

1771. August 9. ROBERT HAMILTON, Provost of Kinghorn, *against* JAMES RUTHERFORD and OTHERS.

REPARATION—DEFAMATION.

Libellus famosus—veritas convicii non excusat.

[*Fac. Coll.*, V. 308 ; *Dictionary*, 13,924.]

AUCHINLECK. The maxim, *veritas convicii non excusat* has been sucked in with our nurse's milk, yet now it seems erroneous as generally understood. The error has arisen from distinguishing the criminal action from the civil. When a man comes to sue for damages, in which case only this Court has jurisdiction, the maxim does not apply. Here the defenders offer to prove their assertion to be true, and consequently no damages. We cannot condemn in damages where none are proved. But still my difficulty remains from the former judgment of the Court, which refused to allow a proof of the *veritas convicii*. Had the cause been as well argued formerly, as it is now, by Mr Ilay Campbell, the judgment might have been different.

PITFOUR. If a man is conscious of the guilt which another objects to him, he has no title to pursue for damages. The objecting the guilt to him is nothing but *denunciatio veri*. Shall we then say that any man may with impunity call another rogue and rascal? Not at all: the law takes cognisance of such outrages, and commits the prosecution to the public officer. When there is a radical calumny in averring of a falsehood, the private party may carry the prosecution as far as he pleases. In actions brought by the public prosecutor, the maxim, that *veritas convicii non excusat*, still holds, because the very uttering of such reproaches is hurtful to the public peace; nevertheless, in some cases, the *veritas convicii* may alleviate the punishment.

KAIMES. If I lay hold of a private fault in any man with a view to wreak my revenge upon him, I am inexcusable; yet I cannot blame the defenders, who, as burgesses of Kinghorn, desired to clear themselves. As a judge, I dare not say that this was done *malo animo*.

KENNET. In some cases *veritas convicii* will excuse: in others, not. If a man suffer a wrong, he may charge the offender with it even in conversation. But this case is different: the letter was wrote in a style not to expect an answer. The libel was published: it is very gross. The first interlocutor of the Court was pronounced with great unanimity, because the *animus injuriandi* was obvious. I could have wished that the Court had not sustained themselves as judges in matters of this nature; but *that* is now fixed.

GARDENSTON. Here was a malevolent idle accusation. Can we conclude that the magistrate is guilty, because the Court would not allow a proof? The former interlocutor, independent of every other consideration, has fixed this matter.

JUSTICE-CLERK. The defenders appeal to certain distinctions of the law of

England. I know nothing of the law of England ; and, although I did, I would not found my opinion on it. In judging of crime, the *animus* must always enter into consideration. I never saw a case where the *animus injuriandi* was more clearly brought home than in this case. At the time of writing the libel, the defenders had no idea of any evidence but the conversation between Mr Wemyss and the boatman. Their defence was, We will prove the fact of the bribery, but always in a general way. The Court refused to allow that proof ; and now that very refusal is brought as an argument for proving that there was just cause for the *convicium*. All men have right to their good fame till taken from them by public authority in a legal way. All laws establish a difference between possession and right : *Spoliatus ante omnia restituendus*. I will not inquire whether the subject is yours or not : this principle is necessary for the peace of society. The defenders had a legal remedy, which they used not ; but, on the contrary, abandoned it. I have no idea that the laws of this country allow men to vilify their fellow-subjects, under pretence of what they say being true. If we depart from those principles in the age wherein we live, confusion must ensue.

COALSTON. There are two questions here : 1st, Whether the publication of the libel is to be considered as a *famosus libellus*. 2d, Whether the conduct of the pursuer bars the claim of damages. As to the first, it is agreed that a report prevailed of Provost Hamilton having received a bribe : the defenders had right to inquire into the truth of this report. There was nothing wrong in the private letter. Provost Hamilton returned no answer : this silence authorised the letter to the council. The only difficulty is as to the publication of this letter.—But, if the letter was not illegal, how can the publication of it be illegal ? The conduct of the defender may have been indiscreet, though it was not criminal. As to the second question ; the pursuer has barred his claim of damages. There is a material difference between a prosecution at the instance of the public accuser and the private party. *Veritas convicii* excuses not in the former case, but it does in the latter. I am creditor to one of the banking companies for a note of £100 ; I send for payment,—receive an evasive answer. I write a letter requiring satisfaction ; no answer is made. I then publish the letter, and narrate the true *res gesta* : Would an action of defamation and damages lie against me ? If I call a man a bankrupt, who is notoriously so, what reparation is he entitled to demand of me ? The former interlocutor is what strengthens me. Were it not for that, I would say that it is impossible to discern a palinode, and, consequently, impossible to discern for damages ; that the public prosecutor may pursue for the public interest ; but that this Court is not called to restore the character of a guilty man.

HAILES. I am fully satisfied that the conduct of the defenders was malevolent and injurious. They accused Provost Hamilton at random, not for the sake of their own characters, or for the good of the public, but merely to satiate disappointed ambition. Notwithstanding all that I have heard, I am not yet satisfied that the generality of the maxim, *veritas convicii non excusat*, is erroneous. The distinction between *civil* and *criminal*, which the defenders make, may be just ; yet it is not the distinction which has prevailed in practice, and our law

is as much founded upon usage adapted to the temper and genius of the nation, as upon principles. I will not deny that cases may be figured where the *veritas convicii* will protect from an action of damages. Some characters may be so notoriously profligate, and some offences so generally known, that the person reproached may not have the front to pursue for damages; and, if he did, he might be refused them. Such was the case of *Fyfe*: a woman whom the whole town knew to be a bawd, could not well demand damages on account of her being called a bawd. The case of some sharpers, in the last age, might be assimilated to this. [I alluded covertly to such men as *Colonel Charteris*.] But *here* the case is totally different. Some men, from private resentment, charge Provost Hamilton as guilty of a crime: when they charge him, they know nothing of the matter; but, in an action for damages, they say, we have now discovered the crime, and we will prove it. I think that such an excuse, in such circumstances, cannot be received.

MONBODDO. I cannot distinguish between the chief magistrate of Kinghorn and the chief magistrate of the kingdom. We know what English juries have done, but we will not follow their example. Here is a *libellus defamatorius*, the produce of that license which now prevails.

PRESIDENT. (At the first advising.) From the earliest time it has been considered as an injury to slander characters. Were there no remedy in such cases, society would be endangered. In this particular, the civil law is the law of Scotland. An action arises for punishment and reparation: In Scotland, the Commissary Court is the proper place for bringing such actions: they are *always* brought with the concurrence of the Procurator-fiscal, and there is a conclusion for a *public punishment*. The rule that *veritas convicii non excusat* prevails in such case. The opinion of Carpzovius and of Blackstone agrees with mine. Carpzovius lays this down well:—If the defamation is purely with intention to hurt, punishment will be awarded; but a man may call another a thief, when he is ready to prove it for the benefit of society. Were an action still to be brought before the Commissary Court, I do not think that *veritas convicii* would excuse. The pursuer has mistaken his cause. The action for scandal has been overlooked: the action for pecuniary damages is brought. It has been found by this Court, that an action for damages and a palinode cannot proceed here. The conclusion for a palinode must be departed from. Gilbert admits that *veritas convicii* alleviates: if so, it must be proved. In the Criminal Court, do we not allow a proof of facts to alleviate as well as to exculpate? It is objected, Why did you not condescend? It was answered, You would not admit me into the cause. If the defenders are now allowed, they must condescend specially upon circumstances and witnesses. In no case where money is asked for damages, can money be given unless the damages are proved. In 1741, if every idle word had been actionable, and the maxim, *veritas convicii non excusat* had been opposed to every defence, many here present might have suffered deeply.

(At the second hearing.) I formerly inclined to the doctrine, that no damages could be awarded where the fact was true. I have, however, so imbibed the doctrine, that *veritas convicii non excusat*, that I know not how to cast it out. It was once a doubt whether this Court could judge in such matters: this

doubt has been got over ; but we still try such case in a civil light. Words may be used so as not to infer damages ; but, wherever there is a malevolent intention, and not a view of correction, *veritas convicii non excusat* : We cannot presume Hamilton guilty, when we ourselves would not allow a proof. The law presumes the words to be false, because the party had no right to use them.

ALEMORE. It is impossible to overhaul the first interlocutor. Actions of this nature are a new branch of business in this Court, and the law is not yet ripened as to them. I reserve to myself hereafter to determine as to the validity of the maxim, *veritas convicii non excusat*.

STONEFIELD. [This ought to have come in before the President's argument.] *Veritas convicii excusat in fervore iracundiæ*, but not where there is premeditated malice. See abridgment of the law by Gilbert, published by Bacon : he distinguishes between scandal by words and scandal by writing. In the last there is premeditated malice, but not in the first ; *King against Roberts*, 8th Geo. II. *Here* is premeditated malice : the defenders went on from step to step. The publication at the cross is altogether unjustifiable.

On the 9th August 1771, the Lords "found that the conduct of the defenders was malevolent and injurious ; repelled the defences : Found expences due ; but, in regard of the pursuer's consent, assoilyied from damages."

Act. H. Dundas, &c. Alt. Hlay Campbell.

Diss. Kaimes, Pitfour.

Alemore and Coalston voted with the interlocutor, upon the footing of the former proceedings being final.

1771. *November 14.* DUKE of QUEENSBERRY and OTHERS *against* MARQUIS of ANNANDALE.

SALMON FISHING.

Regulation of the Salmon-fishing upon the Annan. Demolition of a mill-dam dyke erected by an inferior heritor, refused. The stenting of nets, either entirely across the river, or placed alternately from side to side, but overlapping one another so as to obstruct the fish from getting up, found to be illegal, and prohibited. The placing of other engines or contrivances, which frightened and deterred the fish from coming up the river, likewise prohibited.

[*Fac. Col. V. 364 ; Dictionary, 14,279.*]

GARDENSTON. The defender had right to erect the dam-dyke. As to the slop, the Act of Parliament defines its nature with much accuracy. With respect to the size of the slop, I would assoilyie ; because the pursuers have not proved that a greater slop could have been made without prejudice to the going of the mill. As to the mode of fishing, in so far as nets of a new construction