

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. Act. Wight, Rolland, J. Boswell. Alt. Lord Advocate, Erskine,
Maconochie. Clerk, Menzier.

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

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.