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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-

ral ground on which it proceeded was an allegation made by the defenders, in particular by Rutherford, that the pursuer had been bribed at the last general election; Kinghorn being then the returning borough of the district. The first step taken in this business was a letter which the defenders wrote to the pursuer, in the following terms:

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"Sir, We take this opportunity to inform you of a very extraordinary aspersion, wherein this town of Kinghorn in general, and you in particluar, are deeply concerned. The fact is, that last Monday the Honourable Mr Wemyss, of Wemyss, passing to Leith in the passage-boat Alexander, and holding some conversation with Thomas Tait the master, Tait complained of the great bank of sand in the Pettycur harbour. Mr Wemyss took occasion to say, that if it were not for a mule of a director which our borough had the misfortune to be ruled by, the harbour would have been taken care of. Tait, or some other of the company, answered, That it could never do without a west head. Mr Wemyss replied, You have already got L. 800, and the Johnstons will give you more. We must therefore call upon you, as at the head of the borough, to explain this mystery. We all know Mr Wemyss to be a gentleman of great rank, honour, and fortune; and therefore such an insinuation from him, in so public a manner, and in a matter of the utmost importance to the honour, the independence, and even the existence of us as a royal borough, must fall with great weight. As members of this community, who hold the most considerable property in the town, we have a right to demand to be satisfied; and if you refuse to do it, we will be under the indispensable necessity of speedily vindicating the honour and independence of our borough by every legal measure we may be advised to. We are, &c. (Signed) James Rutherford, John Aitken, David Sibbald, Walter Rymer.

Kinghorn, 22d December 1768."

Mr Hamilton took no notice of this letter; and on the afternoon of the next day another letter was written, addressed "To the Magistrates and Town Council of Kinghorn;" which was produced at a meeting of shipmasters, and subscribed by the defenders and a number of other persons present.

It was in these words:—"Gentlemen, We have lately been informed of a strange and extraordinary charge brought against all of us, as inhabitants, burgesses, and heritors, in this borough, with which we are deeply affected; and we took the first opportunity to communicate it to Provost Hamilton, as the head and ruler of the town, by the letter signed by several of us, a copy of which follows: (a verbatim copy of the letter of the 22d inserted). But as none of us have received any satisfying answer from the Provost, we are more confirmed in the truth of the allegiance, so highly derogatory to our credit as a borough, and to our honour and reputation as private persons; and we are firmly resolved to trace it to the bottom. We flatter ourselves that the greatest part of you are not only innocent, but ignorant of this shameful, this infamous

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transaction. We have given Provost Hamilton an opportunity to vindicate himself; and we must hold him guilty till he takes measures for that purpose. We must next call upon you, who have the administration of the revenues, and the executive government of the borough, to join issue with us in investigating it to the bottom, that we may either shew the world we are all innocent of this high charge, or hold up the author to the just chastisement of the laws he has offended."

The Provost was not in the town; and next day, viz. the 24th, the letter was placarded upon a stone pillar or dial, in a very public spot by the high way, where it remained affixed that whole day, orders having been given by some of the defenders, that none should take it down, and to give notice if any such attempt was made.

It was farther proved, and partly admitted, that, after this transaction, the defenders, in particular Rutherford, had openly and very freely delivered their sentiments as to the pursuer; that Rutherford had made frequent allusions or comparisons betwixt the Provost and Judas, and had said there was a Judas amongst them; but he had made a better bargain; for that the one "had sold his master for 30 pieces of silver, but our Judas has sold us for 800 pieces of gold; That he would make the money out, and that Provost Hamilton would be ashamed to walk the streets of Kinghorn."

The pursuer brought his action into Court, stating, in the major proposition, That "the raising and propagating false, groundless, and defamatory accusations, &c. was an offence of a high nature, &c.;" and in the minor, "That James Rutherford, &c. were guilty of the foresaid offences;" and concluded for L. 2000 Sterling *nomine damni* for the injury his character had sustained.

It was stated, That what the defenders had done proceeded from no design of callumniating the pursuer; but that they thought it their duty to lay before the Council and inhabitants a fact regarding the interest and welfare of the borough; That they were not the first raisers of the story, it having been mentioned by Mr Wemyss, and currently reported, before it was taken notice of by them in the manner mentioned; and in justification, they farther affirmed, and offered to prove, that the accusation was true, and that the pursuer had actually received the sum of L. 800 as a bribe at the last election.

The pursuer conceded that the defenders had not been the first raisers of the calumny; but a proof, as to the last branch of the defence, upon the maxim *veritas convicii non excusat*, was opposed; and an interlocutor to that import, by the Lord Ordinary, adhered to by the Court.

The cause being heard in presence, the pursuer waved his claim of damages, and limited his demand to the expenses of process; and that the defenders' proceedings should be found and declared to be highly illegal and injurious to his character. Thereafter, in memorials, in support of his action,

The pursuer *pleaded*,

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1*mo*, The *animus injuriandi*, an essential ingredient in all actions of this nature, could not, in the present instance, be explained away or denied. No extrinsic proof was necessary; the facts themselves being of so malignant a nature, followed out in such a manner, and attended with such circumsances, as placed the defenders design in the clearest point of view. If suspicions had been entertained, these might have been satisfied in a more gentle manner by an inquiry at Mr Wemyss, if he had expressed himself in the manner alleged, and upon what grounds he had said so, or by a private inquiry, in decent and temperate terms, from the pursuer himself. Or if, in the terms of their letter of the 22d December, the defenders had followed legal measures towards the pursuer's trial and conviction, no complaint could have been made. The defence, that they had proceeded upon a tender regard to the honour of the borough, was flatly contradicted by the whole train and tenor of their conduct. The argument also, that, as burgesses of Kinghorn, they had a right to be satisfied of the truth of these reports, and that it was incumbent on the pursuer to have satisfied their curiosity, might in part be admitted. Their right to make inquiry would not have been disputed, provided it had been conducted in a becoming manner; but it did not from thence follow, that the pursuer's declining, or, more properly delaying, for a few hours, to make answer to so peremptory a challenge, could justify their proceeding to placard and publish the aspersion in the manner they did. Independent of these facts, the *animus* was sufficiently indicated by Rutherford's subsequent conduct, in repeatedly and publicly expressing himself as to the pursuer in the grossest terms, and representing him as an infamous traitor.

2*do*, The chief defence urged, founded upon the alleged *veritas convicii*, was totally incompetent in law; and had, in fact, by the interlocutor refusing a proof to that import, been already prejudged. The argument, that as the proof which had been allowed was before answer, it was therefore competent for the defenders to plead every defence, so that the matter was still entire, was a most erroneous and absurd hypothesis. The proof was granted before answer as to the relevancy of those facts of which the proof was allowed; but it could not from thence be maintained, that the relevancy of facts, of which no proof was allowed to either party, was thereby reserved. The pursuer opposed the proof offered as too vague and general, and, *separatim, quod veritas convicii non excusat.* The Court was of opinion, That no proof should be allowed. The proof was accordingly refused; which clearly imported a judgment upon the relevancy of these facts, and which it could not be meant to reserve to after consideration, when a proof of the facts themselves was denied. In this the defenders acquiesced; they joined issue upon the other facts, and could not therefore be permitted to assume these facts as true.

3*tio*, But although this plea could still, in point of form, be received, either for exculpating or alleviating the injury complained of, it was an established

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principle of law, that where a fact or accusation was promulgated *animo injuriandi*, the *veritas convicii* afforded no defence. The rules of the civil law, on this point, were express; where it was laid down, that the *fides veri* afforded no defence against the *convicium*, unless the party accused could make it appear that it was done *animo convicii*. Such was the import of the constitution of the Emperors Diocles. and Maxim. in L. 5., Cod. De Injuriis. The same doctrine was laid down, and the same principle acknowledged, in Lib. 9. T. 36. Cod. De Famosis Libellis; and in the same sense were to be understood the words of L. 18. Prœm. D. De Injuriis et Famosis Libellis, "*Eum qui nocentem infamavit*," &c.; which plainly alluded to those who either prosecuted or gave information of a crime, in order that the guilty might be brought to punishment. Matthæus de Criminibus, Tit. De Injuriis, C. 1. § 2.; by whom, as well as by Voet. in Tit. De Injuriis et Famosis Libellis, it was laid down, that the exception or defence of *veritas convicii* was not admitted when there was the *animus injuriandi*, but in those cases only where discovery was made of a crime in which the *salus Republicæ* was concerned.

The defenders argument, reared upon the alleged *veritas convicii*, that the action having been raised merely *ad civilem effectum*, and being *damnum absque injuria*, there was no ground on which it could be supported, admitted of an easy and substantial answer. Though there was a *duplex actio injuriarum*, the one might be prosecuted without destroying the other. The usual method was to institute a mixed action such as the present, partly of a criminal, partly of a civil nature, not only for the redress of the injury itself, and any consequential damage thereby sustained, but for a pecuniary assythement *in solatium* of the injury, even where no damage could be qualified, and for a fine or other punishment to be inflicted on the offender. The civil law was express upon this point; a *solatium* being due for the injury, even though the party could qualify no pecuniary loss or damage. Voet. Tit. De Injuriis, § 13.; and whatever might be the law of England upon this point was nothing to the purpose; as it was not by that law, but by the law of Scotland, that the present question was to be determined.

The law of Scotland, accordingly, as appeared from many different cases, positively contradicted the plea that was maintained. In the case, 3d July 1733, Macewan *contra* the Magistrates of Edinburgh, No 6. p. 3434., the maxim, that *veritas convicii non excusat* was recognised. 4th March 1755, Auchinleck *contra* Gordon, No 82. p. 7348. In the case, 27th July 1763. Dunlop *contra* Alison *, where the pursuer brought his action of injury and damages originally into this Court, and the defender having taken exception to the jurisdiction, the plea was over-ruled. In a case, Captain Cunninghame *contra* Mr David Blair, minister at Brechin, in 1764 *, an action of this nature was sustained. In a case, Robert Wilkie, late Bailie of Aberbrothwick, *contra* Wallace, in 1764 *,

* Not reported, see Appendix.

where Wilkie having brought an action of injury, defamation, and damages, against Wallace, for having composed and propagated a false defamatory *libellus famosus* against him, when one of the Magistrates of the borough; and concluding for a palinode, L. 400 of damages, expenses, and to be otherwise censured, &c. the competency was again pleaded and over-ruled; and though Wallace endeavoured to shew that he had just grounds of complaint, it was found that these did not justify him, so far as to remove the *animus injuriandi*; and he was accordingly found liable in damages and expenses. In the case, Skene and Grahame *contra* A. Cunninghame, No 18. p. 13923, though the defender was in a manner compelled, by a judgment of the Court, to accuse the pursuers, so that no *animus injuriandi* could be presumed, the defence was over-ruled, and damages and expenses found due. In the late case of Sinclair of Freswick *contra* The Justices of Caithness *, where Sinclair having brought an action of defamation and damages for the injurious publication of a sentence which they had pronounced, accusing him of malversation in his office of Sheriff, and in the partial administration of justice; the defence was, that it had not been done *animo injuriandi*, and that *veritas convicii excusat*; but the particulars, by which the defenders meant to establish this last branch of the defence, were struck out of their pleadings, and a proof refused.

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The defenders *pleaded*;

1mo, All actions upon injury, real or verbal, like other actions arising from delinquency, produced a twofold conclusion; one for reparation to the party injured, the other for such an amand to the public as might be adequate to the nature of the offence. If one was damaged by a real injury, he might insist for a pecuniary compensation before this Court; but if he wished to have the guilty person punished, he must resort to a proper criminal court, and have the authority of the public prosecutor to insist *ad vindictam publicam*. Verbal injuries were, in particular, competent before the Commissaries; where it was formerly usual to inflict punishment, or rather penance, on account of the criminal conclusion, and now only a small pecuniary mulct; but our lawyers were agreed that injuries of this kind were not cognisable by the Court of Session; M'Kenzie, T. 30. § 4. Though such questions had of late been brought into this Court, it was merely in the shape of a civil action of damages; and though it was not disputed that the action, at the pursuer's instance, was competent, so far as it concluded for damages on account of the hurt done to his character, it was so to no other effect or purpose whatever. The criminal conclusion therefore must necessarily fall; it could not be considered as an accessory to the only radical foundation of his action; and although it could, it would still, in order to support the accessory, be necessary to shew that the principal conclusion was well founded.

* Not reported, see APPENDIX.

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2*do*, The rules and maxims of law, applicable to this case, deprived the pursuer of any claim for damages. The maxim, *veritas convicii non excusat*, as treated by the different authorities of the civil law, admitted of various qualifications and distinctions. The framing or publishing a *libellus famosus*, in the arbitrary periods of the Roman state, was severely proceeded against, whether it was true or false; but the rules taught in the Pandects were very different, L. 18. D. De Injuriis. "Eum qui nocentem infamavit, non esse bonum equum obeam rem condemnari." L. 55. D. De Reg. Juris. The same doctrine was laid down by Wissenbachius, in tit. De Injuriis, § 16. Perezeus in Codicem, and by Voet, in hoc. tit. § 9. 20. That maxim, in short, neither was nor could be understood to apply to the case where a special fact, not only true in itself, but which the party had a right to allege, or which, from its nature, was of importance to be known. The same rule and distinction were recognised by all the writers on our own law; M'Kenzie, Tit. Injuriis; Stair, B. 1. T. 9. § 4. who referred to the practice of the English; Bankton, B. 1. T. 10. § 31.; Erskine, B. 4. T. 4. § 42. From these authorities, it appeared to be confirmed, that the defence of *veritas convicii* was rejected only in the criminal suit or conclusion for punishment; but where a party demanded damages upon account of a supposed injury done to his character by defamatory words, it would be most unreasonable to give him damages if the words were really true, and which of course ought to produce that effect against his character which he complained of.

When the practice of the Courts was inquired into, it would be found that these distinctions were uniformly observed; and that the general maxim of *veritas convicii non excusat*, though often pleaded, had never been followed, except under such restrictions and limitations as shewed it to be no maxim of the law of Scotland. Cases, indeed, might occur, where a proof of the *veritas convicii* would, from the nature of the thing, be improper; where, for instance, a general character had been endeavoured to be affixed, or an opprobrious epithet, which could have no other meaning than an affront; but it was very different where the ground of accusation was a special fact; and no instance could be found, either in the records of the Commissaries, or in the practice of this Court, where a party had obtained damages upon account of a special fact, which was either proved to be true, or offered to be proved, and upon the part of the accused, declined. Numberless instances to the contrary could be given. The case of Ramsay *contra* Jervie in Bathgate *, where the one had accused the other of being accessory to the murder of a woman who was accused of keeping a house of bad fame; the late case of Watson *contra* Turner *, where the whole question turned upon an examination into the fact, Whether Watson the defender had sufficient grounds to charge perjury; and in the case of Oliphant *contra* Macneil *, the latter having called Oliphant "a damned perjured villain," was nevertheless assoilzied; it appearing that he had sufficient ground to say so at the time. A decision ex-

* Not reported, see Appendix.

pressly in point was given, 5th December 1738, Gordon *contra* Pain, No 294. p. 6079.; and the case of Sinclair of Freswick *contra* the Justices of Caithness, (mentioned above) instead of being adverse to, supported the doctrine pleaded; for, though the Court refused a proof of such allegations as were foreign to the matter at issue, they allowed a proof of all facts respecting Freswick's behaviour, in so far as they had any relation to the cause before the Justices at the time.

3tio, The distinction suggested betwixt the civil action on the case for damages, and the criminal pursuit by indictment or information, with the consequences which were the result, were fixed beyond dispute, and uniformly acknowledged in the law of England. If the defendant was able to justify and prove the words to be true, no action would lie though special damage had ensued, it being then no slander or false tale. If the fact was true, it was *damnum absque injuria*; and where there was no injury, the law gave no remedy. Blackstone, B. 3. c. 8. § 5. B. 4. c. 11. § 13. Coke, Inst. 3. 174. Wood, Inst. B. 3. c. 3. § 11. Jacob, *voce* Libel. Hawkins, B. 2. c. 73. § 6. 5. Rep. 125. Hob. 253. 1. Danvers, 162. 3. Salkeld, 226. State Trials, v. 4. p. 304. case of the Bishops. Ibid. v. 5. p. 442. case of Fuller. Ibid. p. 528. case of Tutchin. In a late noted case, Mr Onslow *contra* Parson Horn, where the defendant had, in a letter in the Advertiser, charged Mr Onslow, one of the Lords of Treasury, with having sold an office in America, and had also uttered some injurious expressions against him at a meeting of the freeholders of Surrey; Mr Onslow, having brought an action on the case for damages, though he was non-suited as to the written libel on account of some informality, got Horn subjected in damages for the defamatory words, because he could not justify the truth of what he had said.

4to, The pursuer's action, when brought into Court, was totally unsupported; and in the way he had shaped it, involved the grossest absurdity and contradiction. The major proposition of the summons set forth, That framing and publishing a false libel was highly injurious to the person libelled; the minor proposition stated, That he had been injured by a false libel; and the conclusion was for L. 2000 of damages on that account. The justice of the major was not disputed; but not only was there a total lack of evidence as to the minor, but though the defenders had affirmed, and offered to prove that it was not a false accusation, the pursuer, instead of courting inquiry, and calling upon them to support their charge, had excluded all light and all examination into the truth or falsehood of the case. Hence, as his minor proposition fell to the ground, the conclusion which hung upon it necessarily followed. The pursuer's attempt to get over this argument, by *contending*, That as the defenders' offer to substantiate the *veritas convicii* was adjudged by a final interlocutor, so that the matter was at rest, was framed upon an erroneous conception of the circumstances and mode of procedure that had occurred. The interlocutor adhered to, gave no special judgment upon the competency of such proof; far

No 19. less did it determine what effect the pursuer's denial of the fact alleged was afterwards to have upon the cause. Had the pursuer called upon the defenders to prove, their refusal would have been equal to a proof in his favour; and upon the same principle were they entitled to plead upon the effect of his refusal; and to insist, that since he was the cause why no evidence had been brought upon the fact affirmed, he must be held as admitting the truth of the allegation, or, at any rate, that he was not at liberty to say that the accusation preferred was a false charge.

5to, The *animus injuriandi*, which was a necessary ingredient in all actions of this description, could not be presumed; and from every circumstance in the case, it was clear, had never had any existence. The defenders had not been the first raisers or authors of the story, but had merely taken notice of what had been thrown out by Mr Wemyss. What they heard therefore was from good authors, which was held to be a sufficient defence; M'Kenzie, Tit. Injuriis. 1. Roll. Abridg. 64. And upon the supposition that the part they had taken was in itself of a libellous nature, it was enough for them to give up their author; which accordingly they had done from the first. The information they had received was of such a nature, as not only justified, but rendered it incumbent upon them, in their respective situations, to take notice of it; they had done so at first in the gentlest manner; but as the pursuer paid no regard to their information, they were under the necessity of bringing the matter forward in another shape. The placarding, as it was called, of the letter to the Council, was of no farther import than any other mode of publication; and as to the alleged circulation of the calumny, whatever had on that point been proved, was nothing more than what naturally followed from the story's being the universal topic of conversation in the burgh and neighbourhood.

The Judges considered this as an important and leading case. They were all of opinion that the *animus injuriandi*, upon the part of the defenders, was clear from the nature and circumstances of the case, and was otherwise fully established. They were also of opinion, That when the *actio injuriarum* was pursued *ad criminalem effectum*, the maxim *quod veritas convicii non excusat* strictly applied; so that the only difference upon the Bench was to the application of this brocard, in cases like the present, where a conclusion merely for damages was insisted on. Several Judges, of high authority, gave their opinion, That in a civil action, the *veritas convicii* was entitled to deep regard; and that if it did not entirely exculpate where there was an *animus injuriandi*, it would, at all events, operate an alleviation. The majority, however, thought, That, in the present case, the *veritas convicii* could not be proponed in defence; but, in giving this opinion, they were much swayed, and considered themselves as in some measured tied down by the previous final interlocutor, by which a proof on that head had been refused.

The following judgment was pronounced, August 10. 1771, Repel the defences; find the attack made by the defenders, upon the character of the pur

suer, was malevolent and injurious; and therefore find them, conjunctly and severally, liable in expenses of process, of which ordain an account to be given in; but not in damages, in respect the pursuer has passed from any."

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The defenders gave in a reclaiming petition, maintaining chiefly, That they ought not to be found liable in expenses; and in particular, as they had at first admitted all that had subsequently been proved, that the pursuer ought to be found liable to them in the expenses that had in that manner been unnecessarily incurred. Upon advising this petition with answers, the COURT "adhered to their former interlocutor, so far as respects the principal cause, and refuse the petition: They also find expenses due, and ordain an account to be given in; reserving to the Court, at advising said account, to modify the expense of the proof, so far as the same shall appear to have been unnecessary."

Lord Ordinary, *Stonefield.* For Hamilton, *A. Lockhart, Sol. H. Dundas, J. Boswell.*
For Rutherford, &c. *Macqueen, Ilay Campbell, Crosbie, Claud Boswell.* Clerk, *Tait.*

R. H. *Fac. Col. No* 103. *p.* 308.

1771. *November* 19.
ROBERT WARRAND, Postmaster at Inverness, *against* HUGH FALCONER, Merchant in Inverness.

No 20.
Where one wrote a private letter, accusing an inferior postmaster to his superior of malversation in office, the same held to be an injurious libel and actionable, the accuser having declined to make good his charge.

WARRAND having had a quarrel with Falconer upon his not having delivered his letters one night when the post had arrived later than usual, and Falconer having, upon that occasion, insulted Warrand, a criminal prosecution was brought against him, in which he was found guilty, and fined in 600 merks.

Before this trial was brought, Falconer, in a letter to the Postmaster-general, made a complaint of Warrand, and stated, "I am a merchant here, who have suffered greatly by the bad behaviour of your deputy; I have the most convincing proof of his keeping up my letters; and have great reason to fear that he may greatly hurt my interest by such practices. It could likewise be proved that he detained letters for others in this town; and that he opened and read them."

The contents of this letter having been communicated to Warrand by the Postmaster-general, he, in order to vindicate himself, brought an action of injury and damages against Falconer; who, in defence, *stated*, That the letter had not been written with the design of calumniating the pursuer, but had been intended merely as a private piece of information to the Postmaster-general; who, he did not conceive, would have made it public. If he entertained suspicions of the pursuer's conduct in office, he was authorised to give information of them to his superior, that inquiry might be made; and, in the case, 31st December 1708, James *contra* Watkins, No 5. p. 3432, it was found, That in