilty, and that no action lay. But as he had acknowledged that she withstood his solicitations for the space of two years, which showed that she had virtue, till he, by debauching her mind, had robbed her of it; it was, notwithstanding her compliance at last, justly be deemed *stuprum fraudulentum*, and as such sufficient to produce action at common law without the aid of the statutes.

Nor may it be amiss to observe, that although in his oath he denied the promise of marriage, yet he acknowledged other circumstances, which tended much to shew, that, at least, she was in the belief he was to marry her. And

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whereas, the few of the Lords who opposed this judgment could not relish this doctrine of robbing a woman of her virtue, by debauching her mind; yet the far greater number of the Court held it to be a doctrine well founded in law, and from the analogy of other cases, particularly *vide l. 1. § 3. De servo corrupto*. And it was observed, that in the law of France there is what they call a rape of seduction in contradistinction to *vis et metus*.

*Kilkerran, (REPARATION.) No 3. p. 487.*

\* \* D. Falconer also reports this case:

1748. December 19.—ELIZABETH LINNING, a young woman past 25 years of age, having a small portion, and her parents both dead, was living in the house of her uncle, a gentleman of an opulent estate, which he was not bound to give to his only son; with none in the family besides the said son, their grandmother, and a servant; during which time there was a child procreated betwixt the cousins, which she afterwards brought forth; and thereupon pursued him in a declarator of marriage, referring the libel to his oath.

He deponed negatively as to the marriage, or any promise of marriage; but confessed a tract of importunate solicitations, before she yielded; as also, that he had said to her, marriage was valid by the consent of parties, without further solemnization; that this discourse was occasioned by their being talking of two persons, who they believed were married in that manner; and was introduced by her.

She having raised an action against him for damages, the Commissaries conjoined the processes, and assoilzied from the conclusion of marriage; but, 10th November 1748, "found the qualifications of the defender's having enticed and seduced the pursuer to yield to his embraces, proven by his oath, relevant to make the defender liable in damages to the pursuer; and modified the same to the sum of L. 500 Sterling."

*Pleaded* in a bill of advocation, No damages can be due, as the pursuer and defender were partakers in the same guilt; and it is not enough to infer seduction, that the man solicited the woman to a criminal conversation, since he did not use any art to deceive her with regard to his intention: Besides, the sum is extravagant, considering the circumstances of the parties, and that he has nothing independent of his father's will.

*Answered*; When a woman of a former untainted character yields not easily, but to a long course of importunate solicitations, damages are due; Exod. chap. 22. ver. 16, and 17.; Grotius, l. 2. c. 17. § 15.; Puffendorff, l. 3. § 1. § 10. 15th July 1696, Hislop against Ker, No 7. p. 13908.; and a case determined by the Commissaries in 1719, Castlelaw against Agnew, See APPENDIX., wherein a bill of advocation was presented and refused;—especially in

this case, considering the pursuer was situate so as to be exposed to the defender, who ought to have been her protector.

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THE LORD ORDINARY upon advice, 1st December, " remitted the cause to the Commissaries, with this instruction, that they should restrict the damages to L. 200 Sterling, beside the full expenses of process."

On a reclaiming bill, wherein it was *pleaded*, The defender had suffered by his oath not being fully taken down as emitted; which was not thought of consequence by his lawyers, as the action wherein it was taken, was a declarator of marriage, which it denied;—that if it had been justly marked, or if he were now re-examined, it would appear he was not so much in fault; as she voluntarily exposed herself to his company, even after she might have been put on her guard; and, by her whole behaviour, shewed a purpose of inflaming him with a passion strong enough to induce him to marry her, which he always denied on its being proposed by her, and thereon gave over his solicitations, till she threw in his way another opportunity, and at last yielded to his courtship;—and on a bill for her, reclaiming against the restriction of the damages;

" THE LORDS adhered."

Reporter, *Kilkerran.* Act. *Ferguson & Graham.* Alt. *Lockhart & Dundar.*

*N. B.* A bill of advocacy was offered for her, insisting that there appeared sufficient matter from his oath, notwithstanding his general denial, to infer a marriage, which therefore ought to be declared; or if any dubiety remained insisting for a re-examination; whereon it was observed, it was inconsistent in the same action to insist for damages on account of a seduction, and for marriage; and that the Commissaries had done preposterously in conjoining the processes;—that the pursuer could not insist in her declarator of marriage, while the judgment stood giving her damages; and if that were taken away, the defender could not be re-examined, as he had denied upon oath any marriage, or promise of marriage.

*D. Falconer, vol. 2. No 22. p. 27.*

1767. June 27. JAMES THOMSON against ELIZABETH WRIGHT.

IN a process brought at the instance of James Thomson against Elizabeth Wright, for breach of promise of marriage, and for damages thence arising; the defences pleaded for her, and offered to be proved, were three; *1mo*, The pursuer had passed for a man of substance, whereas he was bankrupt; *2do*, He was a spendthrift, a drunkard, debauched, and excommunicated; *3tio*, He was impotent from being castrated.

No 10.