

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-

No 18.

ing to the opinion of all writers upon law ; and so far it differs from damages awarded to repair a patrimonial loss, in which it is sufficient to specify even *culpa levissima*. But then the question is, Whether there be not sufficient in the present case to infer *dolus malus* in the defender. To pave the way for answering this question, it will be admitted, that certain actions are, in themselves, so black as to infer *dolus malus*, without necessity of any other proof. This is the case of murder, and also of theft, where the presumption of *dolus malus* is so strong, as even to support a capital punishment. Is not the accusing a man or woman of adultery, one of these cases? Suppose I accuse an innocent young man as having murdered his father, the accusation is presumptive evidence of *dolus malus*, unless I prove the contrary ; and there can be no good ground for distinguishing the cases. Cunningham, therefore, must be presumed to have accused the person *dolo malo*, unless he can bring preponderating evidence to the contrary. The evidence he brings, is his barely asserting that he had information ; and that he believed his information. But this cannot exculpate, unless he produce his informers ; and if he be silent upon this head, the presumption must lie that he had no information ; which, instead of an exculpation, is an additional circumstance to prove his *dolus malus*.

Had the defender, instead of alleging information, candidly told what probably was the truth, namely, that he was tempted by a fit of jealousy to accuse both his wife and the pursuers, and that otherwise he had no malice or ill-will to any of them, it is probable that he would not have been found liable in damages.

The President was of opinion that *culpa* is sufficient in this case ; and quoted the case of Campbell of Blytheswood, who, upon the information of his son, a raw youth, that he was filled drunk by some burgesses in Dumbarton, and a bond elicited from him of L. 2000 Sterling, brought wantonly a process of reduction and improbation against these gentlemen, full of injurious expressions, which was altogether a dream. The gentlemen upon this having raised an *actio injuriarum*, Blytheswood was decreed to pay L. 40 of damages, with expense of plea ; merely upon account, that the defender had acted rashly and incautiously. For it did not appear that he had any *animus injuriandi*, having no other view in the process but to reduce the supposed bond.

Sel. Dec. No 233. p. 307.

1771. August 10.

ROBERT HAMILTON Provost of Kinghorn, Pursuer ; *against* JAMES RUTHERFORD, JOHN AITKEN, DAVID SIBBALD, and WALTER RYMER, in Kinghorn, Defenders.

No 19.
Libellus famosus—veritas convicii non excusat.

THE pursuer brought an action of damages against the defenders, in the Court of Session, on account of an alleged injury and defamation. The gene-