

No 13.
adultery can be instituted by a husband against the adulterer, without a process of divorce being brought against the wife. See Paterson against Bone, *infra*.

The defender *pleaded*; *In hoc statu*, the action is not competent. By the Roman law, during its better periods, and downward to the innovations of Justinian, no husband, while acquiescing in his married state, by declining a divorce, could bring any action on the ground of his wife's adultery, either against herself, or against the adulterer. To that enlightened people such a conduct seemed to betray the purpose of committing *lenocinium*, l. 11. § 10. l. 29. D. Ad leg. Jul. de Adult.; l. 11. Cod. eod. tit. Neither is there to be found any instance in which our law has given its sanction to the contrary doctrine.

Answered; There is no injury surely which affords a better title for an action of damages than that in question. And there are obvious situation in which it would not be for the interest of the injured husband, or of his family, to institute a process of divorce. But it would be most unjust, that the husband, on this account, should be forfeited of so strong a right of action. In England, such actions of damages are perfectly well established, without either separation *a mensa et thoro*, or divorce Blackstone, B. 3. chap. 8.

The cause was reported by the Lord Ordinary; when

THE COURT found the action competent.

Reporter, Lord Swinton, Act. Wight. Alt. C. Hay. Clerk, Home.
S. Fol. Dic. v. 4. p. 227. No 328. p. 503.

1803. December 10.

PATERSON against BONE.

No 14.
A husband may insist in an action of damages against the adulterer, without any previous process of divorce. See Maxwell against Montgomery, *supra*.

MALCOLM PATERSON, tanner in Glasgow, brought an action of damages against David Bone, grocer, for having seduced his wife, and, in support of this claim, offered proof of the adulterous connection.

THE LORD ORDINARY pronounced this interlocutor, (June 28. 1803); "In respect no decree of divorce for adultery has been obtained by the pursuer against his wife, nor has she been otherwise legally convicted of that crime, finds, That such a process as this, where the pursuer offers a proof to convict her, but in which she is not a party, is utterly incompetent; therefore dismisses the same, and decerns; finds the defender entitled to expenses."

The pursuer reclaimed, and

Pleaded; Though a man may not choose to push his resentment against his wife for adultery so far as to insist for a divorce in the consistorial court, yet he may demand reparation from the person who has seduced her. Many reasons may prevent a husband from resorting to the utmost rigour against his wife, with which her seducer has no concern, and which ought not to screen him from the civil consequences which the law stamps upon his guilt. This is the doctrine of the Roman law after the time of Justinian, l. 11., Cod. ad Leg. Jul.

de Adult., as well as of the English law, Blackst. B. 3. c. 8., and of our law, Maxwell against Montgomery, 7th March 1787, *supra*. No 14.

That this is an action establishing the guilt of one who is not a party to it, is not more true than it is where the husband sues for a divorce against his wife. The proof brought is to criminate her with one who is no party to the action. It is the evidence of a crime which may expose him both to a civil and criminal prosecution; yet such a plea is not admitted as any objection in actions of divorce.

Answered; Wherever an action is brought, which has for its foundation the commission of a crime, the person charged with the offence should, in some shape or other, have an opportunity of establishing his innocence. An injured husband should certainly be entitled to redress; but the rights of the wife should not be overlooked: she ought to have an opportunity of disproving the crime laid to her charge. In every case of a similar nature, before damages can be sought, upon the footing of the husband being deprived of the society of his wife, he ought to prove the existence of the offence in the proper way, in an action of divorce before the consistorial court, and entirely separate himself for ever from the woman, by whose crime, in a pecuniary point of view, he profits. The conduct of the husband suing for damages, and still acquiescing in his married state, was, in the purer period of Roman jurisprudence, discountenanced, as it seemed to betray too much an appearance of *lenocinium*, l. 11. § 10. D. ad Leg. Jul. de Adult.; l. 11. Cod. eod. tit.

THE COURT, (10th December 1803), upon the principles laid down by the pursuer, altered the Lord Ordinary's interlocutor, and remitted to his Lordship to proceed in the cause.

Lord Ordinary, Polkemet.	Act. Maconochie.	Agent, Jo. Mowbray, W. S.
Alt. Campbell.	Agent, Jo. Dillon.	Clerk, Home.
E.		Fac. Col. No 128. p. 283.

SECT. III.

False Accusation.—Verbal and real Injury.—Scandal and Defamations.

—Does *veritas conviti* excuse?—Whether a verbal Injury may be retorted by a real one *ex intervallo*?

1611. July 27. HILL against SIM.

SIM had raised a process against Hill before the Magistrates, to have him fined and punished for openly threatening to stick him and burn his house; and not having insisted, Hill raises a process of scandal against him before the

No 15.
Whether a
judicial accu-
sation is to be
reputed a
formal in-
jury?