

No 15.

Commissaries of Edinburgh, to make a recantation of the slander, *actione ad palinodiam*, the libel before the Bailies of Queensferry having no other design but to defame his good name and reputation. Which cause being brought before the Lords, it was *urged* for Hill, This strikes not only at his fame, but likewise at his interest and livelihood in that place; for if he be not vindicated and repaired. he may give over his trade, reputation supporting credit in the course of human affairs in the world. And Sir George Mackenzie in his Criminals, Tit. INJURIES, tells us, the Commissary inflict pecuniary mulcts in such cases, and cause the offenders stand at church-doors, do penance, and crave pardon, it being an ecclesiastic censure borrowed both from the Roman and Canon law. And the Lords have ratified such sentences, 5th February 1669, Deans *contra* Bothwell, No 290. p. 7577; and the very last session, Robertson against Arbuthnot. And it is no defence, that it is done judicially in a court; for that rather aggravates the guilt, transferring it from a verbal to a more atrocious written injury, and spreads it more than transient words can do. *Answered*, The *animus injuriandi* goes to the essence of this crime, which can never be presumed of one who applies to a judge in a legal way, and complains what the *fama clamosa* of the neighbourhood was full of; and if he conceived himself injured, he ought to have applied to the same Judge where it was tabled, and not have carried it away to the Commissaries, who, though competent to such processes, when brought originally before them, yet they ought not to meddle where it is depending before another court. *Replied*, It can never excuse that the defamation was judicial, for law has not been defective to provide against such, as well as extrajudicial slanders. And the title *De Injuriis et famosis libellis* is full on this point. And Faber *ad tit. De Injuriis*, determines the case qui alium vocavit in jus et dedit libellum, et succubuit, *præsumitur animo injuriandi id fecisse, quando existimatio ejus qui vocatur inde lædi potest.* Neither could I insist before the Bailies for reparation, because he took up the process, whereby I could only instruct the affront done me; and a defamer ought not to have the election of a Judge privative of the Commissaries, who are acknowledged to be the Judges Ordinary to all such cases. THE LORDS at first found, That what one pursued judicially could not be reputed a formal injury. But there being a struggle, many contending it was of a more heinous nature than extrajudicial calumnies, they stopt the interlocutor till it were farther considered.

*Fountainhall, v. 2. p. 667.*

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1727. December 28. Mr ROBERT DUNDAS *against* ARBUTHNOT and HOPE.

No 16.

A PARTY who, upon a signed information as guilty of forgery, had been committed to prison by the King's Advocate, and had been liberated upon

running his letters, no day being fixed for his trial within 60 days, insisting against the informer for damages and reparation; the informer *answered*, That he acted *bona fide*, and had good reason to believe the pursuer guilty. *Replied*, It is more equitable that the damage, which must be borne by one of them, should lie upon the rash accuser, than upon the person wrongfully accused; the one was in an error at least, the other in none. THE LORDS found the informer not liable in damages. See APPENDIX.

No 16.

*Fel. Dic. v. 2. p. 341.*

1750. June 19.

HAMILTON against ARBUTHNOT.

No 17.

A PERSON, having spread a calumnious report against a merchant advertising a sale, that the goods were an imposition, and rotten and mill-dewed trash, the LORDS condemned him in L. 40 Sterling of damages to the party injured.

*Fel. Dic. v. 4. p. 228. Kilkerran.*

\* \* This case is No 384, p. 7682, *voce* JURISDICTION.

1765. March 8. GRÆME and SKENE against CUNNINGHAM.

No 18.

ALEXANDER CUNNINGHAM Clerk to the Signet, having brought a process of divorce against his wife upon the head of adultery; and having described certain men, without naming them, as the persons guilty with his wife, he, by order of the COURT, specified Colonel Skene of Hallyards, and William Græme younger of Gartmore, as the persons described by him. And afterwards, having referred the facts libelled to their oaths, they deponed negative; upon which he deserted his process, and appeared to be convinced that his wife was innocent.

An *actio injuriarum* must have *dolus malus* for its foundation.

In a process of scandal, at the instance of these gentlemen against Mr Cunningham, his defence was, That in the process of divorce against his wife, he was appointed by the COURT to name those whom he suspected to have a criminal correspondence with her; that he named the pursuers, having been informed that they were the guilty persons, though he now was satisfied of their innocence, from their own depositions; that he never had any intention to injure them, but only to carry on his process against his wife, whom he thought guilty; and therefore that they can have no claim of damages against him.

“ Found, That Alexander Cunningham, the defendant, has grievously injured the pursuers, and defamed them in their characters and good name; and therefore that he is liable to them in damages and expenses.”

An *actio injuriarum*, where there is no patrimonial loss, and where the damages awarded are only *in solatium*, must be founded upon *dolus malus*, accord-