

No 185. in their judicative capacity, with which they were by law invested, and not as individuals, they were not to be accountable for an error in judgment.

Answered; This is an action brought for reparation of an injury. It has been occasioned by scandal and defamation, a matter proper to the cognizance of the consistorial, and not belonging to the ecclesiastical courts. These last have no powers to give to the party injured, redress by palinode, money, or otherwise.

THE LORDS adhered to the Lord Ordinary's interlocutor, 'remitting the cause to the Commissary, with this instruction, that he refuse a proof as to what these defenders said or acted at the meeting of the kirk-session, or in their collective capacity.'

Lord Ordinary, *Hailes.* Act. *G. Wallace.* Alt. *Wm. Robertson.*
S. *Fol. Dic. v. 3. p. 347.* *Fac. Col. No 126. p. 232.*

. See additional particulars of this case, p. 7468.

1781. July 25.

No 186.

A clergyman having refused to a parishioner admittance to the sacrament, it was found, that he was not amenable to a civil court; but he having said, in public companies, that he refused such admittance, because the person was guilty of perjury, the Lords found him liable in damages.

PATRICK M'QUEEN, Forrester at Abernethy, and his Wife, JANET M'GREGOR,
against Mr JOHN GRANT, Minister at Abernethy.

The pursuers having applied to the defender for tokens of admission to the sacrament, were refused on account of some depositions emitted by them before the circuit court at Inverness; in which depositions, it was alleged, that they had perjured themselves. The pursuers, upon this, complained to Mr M'Gregor, factor of Sir James Grant, and he wrote to the defender upon the subject. In answer Mr Grant said, that he, 'heard them (the pursuers) charged in face of court with having perjured themselves; that Lord Kennet and Mr Nairne (the depute advocate) had passed by their evidence altogether; that, by the generality of people, they were censured and condemned in the severest terms; and that, while they were under such scandal, they could not be admitted,' &c. &c.

Mr M'Gregor then wrote to Mr Nairne, who, in answer, said, he 'had no impression that the pursuers were guilty of perjury, nor could they appear in that light to Lord Kennet, otherwise he would have committed them to prison; and that it would be exceedingly unjust if every slight discrepancy of witnesses were to be considered as perjury, or made the ground of ecclesiastical censure,' &c. &c.

This answer of Mr Nairne's was transmitted to the defender Mr Grant, and produced a second letter to Mr M'Gregor, in which he, in general, adhered to his former one, and particularly, alleged, that 'there was a *mala fama* universally against the pursuers as to this matter; and that their characters could

‘ not be cleared without a direct and positive attestation that their evidence was sustained by the Court.’

An action of defamation and damages was raised against Mr Grant, and came to be discussed before Lord Kennet Ordinary. His Lordship having heard parties, ordered a special condescence for the pursuers, upon which, with answers, the following interlocutor was pronounced: “ Although the Lord Ordinary is of opinion, that, if the defender had no other reasons for refusing to admit the pursuers to partake of the sacrament of the Lord’s supper, than on account of the depositions emitted by them in the criminal action mentioned in the condescence, he acted very improperly; and from his two letters, both dated in August last, to Mr M’Gregor, it would appear he had no other reason; yet as, by that refusal, he was acting in his capacity of minister in the parish of Abernethy, he is not, on that account, amenable to the civil courts of law, and therefore finds the condescence not relevant, and assoilzies the defender from this action, and decerns; but, on account of the impropriety of his conduct, finds him entitled to no expenses.”

In a reclaiming petition for the pursuers, it was *argued*, that office will not sanctify injury; and, if a man abuses his office for the purpose of injuring his neighbour, he is nevertheless liable in damages for that injury. The *bona fide* execution of an office may be a reason for excusing a man who is guilty of error; but, when it appears that there is no *bona fides* in the matter, on the contrary, that a malicious intention has been at the bottom throughout, office is rather an aggravation than an excuse; and the presuming, under the pretext of office, to commit an injury, is an offence against the public, as well as against individuals.

Two decisions were also quoted to show that ministers were answerable to a civil court for their behaviour in an ecclesiastical capacity. The one was the process in 1775, at the instance of John, Robert, and David Scotlands, against the Reverend Mr Thomson at Dunfermline,* who, in a sermon from the pulpit, had attacked the pursuers as guilty of breach of trust in some election-business of the burgh; and the other was a process in 1762, by one Snodgrass and others in Paisley against the Reverend Dr Wotherspoon* for having, in a sermon, represented them as vicious and abandoned people, who had been guilty of an atrocious riot, in ridiculing preachers and preaching, and making a mock celebration of the sacrament, the very night before that ordinance was celebrated in the town. Which sermon was afterwards published with a preface, pointing out the persons against whom it was directed. In both these cases, damages and expenses were awarded by the Court.

The Court were not unanimous in the present case; but, by a considerable majority, the petition was refused without answers.

A second reclaiming petition was remitted to the Lord Ordinary, in respect the pursuers alleged that Mr Grant had been industrious in propagating the scandal.

Lord Ordinary, *Kennet.*

Act. *And. Crosbie.*

Alt. *W. Robertson.*

No 186.

. In a case decided 11th August 1780, Robertson *contra* Campbell and Preston, No 185. p. 7465., the Lords proceeded upon the same principle as in the present case. In that case, at a meeting of the kirk-session of Coupar, previous to the dispensation of the sacrament, it was represented, that Robertson had been guilty of such immoralities as rendered him unworthy of being admitted to that ordinance. Upon this, he was summoned to attend the session; but, having disobeyed the summons, the session immediately came to a resolution, that he was unworthy to be admitted upon that occasion; and their resolution was entered into the minutes.

Robertson raised an action of defamation before the commissary, charging the two ministers, and one of the elders, who composed the session, with having scandalized his character, both in the session-house and out of doors. The defenders declined the commissaries' jurisdiction; but their declinature being repelled, they brought the cause before the Court of Session by advocation.

In the bill of advocation, the defenders maintained that they had all along acted in strict conformity to the rules of the church, without any malice against Mr Robertson, and that they could not be liable in any damages for what they did in the proper and legal exercise of that jurisdiction, with which they were by law intrusted. Upon advising the bill with answers, Lord Hailes, Ordinary, "remitted to the Commissary, with instructions to refuse a proof of what was said or done by the defenders in the kirk-session, or in their collective capacity, but to allow a proof of what they did as individuals."

Robertson reclaimed; but, upon advising the petition and answers, the LORDS unanimously adhered to the Lord Ordinary's interlocutor, and found the respondents entitled to the expenses of their answers.

A second reclaiming petition was refused without answers.

1783. *November 21.*—In the action of damages brought by Patrick Macqueen and his spouse against Mr Grant, their parish-minister, on account of his having, from motives of private pique and resentment, refused them tokens of admission to the Lord's Supper; the Court, 18th July 1781, "Found, that the defender having acted in that manner in his ecclesiastical capacity, was not amenable to the civil courts of law."

The pursuers then amended their libel, and offered to prove, "that the defender had said to many persons, that they had been guilty of perjury at a circuit-court at Inverness; and that they were held as perjured persons by those in Court, and also by the Judge and Deputy-Advocate; and likewise that the defender had said, it was on that account he had refused them tokens to the Lord's Table."

The Court thought the facts thus qualified injurious and actionable. To refuse admission to the ordinances of religion, or to give reasons for that pro-

cedure, either in the church-courts or in private admonition to the parties themselves, was a matter merely ecclesiastical; but to propagate in public companies a story highly prejudicial to the reputation of a parishioner, or even to give it as a reason for his conduct, could not be justified by the character of a minister.

No 186.

A proof was allowed; on advising of which, the LORDS found, "That the pursuers have proved the facts set forth in their amended libel, and that the defender was liable to them in damages and expenses."

Lord Ordinary, *Kennet*. Act. *Crosbie, Elphinston, James Grant* Alt. *Ilay Campbell, Robertson*.
Clerk, *Menzies*.

Fol. Dic. v. 3. p. 346. Fac. Col. No 77. p. 132. & No 127. p. 201.

1781. December 21. MACQUEEN and SPOUSE, Petitioners.

DURING the dependence of the question between the petitioners and Mr Grant their parish minister, *supra*, No 186. p. 7466, Mr Grant requested the presbytery of Abernethy to take cognisance thereof. The presbytery gave a deliverance, declaring their opinion, "That Patrick Macqueen and his wife were not to be admitted, but to remain suspended from church privileges during the dependence of the action against Mr Grant; but that, upon their renouncing that process, and giving proper satisfaction to the presbytery, and conforming to the laws of the church, they should be restored to their former situation."

No 187.

Macqueen and his wife preferred to the Court of Session, a summary petition and complaint against this sentence, as oppressive, and highly derogatory to the dignity of this Court, before which the action depended; and concluded for a proper censure upon Mr Grant, and for such relief and protection to themselves as should be deemed necessary.

The petition was refused as incompetent.

For the Petitioners, *Crosbie*.

C.

Fac. Col. No 17. p. 35.

1785. November 17.

JOHN RUTHERFORD *against* The PRESBYTERY of Kirkcaldy.

THE Presbytery of Kirkcaldy having taken offence at the behaviour of Rutherford in their court, on occasion of the settlement of a minister, as disrespectful, and otherwise improper, passed a sentence, by which he, a writer by profession, and who had acted as an agent in causes before them, was "declared incapable of appearing in future in that character at the bar of this

No 188.

A sentence of a church-court affecting a party's civil concerns, though arising inci-