

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

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Whether a
judicial accu-
sation is to be
reputed a
formal in-
jury?

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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.

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