

restoration. This equitable claim is not to be forfeited by the inefficacy of the sale, which, on that supposition, influences only his right of property. No fraud in his conduct, nor any criminal act has intervened to bar his retribution; and it is of no consequence, that he acted on the idea of acquiring a right to himself alone; as the effect produced, not its motive, is the ground of that claim. Neither is he requiring in a court of law, the fulfilment of an illegal contract; he demands a just recompence only, for a pecuniary benefit *optima fide* conferred by him. That recompence, if it exceed not the value of such benefit, ought at least to be sufficient to save him from loss; for it is a great maxim of equity, that *nemo locupletior fieri debet alterius damno*. To this degree, the defender consents to moderate his demand; requiring nothing more of the pursuer, than relief from his engagement to the captor, by re-delivery of the hostage.

This cause, was reported to the Court by the Lord Ordinary; when, considering the statute against ransoming as entirely out of the question,

“THE LORDS found, that the property of the ship in dispute was not transferred to the defender by the sale made to him, and that the pursuer is still entitled to reclaim or recover the said ship; but found, that the defender is entitled to a recompence for his bringing the ship within the pursuer's power to reclaim it; and remitted to the Lord Ordinary to call and hear parties' procurators on the extent of that recompence.”

Both parties reclaimed against this interlocutor; the pursuer, so far as a recompence was to be allowed to the defender, and the latter, in as much as the property was adjudged to the former.

On advising mutual petitions and answers, the Court adhered, modifying the recompence to the amount of “the legal salvage premium ascertained by the statute to re-captors, together with the expense laid out on the vessel.”

Lord Reporter, *Estgrove*. Act. *Macloed*. Alt. *Alex. Abercromby*. Clerk, *Robertson*.

*Fol. Dic. v. 4. p. 31. Fac. Gof. No 140. p. 219.*

1786. August 2. GRANT against DAVIDSON.

WILLIAM DAVIDSON having been guilty of fornication, agreed to pay to Gregor Grant, the kirk-treasurer of the parish in which he resided, a small sum for behoof of the poor; intending, in this manner, to quash any action which might have been instituted against him in the civil courts, for the penalties imposed by 1661, cap. 38., and likewise to prevent his being prosecuted before the tribunals of the church.

He afterwards refused to fulfil this agreement, on the ground of its being illegal; and

No 101.

No 102.

A transaction between a kirk-session and a person guilty of fornication, whereby the latter became bound to pay a sum of money to the kirk-treasurer for behoof of the poor, legal.

No 102.

*Pleaded* in defence, Kirk-sessions are not warranted, in a judicial capacity, to impose pecuniary fines on persons guilty of fornication. They are equally unauthorised to compound; extrajudicially, those penalties which may be levied in the civil courts, in virtue of the statute of 1661. Indeed, this last must be quite inept and ineffectual; for as these fines are recoverable by a popular action, no private agreement with one person can hinder a subsequent prosecution at the suit of another. Viewed, too, as a pecuniary commutation of penance, such a transaction as the present is liable to much exception. It seems equally inconsistent with the purpose of discipline, as with the genius of our ecclesiastical policy. See 10th *Annæ*, cap. 6.

*Answered* for the pursuer, Though kirk-sessions are not authorised to impose fines for offences of this nature, they have become as legal guardians of the poor's funds, the only prosecutors for those which, by the statute 1661, may be inflicted by the justices of the peace, and other ordinary judges. If, then, such penalties may be recovered, and are in fact exclusively sued for by the kirk-sessions, no reason can be given, why the party liable may not agree to pay to them without a prosecution.

Neither is it of any importance in the present question, that after an agreement of this sort, the delinquent is generally understood to be discharged from ecclesiastical censures. Of this species of punishment the civil courts have no jurisdiction or cognisance. It belongs to the superior judicatories of the church alone, to put a stop to these proceedings in kirk-sessions, when appearing to interfere with the spiritual welfare of the people.

The LORD ORDINARY found, "That the debt being contracted by way of transaction, to free the defender, as well from any prosecution before the justices of the peace, as from any ecclesiastical inquiry into his conduct, cannot be enforced by this Court; reserving to the pursuer, and all others concerned, to insist in a proper action before the justices of the peace, or other judges competent."

A reclaiming petition having been preferred, which was followed with answers, it was

*Observed* on the Bench, As the practice of bargaining with kirk-sessions, for irregularities of this kind, has long prevailed in Scotland, and the money thence arising forms a very considerable branch of the poor's funds; so there do not appear sufficient legal grounds for preventing it in future.

THE LORDS altered the judgment of the LORD ORDINARY, and found the defender liable.

Lord Ordinary, *Hailes*.Act. *W. Miller*.Alt. *Honyman*.Clerk, *Robertson*.

G.

*Fol. Dic. v. 4. p. 30. Fac. Col. No 291. p. 447.*