JAMES MILLER, and Others, Trustees of the late JOHN HAGGART, Esq. Advocate, Appellants.—*Murray—Abercromby.* No. 19.

Right Honourable CHARLES HOPE, Lord President of the Court of Session, Respondent.—*Attorney-General Copely—Menzies.*

Jurisdiction—Reparation.—Held, (affirming the judgment of the Court of Session), That an action of damages is not competent against a supreme Judge, for a censure passed by him, while acting in his judicial capacity, on a Counsel practising at the Bar, and engaged in the cause then before the Court, although it was alleged that the censure had been made injuriously, and from motives of private malice.

April 1. 1824.

2D DIVISION. Lord Pitmilly.

THE late John Haggart, Esq. advocate, a practising lawyer at the Scottish Bar, conceiving that he had been injured by certain remarks made from the Chair by Lord Justice-Clerk Hope, afterwards Lord President, on advising a cause in which he was counsel, raised an action against his Lordship, in which, after narrating that he had been for thirty years at the Bar, during which period there had been five Judges in the Chair, by none of whom he had ever been censured, proceeded to state the circumstances in these terms:—'That, in the year 1809, a cause between the Duke of 'Athole and General Robertson of Lude depended before the 'Second Division of the Court of Session, wherein the Right 'Honourable Charles Hope then presided as Lord Justice-Clerk. 'That the Honourable Henry Erskine, Mr Matthew Ross, Mr 'John Clerk, and the pursuer, were counsel for General Robert-'son; and it being deemed proper to submit an interlocutor pro-'nounced by the Lord Ordinary to the review of the Court, the 'task of preparing a petition devolved on the pursuer. That after 'the petition was prepared, it was laid before the Dean of Faculty, 'who revised and corrected the press-copy. That when the peti-'tion was put to the roll, it was appointed to be answered, and 'no animadversion was made on any of the expressions contained 'in it. That when the petition and answers came to be advised, 'the Right Honourable Charles Hope, Lord Justice-Clerk, not 'only censured expressions used in the petition, but expressed 'himself towards the pursuer in terms that greatly hurt his feel-'ings. That on the 11th of April 1809, the pursuer wrote his 'Lordship, calling to his recollection the expressions he had made 'use of, and expressing a hope that an explanation would be 'given. He received the following answer:—"Granton, 12th 'April 1809. SIR,—I have the honour to acknowledge the

April 1. 1824. 'receipt of your letter of yesterday. If I thought that I were 'bound to give any kind of private explanation to any human 'being for what I may say or do on the Bench, I should consider 'myself as, from that moment, surrendering my independence, 'and forfeiting all title to the confidence of my country. Do not 'suppose, Sir, from this, that I wish to arrogate to myself an 'exemption from all responsibility for what I may say on the 'Bench; on the contrary, I know that I am responsible, and I 'hope I shall always act under the conviction that I am so. But 'it is a legal and public responsibility only to which I will submit." 'That a question afterwards depended before the First Division 'of the Court, between the Duke of Athole and Mr Leslie of 'Butterstown, relative to a large extent of pasture ground; and 'the Honourable Henry Erskine, Mr Matthew Ross, Mr John 'Greenshields, Mr Duncan Macfarlane, Mr Henry Cockburn, 'and the pursuer, were counsel for Mr Leslie in this cause. 'That it was the opinion of all the counsel that Mr Leslie would 'be successful; but difficulties arose, in point of form, from two 'interlocutors pronounced by the Lord Ordinary that did not 'apply to the shape of the cause; and it became necessary to 'apply several times to the Court, with the view of removing 'these difficulties, and none of the statements or expressions in 'the petitions were censured. That it being deemed expedient 'to present a petition to the Court on the merits of the cause, 'the process was laid before the pursuer to prepare it; and that 'he might be enabled to do justice to his client, and state the 'cause fully to the Court, he went to the ground in dispute, and 'took down notes explanatory of all the points in controversy. 'That, after this, he framed a petition with his own hand, and 'transmitted it to Edinburgh, where it was printed and boxed 'the 10th of September 1812. That the petition was moved by 'Lord President Hope on the 17th November 1812, when his 'Lordship turned to the 23d page of the petition, and read the 'interlocutors of the Lord Ordinary, dated the 11th June 1808, 'and 24th May 1809; and, without reading the statement in the 'petition to which he alluded, his Lordship expressed himself 'in the following terms, or used words of the same import:—" I 'do not know what the intellects of the gentleman who framed 'this petition are, or what he conceives ours to be; I do not 'know what his candour may be, or what he expects ours to be, 'when he states that the second condescendence was not appoint-'ed in terms of the Act of Sederunt." That, by using these 'expressions, the audience, which was numerous, with the ex-

'ception of the few who had read the petition, must have con-
'ceived that his Lordship not only considered the pursuer defi-
'cient in intellect, but devoid of candour, and that he had deli-
'berately misrepresented the terms of the Lord Ordinary's
'second interlocutor. That what was stated in the petition,
'and to which his Lordship alluded, was in the following terms:
'—" His Lordship appointed the pursuer to give in a conde-
'scendence, in terms of the Act of Sederunt, of what he offers to
'prove in support of the several conclusions of his libel; and
'when given in, allows the defender to see and answer the same.
'And a short representation being presented in the possessory
'question, his Lordship 'sisted procedure till the process of
'reduction comes to be advised.' A condescendence of six pages
'was accordingly lodged; but the answers were argumentative,
'and extended to 15 pages; and his Lordship appointed both
'processes to be enrolled, that they may be conjoined, and an
'interlocutor pronounced in the whole cause. The processes
'were enrolled, and his Lordship 'conjoined this process with
'the possessory process; and in the conjoined actions appoints
'the pursuer, John Leslie, to give in a more specific condescen-
'dence of what he offers to prove in support of the conclusions
'of his libel.' As the condescendence was not appointed to be
'framed in terms of the Act of Sederunt, and the respondent
'had not confined himself to facts in his answers to the former
'condescendence, it was deemed expedient, in the condescen-
'dence that was now appointed, to meet and obviate what was
'stated in the answers to the first condescendence; but his Lord-
'ship, under the impression that he had appointed a condescen-
'dence in terms of the Act of Sederunt, pronounced the follow-
'ing interlocutor."'

After mentioning that a similar statement had been contained in a previous petition, which had not been censured, and that, if what was stated had been read, it would have appeared to the audience that Mr Haggart had no intention to misrepresent the terms of the Lord Ordinary's interlocutor; that they had been transcribed, and that the reason for not framing the condescendence in terms of the Act of Sederunt was fairly stated; the summons proceeded in these terms:—'That the censure was
'therefore unmerited, and the injury the pursuer sustained was
'aggravated by his Lordship not reading the passages in the
'petition to which he alluded. That his Lordship next turned
'to the 29th page of the petition, and, without reading the pas-
'sage he intended to censure, or explaining that he merely

April 1. 1824. 'alluded to what was there stated to have been the opinion of 'Lord President Blair, when the first petition was moved on the '18th February 1811, and a short petition, requesting an expla- 'nation of the interlocutor written on the first, was moved on the '9th March 1811, his Lordship expressed himself in the following 'terms, or used words of the same import:—" Mr Haggart has 'here, as is his usual practice, stated facts and circumstances of 'which there is no evidence on the record, and which live in the 'memory and recollection of that gentleman alone. Mr Haggart 'has conducted this cause, as he does all the others he is con- 'cerned in, differently from all the other counsel at the Bar." 'That none but those who had read the petition could be aware 'that his Lordship here alluded to what was reported to have 'been Lord President Blair's opinion; and all the rest of the 'audience must have been impressed, that the pursuer had stated 'facts and circumstances relative to the merits of the cause, of 'which there was no evidence, written or parole; and although 'the pursuer was not directly accused of stating falsehoods of his 'own invention, that was the inference resulting from the words 'spoken by his Lordship. That if his Lordship had communi- 'cated, that he merely alluded to the report given in the petition 'of Lord President Blair's opinion, every practitioner present 'would have been aware that no record of such opinions is kept, 'and that they are made from notes taken by counsel or agents; 'and it would have appeared to every practitioner present, that 'the words used by his Lordship were inapplicable, and the 'censure far greater than the offence merited, if the pursuer had 'committed an error in his notes, and given an inaccurate report.'

It was then stated, that there was satisfactory evidence that the report was correct; that the statement was transcribed from a former petition, drawn by Mr Greenshields, which was not censured; that, however, 'his Lordship did not limit his censure 'to the case under consideration, but accused the pursuer of 'inventing and stating facts of which there was no evidence in 'all the causes he was concerned in; and it was imputed to him 'that he had misconducted the case of Mr Leslie, and every 'other case he was employed in from the moment that he came 'to the Bar. That it belonged to his Lordship to censure the 'petition under the consideration of the Court, if it was censur- 'able, and his Lordship was entitled to censure the pursuer, in 'so far as he was concerned, if the cause had been misconducted: 'but his Lordship was not entitled to stigmatize the pursuer's 'whole conduct at the Bar; and it was unjust to charge him

April 1. 1824.

'with the whole misconduct of the case under consideration, as 'it appeared from the record that other counsel were employed. 'That the censure was the more unjustifiable, as his Lordship 'came later to the Bar than the pursuer, and was only acquaint-'ed with a limited part of the pursuer's practice; and his Lord-'ship did not, and could not, mention any instance where the 'pursuer invented or misrepresented a fact in any cause in which 'he ever was concerned. That the said charge or censure was 'aggravated by the tone and manner in which it was delivered. 'That the pursuer, intending to justify his conduct in the face 'of the Court, and of the audience, rose up for that purpose, 'when he was stopped by the said Lord President, who said, '—" I conversed with my brethren on this subject in the robing 'room, and the opinion I have delivered is that of the whole 'Court." That it was not the opinion of the whole, or any of 'the Judges, that the pursuer deserved the harsh and injurious 'censure pronounced by the said Lord President. That, after 'taking down the words his Lordship had used, and shewing 'them to several gentlemen who were present, the pursuer trans-'mitted the paper to his Lordship, requesting of him, if any 'errors were committed, to correct them. That his Lordship 'returned an answer, which will be produced in the proceedings 'to follow hereon, in which he said,—" Your note conveys per-'fectly the sense and substance of the passages of my speech to 'which you allude." That the pursuer then wrote his Lordship, 'and expressed a hope that his Lordship would deem it proper 'to give an explanation. That the pursuer also expressed a 'wish that the letter he addressed to his Lordship might be 'communicated to the other Judges. That the following answer 'was returned:—" Edinburgh, 5th December 1812. SIR,—On 'mentioning the matter to my brethren this morning, they did 'not think it incumbent on me to have any farther correspon-'dence with you on the subject of your letter; and that opinion 'coinciding entirely with my own, I have to request that you 'will consider this as the last and only communication you will 'receive from me." That his Lordship having refused to give 'any explanation of the unwarranted expressions used by him, 'or make any reparation for wounding the pursuer's feelings, or 'injuring his private and professional character, he is laid under 'the necessity of seeking redress in the manner pointed out by 'his Lordship.' The summons therefore concluded, that it should be found that the expressions were unwarranted and injurious, and that his Lordship should be found liable in

April 1. 1824. L.5000 of damages. An amendment of the summons was afterwards made, by alleging that the expressions had been used maliciously, and from 'motives of private malice,' 'and 'for the purpose of injuring the pursuer in his professional 'character.'

Subsequent to the above action being brought into Court, his Lordship having again from the Chair made certain reflections upon Mr Haggart for his conduct as counsel in another cause, Mr Haggart brought a second summons, in which the circumstances were stated in these terms:—'That he was requested by 'Mrs Belinda Edwards, widow of Colonel George Colebrooke 'of Crawford-Douglas, presently spouse of John Taaffe, Esq. of 'Smarmore Castle, to prepare answers for her to two petitions 'presented to the First Division of the Court of Session by 'Richard Mackenzie, writer to the signet, and others. The 'two petitions which were to be answered, and a variety of papers 'which it was necessary to peruse, were only put on the pursuer's 'table on Friday the 24th day of February last; and as the cause 'was put to the roll for advising the day following, it was impos-'sible for the pursuer to prepare the answers. That when the 'two petitions were moved, on Saturday the 25th day of Feb-'ruary, the Court prorogated the time for lodging the answers 'till Monday immediately following, and appointed the petitions 'to be put to the roll on Tuesday, with or without answers. 'That the cause was of great importance to Mrs Taaffe, and the 'time allowed for preparing the answers was too short; but the 'pursuer used every effort he could, and answers were prepared 'and printed on Monday; the advising of the two petitions and 'answers was postponed till Wednesday the 1st of March; and 'before any opinion was delivered, the pursuer stated, that the 'time allowed him for preparing the answers was so limited, that 'he was aware he had not done full justice to his client, and that 'the answers were imperfect. That one of the Judges having 'referred to two passages in the answers, one of them as being 'injurious to Mrs Lee of Hill-street, Edinburgh, and the other 'as injurious to the said Richard Mackenzie, the pursuer imme-'diately stated, that he had no intention of introducing any thing 'injurious to Mrs Lee or Mr Mackenzie, and moved that the 'passages referred to might be expunged. That the Right 'Honourable Charles Hope, Lord President, who had on ano-'ther occasion unwarrantably traduced and vilified the pursuer, 'now, from motives of private malice, and for the purpose of in-

'juring the pursuer in his professional character, said,—"I have 'never seen such low wit, vulgar abuse, scurrility, and buffoon-'ery, as in these answers. It is painful to think the Bar of 'Scotland has furnished a man capable of writing such a paper." 'That after his Lordship had uttered part of those injurious 'epithets, the pursuer requested to be allowed time to take down 'the words spoken, when his Lordship said,—"I will repeat 'them three times over;" and after doing so, he said,—"I shall 'attest them for your satisfaction, if you take down accurately." 'That a paper, containing the epithets uttered, being next day 'handed to his Lordship on the Bench, he, after reading it, 'wrote the following words at the foot thereof:—"The above 'seems to me to be correctly the substance of what passed, '(signed) C. HOPE;" which paper will be produced in the pro-'ceedings to follow hereupon. That the time the pursuer had 'to prepare the answers being much shorter than is usually 'given, and he having apologized for any imperfections in the 'answers before any opinion was delivered from the Bench, and 'having craved that the passages which were pointed out as ex-'ceptionable should be expunged, it is manifest the above expres-'sions must have been used from a malicious intention, and for 'the purpose of injuring the pursuer in his professional and pri-'vate character; and this will farther appear on perusal of the 'answers, which, if they merited any censure at all, under the 'circumstances in which they were prepared, did not merit those 'vilifying epithets which were uttered, and, after a deliberation 'of twenty-four hours, were abidden by and attested by the said 'Right Honourable Charles Hope. That the offence was ag-'gravated by using the above defamatory expressions during the 'dependence of a previous action, brought by the pursuer against 'the said Right Honourable Charles Hope for a similar offence.'

He therefore concluded, that it ought to be found that the expressions were 'unwarranted, malicious, and injurious,' and that his Lordship should be ordained to pay L.5000 of damages.

Against the first of these actions his Lordship lodged these defences:—'The statement contained in the libel is inaccurate 'in many respects. But the defender conceives that it would be 'improper in him to go into any explanation, in this process, of 'the circumstances on which he delivered his opinion as a Judge. 'It is sufficient to say, that, on the occasions libelled, he acted 'in the discharge of his judicial duty; and therefore, even upon 'the supposition that the statement were accurate, nevertheless

April 1. 1824. 'the present action of damages is groundless. Therefore the 'defender ought to be assoilzied.'

The same defence was also lodged in the second action, and it having been conjoined with the previous one, the Lord Ordinary, after hearing parties, assoilzied his Lordship, and, on advising a representation, pronounced this interlocutor:—'Finds, 'that an action of damages cannot be maintained at the instance 'of an advocate against a Judge of this Court, on the ground of 'injury alleged to have arisen from a censure passed in Court on 'such advocate for his manner of pleading a particular cause: 'Finds, that an allegation of private malice having been the motive of the Judge in inflicting the censure complained of, does 'not render the action competent; and that proof of alleged malice 'is therefore inadmissible: And further finds, that although the 'pursuer in this action libels malice, yet he has not suggested in 'his pleading any proof, or offer of proof, of this charge; and 'that the existence of the alleged malice is merely inferred by 'the pursuer from the words used, and from censures having 'been pronounced against him by the defender more than once: 'Finds, that the charge of malice which is thus made, is laid on 'grounds which are insufficient to prove the charge, even were 'such an action competent, when malice is libelled, and relevant 'proof of it is offered;' and therefore adhered.

Against this judgment Mr Haggart reclaimed; but before the cause was advised he died, and the appellants, his trustees, (who had been enjoined by him to prosecute the actions), were thereupon sisted as parties.

On advising the petition with answers, *Lord Craigie* observed:—In this case, when the petition was moved, it appeared to me that we should have seen the terms in which the original pursuer directed his trustees to prosecute the action; and unless these directions had been made a condition of the settlement, I think that the trustees were called on to exercise their own discretion in carrying on the action; and I think in such a case it might have been proper for the defender to have insisted on their giving their oath of calumny. If they had been so called on, I am satisfied that the action would not have been proceeded in, as being neither expedient for the purpose which Mr Haggart had in view for clearing his own character, nor just to the other party.

But if we are called on to decide the question, my opinion is, that the interlocutor is substantially right; but there are some findings in it with which I cannot agree:—1*st*, That there can be no action against a Judge in this Court for censure passed

on a counsel. I conceive that finding to be a great deal too broad. There is no privilege competent to the members of this Court, more than of any other Court. There is, and must be, a difficulty as to who are to review their conduct, and in some cases it may be impracticable; but I do not see that there is any distinction between superior and inferior Judges; and I think Judges or lawyers may be sued for damages for malversations creating an injury to a practitioner before the Court. If a Judge, for example, in this Court, were to say that he could pay no attention to what a counsel said for a prisoner because he was guilty of the same offence, I think, in such a case, which may be supposed, the Judge would be liable to an action. April 1. 1824.

In the *2d* place, I cannot agree with the finding, that it is necessary to prove malice exclusively of the act itself. I think the act may be of such a nature as to prove malice of itself, so as to make it unintelligible without supposing malice. On these points I think the interlocutor goes too far. At the same time, if I were called on to decide the point in this case, I would say, that the words do not import malice. They are strong, no doubt, but they were said on the spur of the occasion, and I think were meant, not so much to injure the party, as to express the indignation the Judge felt at the proceedings. In that view the case ought to be decided as the Ordinary has done. But I must go further, and I say, that in order to authorize a prosecution of this kind, other measures ought to have been adopted; the words should have been minuted at the time, and the pursuer should have taken the opinion of the rest of the Court if he was injured or not. The injury might thus have been ascertained, and, in addition to taking away the censure, whether there was room for an action of damages. But the presumption is, that the Court did approve of, and go along with the Judge in what was said. But, under all the circumstances, I think no proceedings can be held in this action. If loose expressions, used in the course of an argument or an opinion, are to be decided on, not by those Judges who sit along with the Judge who used them, but by others, I think it is inexpedient. I can conceive a case where an action could not even be brought. In the case of a judgment pronounced by a Court, consisting of a number of members, could they try themselves? It would be necessary to have an impeachment, or a bill of pains and penalties. But in a case like this, if any injury has been done, the proper steps were not taken to enable the party to bring his action.

Lord Robertson.—This is an action originally brought by Mr

April 1. 1824. Haggart, and now insisted in by his trustees, the object of which is to recover damages from the President of this Court, on account of certain words used by him while sitting on the Bench, and in his judicial capacity, as to the conduct of an advocate in a particular cause, about which the Court were deliberating. The defence that is made to this action is of a preliminary nature. (His Lordship then read the defence). The Lord Ordinary has sustained that defence, and the case comes before us to review that judgment. It appears to me that this action is altogether incompetent, and that it is impossible for us to entertain it, unless it can be shewn that, if the defender were to enter on his defence, we have sufficient jurisdiction. This Court, like every other Court, from the highest to the lowest, must have a superintendance over those who practise before them. The Court has, and must have, from the nature of the thing, and has always, exercised a superintendance over those practising before them for their conduct in their professional capacity. This is sometimes done by way of censure, sometimes in a more severe way. It cannot therefore be said, that the defender was exercising a power not competent to the situation he held when he censured a person practising at the Bar of the Court. This power is, from its own nature, entirely discretionary; and the exercise of it, and the mode in which it is exercised, must depend on the discretion and sound sense of the Judges. The basis of the pursuer's plea, therefore, must be, not an allegation that the defender had been exercising a power not belonging to him, but that he had been exercising it unduly; that he had gone ultra rectas metas of his power; that he had pronounced a censure more severe than what was due; or that it was greater than the cause or the offence, if any, required. It will be observed, as to the first action, that all the Judges concurred in the censure; for it is said, 'The 'opinion I have delivered is that of the whole Court.' If it was therefore competent to call the Lord President in an action, it was also competent to call the whole Judges; and if the action is competent before us, we are to have the whole Judges of the First Division at the time brought before us for words spoken in their judicial capacity. This appears entirely anomalous, without precedent, and would lead to most dangerous consequences. If Judges in any Court were liable to be called to account for words spoken in their judicial capacity, it may be said, in the words of Lord Stair, 'No man but a beggar, or a fool, would be a Judge.' But if this action be competent, before what Court is it competent? It is an action for an injury by verbal slander. Is not an

action of that kind competent before the Commissaries? And yet if such an action were brought before them, is it possible to maintain, that that, or any inferior Court, are to judge of words spoken in a superior Court? But it is said, that that argument is not applicable, because the action is brought before a supreme Court. But what power have we to take cognizance of what the Judges of the First Division have done? If any Judge of the Supreme Court shall, in his individual capacity, do any thing subjecting himself to the laws of his country, either civil or criminal, he must be dealt with as any other person. But there is nothing making it competent for us to judge whether the conduct of the Lord President was proper or not, whether the censure was merited, whether it was more than the offence deserved, or if the Court acted with a sound discretion in inflicting it. But it is said, that there is no wrong without a remedy. No doubt that is the case, and I hope it will ever be so. But it must be a constitutional remedy, consistent with the rights of the Supreme Court. If any Judge, either judicially or not, should commit a wrong, God forbid there should be no remedy; but then the redress does not lie with us; it is by application to the King in Council or to Parliament. In my opinion, the interlocutor is right, and we have no power to alter it.

Lord Glenlee.—I agree very much with what was said by Lord Craigie. I was for seeing the petition, because it appeared to me, that the grounds of defence went a great deal further, in freeing Judges from an action on account of malversations, than I was disposed to go. I am aware that, if mere iniquity is alleged—of the Judge having done a thing which he was entitled to do, but having done it in a way not called for—that is, merely an erroneous performance of an act otherwise legal; I think, without entering into the distinction of higher or lower Courts, no action would lie. But if I offer a separate proof that the Judge has been bribed to pronounce an erroneous judgment, though he might not be amenable for the erroneous judgment, yet if I can instruct that a bribe was actually given, I would have little doubt in that case that an action would be competent. But, where the only thing complained of is, that the Judge has performed a judicial act in an improper way, there, I think, it would not do to allow an action. But, if you came to a Judge going ultra vires, though it may still bear the character of a judicial act, I think he would be responsible. For instance, it would be a judicial act if we were judging of a supersedere of diligence, and we were to allow it, though not allowed by the statute: this

April 1. 1824.

would be a judicial act; and yet, by the words of the statute, we would be all liable as cautioners for the debt. What the form of process would be for making us liable, it is not my business to say. till the case comes before us; but just the same sort of process might be used for recovering damages where the Judge has gone ultra vires. But I think there is not sufficient stated in the libel here to support it. 'There can be no doubt that a Judge is allowed to censure a practitioner, and to put that censure on the record. But he is also entitled to give his opinion of a paper or a speech, and of the manner of the practitioner's conducting himself: and if he really and truly believes it, I know nothing to prevent him saying so. The only point a little doubtful, is with respect to the particular expression in one of the libels, not alluding to the case then before the Court, but to the general conduct of the original pursuer at the Bar. But it appears to me, that the libel excludes the possibility of saying any thing about it; because it appears that, when Mr Haggart rose for the purpose of remonstrating against it, he was told that it was the opinion of the whole Court, and there was no contradiction of that made by any of the Judges; and therefore it had the sanction of every one Judge: and if any of them thought otherwise, and, when this declaration was made, that it was the opinion of the whole Court, sat still without saying any thing, I think they were ten times more to blame than the President for saying it. But as, by the shewing of the libel, this injury was not done by him individually, but by the whole Court, I have great doubts if an action against him could be listened to, even supposing that this allusion to his general conduct was competent for a Judge to use, which is the most doubtful question. One Judge may use more gentle language, and another more severe; but there is nothing which you can say a Judge was not entitled to say, if he really believed it.—I have nothing further to add to what Lord Robertson has said.

Lord Bannatyne.—In a case of this kind, I think it is necessary that every Judge should express the grounds of his opinion. It is not necessary to say any thing as to the origin of this action; the only point is, whether it can be maintained. My opinion coincides with that of the Lord Ordinary, as expressed in his interlocutor. It belongs to every Court to regulate the practitioners at their Bar. As to an inferior Judge, we all know where the remedy lies for malversation; the superior Court will apply the remedy. But it is another question when the abuse has taken place in a Court like ours, composed

of many members, and whose judgments are not subject to any review in this country. There must either be no remedy by civil action, or it must lie in the Court itself; but it does not follow that the remedy must lie in that Court. He would have a remedy, but I have no idea that it would lie here. It is of no consequence whether it was the head of the Court or not that expressed his opinion of the conduct of a practitioner at the Bar. Though a single Judge does it, it is in presence of the whole Court; and if they thought he did wrong, they would have expressed their opinion in one way or another. One Judge may say a thing more hastily than another; but if the rest of the Court acquiesce, the whole Court are implicated, and it must not be considered as done by an individual Judge. Will any man say, that, if it were a single Judge, action could be brought against him before himself! This Court cannot judge of an action against themselves. And I am confirmed in the opinion I have given by the fact, that for 300 years since the Court has subsisted, there has been no such action. If it had been competent, there must have been some such cases, and we would have had many instances. I must make another observation, that nobody supposes that the Bar has suffered any injury for want of a remedy in this Court. This Court is as much interested as the Bar is, in the preservation of their privileges. The liberty allowed to the Bar has seldom been abused, but where it is, it is the duty of this Court to repress it. There is no wrong here without a remedy; the Bar have enough of knowledge to tell them where the remedy lies; and if they were called together, they would decide that the remedy could not lie in this Court.

Lord Justice-Clerk.—When this petition was moved, I took the liberty of stating shortly the grounds leading me, even on the petition, summons, and defences, to the opinion that the petition ought to be refused; but as it appeared to your Lordships, from the novelty of the case, that it was better to have an answer on the record, you ordered it to be answered; and I do not regret that that step was taken, as it has led, not only to a full answer, but to deliberate opinions on the case by your Lordships. I should have considered the case of infinite importance indeed, if you had had any hesitation as to the judgment to be pronounced; because I should have considered, that the sustaining an action of this anomalous and unprecedented nature, would have been one of the greatest innovations since the institution of the College of Justice. But, in consequence of the opinions expressed

April 1. 1824. by all of your Lordships, there is no risk of establishing such dangerous prosecutions. I say dangerous, not with reference to the individuals who may fill the Chairs of this Court, but I state it advisedly and confidently, most dangerous to the interests of the country. For if I considered it as sanctioned by your Lordships, that, when either a party or a practitioner should conceive himself injured by what is said by a Judge in his judicial capacity, and warranted to charge malice, he should be entitled to bring an action of this kind, no man can doubt that there would be a total end to the independence, dignity, and security of Courts of Justice. We can never lose sight of this, that both of the summonses (and I may notice both, though we are at present considering only one of them, as the other has been superseded) are rested on the basis, that the injury complained of was the act of the head of this Court sitting in judicio; not any private slander, not any act of defamation committed extrajudicially, but founded on the conduct of that Judge in the discharge of his sacred office. I never can lose sight of the fact, that, take the case in any aspect, view it as held out in the petition, you never can see any thing but an action for an injury rested on the judicial proceedings of a Judge in the discharge of his sacred office. It has not been denied, but admitted, both in the summons and in the petition, that the censorial power of this Court, and of every other Court, even of inferior Courts, is an unquestionable proposition, because no lawyer can entertain a doubt upon it; and your Lordships must be aware, that, as we are sworn to discharge our duties faithfully, if, in cases where a censure is required, we shrink from inflicting it, we are as guilty as if we pronounced an unjust judgment. This is most unquestionably an action for a judicial act; therefore I am decidedly of opinion, that we are just called on to decide this case in the same situation as if we were sitting in the Court of Session before its Division—that we, the fourteen Judges of the Court of Session, might have been called to entertain an action against our own head for what was done by him in the presence of the whole Court. The Division of the Court makes no difference in the case; for as Lord Robertson has most correctly observed, the Judges of one Division have no power on earth to review the decisions of the other. But then it is most correctly observed by some of your Lordships, that if this is á competent action on the face of these summonses, it is equally competent in the Commissary Court, which indeed is the proper forum for actions of defamation; and therefore we must carry the doctrine to this extraordi-

nary conclusion, that it is competent to bring the head of this Court to answer at the Bar of the Commissary Court for an act in his judicial capacity. That is the inevitable result if you sanction this action. But I have already observed, that the power of censure is admitted; the case is therefore made still narrower, because the action is rested on an allegation, that there has been an undue excess of the exercise of this power; and therefore it must be maintained, that the question as to the degree of the censure is to be submitted to consideration either here or in the Commissary Court, or submitted to another tribunal, to the cognizance of a jury of twelve men, taken by accident, to try whether a Judge of a Supreme Court, in the performance of his sacred duty, and which, if he had omitted, he would have been guilty of a dereliction of his duty, has exceeded the measure of his duty in the opinion of these twelve men. The very enunciation of this, which I hold to be the inevitable result of entertaining such an action, must convince every reasonable man that you will do irreparable injury, not to the Judges, for that is nothing, but to the country at large. You will degrade the situation of a Judge of this Court into the low mean situation, so well described by Lord Robertson in the words of Lord Stair. But it is of some consequence, in a case of this kind, that, with all the anxiety and pains that have been taken as to this dying legacy, and, it is evident no common pains have been taken, no vestige of authority, either in the opinions of Judges, in the statute law, or in the decisions, have been pointed out. I should therefore conceive that that circumstance, with the total absence of all precedent, is a good illustration that such actions have never been considered competent. Your Lordships will not suppose that I mean to say any thing as to my not supposing possible, that any Judge, acting palpably ultra vires, may not be liable in reparation in the proper way. I am not called on to give an abstract opinion on such a case; all such cases must be viewed as extremely delicate cases: upon such extreme cases I shall reserve my opinion till they do occur. But as to any thing appearing on the face of the act, an act done under the controul of the Court, and in reference to the particular case before the Court, I have not a doubt that there is no foundation for maintaining that any such action can be sustained. And I humbly conceive, that it is of importance to notice that no such actions are countenanced by the law of England. If any thing is discoverable from the authorities, the principle is carried further there than is necessary for deciding this case. There is one observation I

April 1. 1824.

may make, that if ever there was a case in which such an action could be listened to, it might have been attempted in a recent case before Justice Best. I allude to the trial of Davidson, in which the person, choosing to be his own advocate, conducted himself in such a way that the Judge was forced to fine him three different times, to the amount, I believe, of L.100. In the course of the trial the tone of the defender was considerably altered, and his Lordship remitted the fine. But, put the case that this person, instead of betaking himself to the course he did, by trying to get a new trial, or even presenting a petition to the House of Commons, had brought an action of damages, and, according to the argument here, nothing more is requisite than to libel malice, and what would have been more easy than for him to say that it was done from malice? But was that ever dreamt of, or was it ever thought that this, which was the act of the Judge, would support such an action? I say, therefore, that as the fining for misconduct is an extremely close parallel with the case of censure, it is clear that, by the law of England, no such action is allowed.

I have just one observation more to make. I have looked at the summonses, and attended to the words used, all accompanied with a statement as to what led to the conduct of the Court. All and each of them apply to the particular cases then before the Court. No doubt there is one of them, which alludes to the mode in which that case was conducted being according to the mode of conducting cases by that gentleman. I am not prepared, in reference to the way which, upon the face of the summons, that ground of action is stated, to say that this, which is supposed to be an excess of power, can be viewed as such; because I am bound to say, that if any practitioner has a peculiar mode of conducting himself as to judicial procedure in every case, and it becomes necessary for a Judge to take notice of it in the case then under consideration, that if that Judge is satisfied that his conduct is the same in other cases, he is justified in saying so, if he conscientiously believes it. I beg leave to say, that I do not conceive that there is any thing in that part of the charge that I can lay hold of. And as to all of them, I may add, that they do not demonstrate malice; and the only mode in which malice is attempted to be made out is by their being reiterated on several occasions. If it so happens, (as is justly observed in the interlocutor), that he repeats the conduct which called for the censure, is it the fault of the Judge that he is bound in duty to repeat the censure? That infers no malice, and yet it seems it is on

April 1. 1824.

that, and that alone, that the gravamen of charge of malice lies. Therefore I agree, that there is nothing on the face of the thing to indicate malice. But the allegation of malice is of no consequence, as there is no mode of proving it. I may only add, that I would not shrink from observing on the conduct of a person bringing a summons in such circumstances; but as he is now no more, I will not say any thing on it. I agree with your Lordships, that the interlocutor ought to be adhered to.

The Court, therefore, on the 1st June 1821, adhered, and found his Lordship entitled to expenses.*

The appellants then entered an appeal, and contended that the judgments were erroneous,—

1. Because the expressions directed against the conduct and character of Mr Haggart were highly injurious to him, and were calculated to destroy his professional reputation, and consequently were such as to entitle him to damages, unless they could be justified under the circumstances in which they were pronounced. But the only ground of justification was, that his Lordship had made use of those expressions in the bona fide exercise of his power and right, as a supreme Judge, to censure the conduct of a counsel conducting causes before the Court. This power, under proper limits, the appellants admitted; but they contended, that, in both instances libelled, its due limits had been so far exceeded as to warrant the inference that it had not been bona fide exercised, but had been used to gratify a feeling of irritation against Mr Haggart; that instead of being confined to the case before the Court, it had been extended to the whole professional life of Mr Haggart,—a latitude of censure which was inconsistent with the liberty and independence of the Bar, and highly unconstitutional and oppressive, (particularly as, in the first of the two instances libelled, Mr Haggart was denied all opportunity of defending himself); and that, unless the power of censure was placed under limitations, the reputation and fortunes of counsel would be left entirely at the discretion of any individual Judge who might entertain vindictive feelings, and be inclined to gratify them, by promulgating from the Bench unfounded and malicious charges.

2. Because, as it was libelled that the expressions had been made use of from motives of private malice, and as in judging of a question of relevancy this must be assumed to be true, the appellants were entitled to a proof, and at all events to lodge a

---

* See 1. Shaw and Ballantine, No. 54. and Fac. Coll.

April 1. 1824.

condescendence of their averments, according to the usual practice; but that, independently, the expressions themselves, and the mode and circumstances in which they were used, established the truth of the allegation. And,

3. That although Judges were protected in general against claims for what they may have done in the due exercise of their judicial functions, yet there was no authority which declared that they should be exempt from responsibility for the malicious abuse of their powers; and that all the statutes to which reference had been made merely established that they were to be liable to punishment by the King, but not that private individuals were not to be entitled to pecuniary redress.

On the other hand, it was maintained by his Lordship,—

1. That even if malice were substantially alleged, this would not support the action of the appellants. In support of this proposition he contended, that as the ground of the action was a judicial act done in his capacity of President of the Court of Session, in the presence of, and under the controul of the Court, as its organ and speaker, the question came to be, whether, upon a mere general allegation of malice, any party who has been in Court may raise an action of damages against any of the Judges, or the whole Court of Session, for an act done by them or by the Court? If this were competent, then, as Judges were onerous agents, and there was as little reason for distinguishing between malice and any other cause of wrong, actions might be instituted against them upon mere allegations of favour, fear, negligence, or incapacity. But if such actions were competent, then not only the individual Judges, but the whole Court of Session, and even the Court of Justiciary and Exchequer, might be convened before the Commissary, the Sheriff, or the Bailie Court, and their proceedings reviewed by these inferior tribunals;—a consequence so anomalous and so absurd that it demonstrated the incompetency of the action; and accordingly no precedent had been adduced in support of it, although there must have been frequent opportunities and inducements to try the question. On the contrary, there were numerous authorities, both in the law of Scotland and England, which established that a supreme Judge was not subject to any action, either before his own or any of the Inferior Courts, for what he had done in performing his judicial functions, and that he was only answerable to some extraordinary jurisdiction or power, as the King in Council, or Parliament. And,

2. That as it was not pretended that the appellants could

allege any other facts than those which they had libelled to establish malice, and as the malice was said to be matter of inference from the expressions which had been used, there was not such a substantial allegation of actual existing malice as ought to be admitted to proof, even supposing the action were competent. April 1. 1824.

The House of Lords, in each of the cases, 'ordered and 'adjudged, that the appeal be dismissed, and the interlocutors 'complained of affirmed, with L. 200 costs.'

Lord Gifford.—My Lords, I consider this a cause of very great importance indeed, as it involves a question, Whether an action is to be maintained by a private individual against a Judge for words spoken in the exercise of his judicial duty, delivered from the Bench, in the face of judgment?

I look upon it as extremely fortunate that, in every part of his Majesty's dominions, all Judges, however high their rank and station, are responsible for their official conduct; and most lamentable and frightful would be the situation of the country if they were not; for, however great their elevation, Judges are still but men, and subject to all the errors and infirmities of human nature. But the question here is, not whether a Judge lies under a public responsibility for his judicial acts? but whether an action of damages is competent against the Judge, at the suit of any private party who may feel himself aggrieved by the judicial acts of that Judge?

My Lords,—If I had felt any doubt upon this point, I should have had great hesitation in coming to the conclusion at which I have arrived; but, after the utmost attention which I have bestowed upon the present case, I have no difficulty in giving it as my firm and decided opinion, that this action is not maintainable.

It has been admitted by the appellants, that this is the first attempt to bring such an action; and after the ability and industry so eminently displayed by their counsel, they have not been able to lay before your Lordships a single authority, either from statutes, from adjudged cases, from the opinions of text writers, or from the dictum of any Judge, to authorize such a proceeding. And, my Lords, so far is this state of things from being productive of any detriment to the due administration of justice, that, were the law otherwise, it would go at once to subvert the independency of Judges, and be found, upon very short experience, to operate most prejudicially upon the interests of the suitors themselves.

My Lords,—Much as it has been urged at your Lordships' Bar, I can discover no ground for the distinction endeavoured to be drawn, between language used by a Judge upon the Bench, and any other judicial acts; for those who argue for the competency of such actions as those now brought before this House, must go the length of maintaining, that any judgment may be canvassed by an unsuccessful party,

April 1. 1824. for the purpose of grounding upon it an action of damages against the Judge.

It has been said, that such actions can only be prosecuted before the Court of Session. I can find no authority for such an opinion, or for holding that they are not equally competent before an inferior Court. If so, what must be the consequence? Of necessity the inferior Court must inquire into the proceedings which gave rise to the judicial act complained of, before they can decide upon the question of damages. It is admitted, that the Court may censure either a party or a practitioner of the law, for any irregularities appearing in the course of a suit; and thus the inferior Court would be entitled, and indeed called upon, to overhaul the whole proceedings of the Judge or Court complained of, in order that such an inferior Court may be enabled to determine whether the censure was merited or not. But this leads inevitably to the conclusion, that the inferior Court may reverse the decree of the superior—a conclusion sufficiently absurd to prove that the argument cannot possibly be sound.

I make no remark whatever upon the conduct of Mr Haggart, of whom I know nothing, and probably your Lordships know nothing. I shall, in my remarks which I have to make, abstain from any observation upon the particular expressions which called down the censure complained of, because these expressions have not been set forth in the printed cases, and because the person upon whom the censure was inflicted is dead. I may, however, observe, upon the first summons, (which is by far the most material), that it narrates various proceedings in which Mr Haggart, acting professionally as an advocate at the Scottish Bar, had been visited with animadversions from the Lord President; and particularly, in the year 1809, in the course of an action depending in the Court of Session, between his Grace the Duke of Athole and a gentleman of the name of Robertson. The summons then recites subsequent occurrences, in a suit between the same noble Duke and a Mr Leslie, in which the Lord President is said to have used the expressions which alone are made the grounds of this first action. Those which had occurred on the former occasion appeared to have been introduced for the purpose of proving malice on the part of the respondent. But, my Lords, if these appellants had sought reparation in an inferior Court, such Court must have gone into an investigation of all the proceedings referred to in the summons, (or declaration, as we should call it in the English Courts), whether stated as matter of substantive charge, or of aggravation.

My Lords,—The expressions ascribed to the Lord President, and which appear to have given the most offence to the deceased, are thus stated in the summons, which your Lordships will find printed on p. 4. of the appendix to the respondent's case. In the first, 'Mr Haggart has here, as is his usual practice, stated facts and circumstances, of which there is no evidence on the record, and which live in the memory and recollection of that gentleman alone. Mr Haggart has conducted

this cause, as he does all the others he is concerned in, differently from all the other counsel at the Bar.' And while it was admitted by the appellants, that although the Lord President was fully authorized to remark upon the advocate's mode of conducting the cause then under the immediate consideration of the Court, it was contended, that his Lordship was not justified in thus characterizing the whole course of Mr Haggart's professional practice. April 1. 1824.

But, my Lords, it is here most important to observe, that the Lord President is not even accused of having said any thing extrajudicially. The words attributed to the learned Judge were uttered in presence of all the other Judges, and in the hearing of the whole. His Lordship said from the Chair, 'I conversed with my brethren on this subject in the robing room, and the opinion I have delivered is that of the whole Court.' The reprimand from the Chair must, therefore, be considered and held to be the act of the whole Court; and if the other Judges entertained an opinion different from that of the Lord President, they should have said so.

My Lords,—Several Acts of the Parliament of Scotland have been cited in these papers, and by counsel at the Bar, in the course of their very able argument, to prove the responsibility of Judges; but after a careful examination of all these statutes, I am decidedly of opinion, that every one of them relates to a public responsibility, without affording the slightest countenance to a civil action of damages at the suit of a private party.

With regard to the second action brought under appeal, the language complained of is much weaker; and it appears that, in this instance, the Lord President was not the first person who had noticed exceptionable language in Mr Haggart's recorded pleadings. Indeed, it is admitted in the summons, that one of the Judges had previously observed upon certain passages in the paper drawn by that counsel, as being injurious to two persons, the one a lady and the other a gentleman.

It has been objected, my Lords, on the part of the appellants, that we are not to make any reference to the law of England, as this is purely a question of Scotch law. But, in the absence of all authority in the law of Scotland, that of the sister kingdom, as founded on good sense, and the most correct views of expediency, may be very correctly and usefully referred to; and no lawyer will assert, that any such actions, as those now before the House, could be entertained in the Courts of this country. Without a remedy so unheard-of, the independence of the English Bar has not suffered; nor has the want of such a remedy been injurious to the interests of suitors in our Courts.

My Lords,—To admit of such evidence of malice as has here been offered, (evidence to be derived merely from construction of the 'words 'themselves,') would be to make way for the utmost confusion and mischief in the administration of justice; and, upon the whole, the

April 1. 1824. conclusion is irresistible, that the interlocutors of the Court below are well founded.

In conclusion, my Lords, considering the nature of these actions, the long protracted litigation to which the learned Judge has been exposed, and that this is the first attempt to subject the conduct of any Judge to such a scrutiny at the suit of a private party, I am farther of opinion, that we would not do justice to the eminent character who has now been made to appear as respondent, if we did not order those interlocutors to be affirmed, with costs.

Appellants' Authorities.—Anderson, Jan. 3. 1750, (13,949.); 4. Stair, 1. 6.; 1537, ch. 36.; 1. Ersk. 3. 9.

Respondent's Authorities.—Instruct. to Commissaries, 1563, § 8.; Balfour, 657.; Spott. Pract. Preface; Comyn's Dig. Tit. Action on the Case for a Conspiracy, B; 1. Hawkins, 72. 6.; 1. Robert I. ch. 31.; 1469, ch. 20.; 1487, ch. 12.; 1540, ch. 104.; 4. Stair, 1. 6. 24, 25, 26.; 6. Anne, ch. 6. § 1.

J. RICHARDSON—SPOTTISWOODE and ROBERTSON,—Solicitors.

(Ap. Ca. No. 25.)

No. 20. JOHN INNES, R. B. ALLARDYCE, and Others, Appellants.—*Fullerton.*

Sir ALEXANDER KEITH, Respondent.—*Murray.*

April 6. 1824.

1ST DIVISION. Lord Succoth.

Commonty.—This was a question as to whether the Common or Forest of Cowie, situated in Kincardineshire, belonged to the respondent in property, subject to rights of servitude in favour of the appellants? or whether it belonged to them in common property? The decision of the case depended upon a series of complicated titles, and a long parole proof, on advising which, the Court, on report of the Lord Ordinary, found, 'that the 'whole of the forest, muir, and commonty of Cowie, belongs in 'property to Sir Alexander Keith of Dunottar, subject to the 'rights of servitude, and others, which the other heritors may 'be able to instruct over the same.' And to this interlocutor they adhered on the 3d of February 1818. The House of Lords 'ordered and adjudged, that the appeal be dismissed, and 'the interlocutors complained of affirmed.'

J. DUTHIE—J. RICHARDSON,—Solicitors.

(Ap. Ca. No. 27.)