(Heard 7*th*, 8*th*, and 11*th* *July*. — Judgment 11*th* *July*, 1842.)

THE REVEREND JOHN FERGUSON, Minister of Monivaird, and Others, *Appellants*.

THE RIGHT HONOURABLE THOMAS ROBERT, Earl of Kinnoul, and the REVEREND ROBERT YOUNG, Preacher of the Gospel, Presentee to the Church and Parish of Auchterarder, *Respondents*.

Courts. — *Public Officer.* — Courts or public officers having a ministerial duty to perform, are liable to action for refusal to enter upon the performance.

Church. — The members of a Presbytery are liable in damages for refusal to take a presentee to a church upon trial.

Corporation. — The individual members composing the majority of a corporation authorizing an illegal act, are liable in damages for so doing.

THE respondent the Earl of Kinnoul, as heritable proprietor of the right of patronage of the church and parish of Auchterarder, and the respondent Robert Young, preacher of the Gospel, presentee to the said church and parish, brought an action setting forth, That the church and parish of Auchterarder having become vacant on the 31st of August, 1834, the Earl of Kinnoul, in September, 1834, issued a deed of presentation in favour of the respondent Young, "nominating and presenting "him to be minister of the said church and parish of Auch- "terarder, during all the days of his lifetime; and giving, "granting, and disponing to him, the constant localled and "modified stipend, with the manse and glebe, and other profits "and emoluments pertaining and belonging to the said church

" and parish, for crop and year 1835, and during his lifetime, " and his serving the cure of the said church; requiring thereby " the Reverend the Moderator, and the Presbytery of Auch- " terarder, to take trial of the qualifications, literature, good life " and conversation of the said Robert Young, pursuer; and after " having found him fit and qualified for the functions of the " ministry of the said church of Auchterarder, to admit and " receive him thereto, and give him his act of ordination and " admission in due and competent form." That at a meeting of Presbytery, which was held on the 14th day of October, 1834, the deed of presentation, together with a certificate of the patron's having qualified to Government, the presentee's letter of acceptance of said presentation, certificate of his having qualified to Government, parochial certificate, and a certificate signed by five ministers of Dundee, that the presentee was a licentiate of the Presbytery of Dundee, with an engagement to produce an extract of his license so soon as a meeting of the Presbytery of Dundee should be held, were all given in and read, and appointed to lie on the table of the Presbytery until their next meeting. That at the next meeting of the Presbytery, which was held on the 27th October, 1834, there was produced an extract of the license of the respondent Young, as a preacher of the Gospel, and testimonial in his favour by the Presbytery of Dundee, whereby they " testify and declare, that Mr Robert Young has frequently " preached within their bounds with acceptance, and that his " conduct, as far as known to them, has been uniform, pious, " grave, and exemplary, as became a preacher of the Gospel, " and one whose views are directed to the holy ministry, so that " they can, and by these presents do, respectfully recommend " him to the attention of any Presbytery or Christian people " where Providence may order his lot, for all due and suitable " acceptance and encouragement from them;" all which documents having been read, the minutes of the Presbytery of

Auchterarder bore, "that all the documents usually given in in "cases of this kind, having already been laid on the table, along "with the presentation in favour of the Reverend Robert Young, "to be minister of the church and parish of Auchterarder, the "Presbytery did so far sustain the presentation as to find them-"selves prepared to appoint a day for moderating in a call to "Mr Young to be minister of that church and parish." That after certain procedure, the Presbytery, at a meeting held on the 7th of July, 1835, did, on the sole ground that a majority of the male heads of families, communicants in the parish of Auchterarder, had dissented, without any reason assigned, from his admission as minister, refuse to take trial of the qualifications of the said Robert Young, and did then reject him as presentee to the church and parish of Auchterarder, so far as regarded the particular presentation in his favour, and the occasion of the vacancy in the parish; and intimation of the determination was directed to be forthwith given to the patron and presentee, which was done accordingly. That the respondents, as patron and presentee respectively, thereupon instituted a process against the Presbytery of Auchterarder, and Mr John Ferguson, minister of Monivaird; Mr James Thomson, minister of Muckart; Mr John Brown, minister of Glendovan; Mr John Clark, minister of Blackford; Mr William Stodart, minister of Maderty; Mr Peter Brydie, minister of Fossaway; Mr William Mackenzie, minister of Comrie; Mr William Laing, minister of Crieff; Mr Alexander Laird, minister of Ardoch; Mr Samuel Cameron, minister of Monzie; Mr Thomas Young, minister of Gask; Mr James Walker, minister of Muthill; Mr Alexander Maxtone, minister of Fowlis; and Dr James Russell, minister of Dunning, the individual members thereof, to have it declared, "That the pursuer, the said Robert Young, "has been legally, validly, and effectually presented to the "church and parish of Auchterarder: That the Presbytery of

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" Auchterarder, and the individual members thereof, as the " only legal and competent court to that effect by law consti- " tuted, were bound and astricted to make trial of the qualifica- " tions of the pursuer, and are still bound so to do; and if, in " their judgment, after due trial and examination, the pursuer " is found qualified, the said Presbytery are bound and astricted " to receive and admit the pursuer as minister of the church and " parish of Auchterarder, according to law: That the rejection " of the pursuer by the said Presbytery, as presentee foresaid, " without making trial of his qualifications in competent and legal " form, and without any objections having been stated to his " qualifications, or against his admission as minister of the church " and parish of Auchterarder, and expressly on the ground that " the said Presbytery cannot, and ought not to do so, in respect " of a *veto* of the parishioners, was illegal, and injurious to the " patrimonial rights of the pursuer, and contrary to the provi- " sions of the statutes and laws libelled." That in this action, on the 8th of March, 1838, the following judgment was pronounced: — " The Lords of the First Division having considered " the Cases for the Earl of Kinnoul and the Reverend Robert " Young, and for the Presbytery of Auchterarder, with the " record and productions, and additional plea in defence ad- " mitted to the record, and heard counsel for the said parties at " great length in presence of the Judges of the Second Division " and Lords Ordinary; and having heard the opinions of the " said Judges, they, in terms of the opinions of the majority " of the Judges, repel the objections to the jurisdiction of the " Court, and to the competency of this action as directed against " the Presbytery: Farther, repel the plea in defence of acqui- " escence: Find, that the Earl of Kinnoul has legally, validly, " and effectually exercised his right as patron of the church and " parish of Auchterarder, by presenting the pursuer, the said " Robert Young, to the said church and parish: Find, that the

" defenders, the Presbytery of Auchterarder, did refuse, and " continue to refuse, to take trial of the qualifications of the " said Robert Young, and have rejected him as presentee to " the said church and parish, on the sole ground (as they admit " on the record) that a majority of the male heads of families, " communicants in the said parish, have dissented, without any " reason assigned, from his admission as minister: Find that the " said Presbytery in so doing have acted to the hurt and preju- " dice of the said pursuers, illegally, and in violation of their " duty, and contrary to the provisions of certain statutes libelled " on; and in particular, contrary to the provisions of the statute " of 10th Anne, cap. 12, intituled, 'An act to restore patrons " 'to their ancient rights of presenting ministers to the churches " 'vacant in that part of Great Britain called Scotland;' in so " far repel the defence stated on the part of the Presbytery, and " decern and declare accordingly, and allow the above decree to " go out and be extracted as an interim decree; and with these " findings and declarations, remit the process to the Lord Ordi- " nary to proceed therein as he shall see just." That on the 3d April, 1838, a memorial was presented to the Presbytery by the respondents, as patron and presentee, setting forth the decree pronounced by the Court, and requiring the members of Presbytery "to repair so far the injury decreed to have " been done, by taking the said Robert Young on trials, and " thereafter proceeding in his settlement as minister of the " said church, without any farther delay;" nevertheless, they refused to make trial of the qualifications of the said Robert Young, and to proceed in his settlement as aforesaid; and therefore the respondents, for their respective interests, as patron, and presentee, protested that the Presbytery, and the individual members thereof, should be, conjunctly and severally, liable for all loss, skaith, injury, and damage, done, or to be done, or occasioned to the respondents, or either of them, by or through

such refusal or delay: That the Presbytery of Auchterarder, and individual members thereof, having referred the memorial presented by the respondent to them as aforesaid, to the Synod of Perth and Stirling, the same was referred by the Synod to the General Assembly, by whom the following deliverance was pronounced: "The General Assembly sustain the references, " approve of the conduct of the Presbytery of Auchterarder, and " the Synod of Perth and Stirling; authorize the procurator for " the Church to appeal the judgment of the Court of Session, " in the action at the instance of the Earl of Kinnoul and the " Reverend Robert Young, against the said Presbytery, so soon " as he and the other counsel for the Presbytery in the said cause " shall think it expedient to do so: Find, that it is not expedient, " in the circumstances of the case, to institute any proceedings " at present against the said Mr Robert Young, in regard to the " said action; dismiss the application contained in the memorial " presented by the said Reverend Robert Young to the said " Presbytery; and in regard to the notarial protest served by " him on the said Presbytery, before proceeding farther, direct " the said Reverend Robert Young to be cited to appear at the " Bar of this House on Monday next, that he may be heard " thereon." That accordingly the defenders, the Presbytery of Auchterarder, and the individual members thereof, thereafter entered an appeal against the aforesaid judgment pronounced on 8th March, 1838; but the House of Lords pronounced the following judgment: — "*Die Veneris*, 3° *Maij*, 1839. After hear- " ing counsel upon the petition and appeal, as also upon the " answer put in to the said appeal, and due consideration had as " well yesterday as this day of what was offered on either side in " this cause, It is ordered and adjudged by the Lords spiritual " and temporal in Parliament assembled, that the said petition " and appeal be and is hereby dismissed this House, and that " the said interlocutor therein complained of be, and the same

" is hereby affirmed." That the judgment of the House of Lords having been applied in common form, and the cause having been remitted to the Lord Ordinary, his Lordship (Lord Murray,) on the 8th of June, 1839, pronounced a judgment, whereby it is found and declared, that the said Presbytery, and the individual members thereof, " are still bound and " astricted to make trial of the qualifications of the pursuer, the " said Reverend Robert Young, as presentee to the church " and parish of Auchterarder; and if, in their judgment, after " trial and examination in common form, he is found qualified, " to receive and admit him minister of the church and parish " of Auchterarder according to law. That the decree having " been allowed to become final, it was extracted by the pursuers; " and, on the second of July, 1839, they presented a memorial, " narrating the aforesaid decree (an extract of which was pro- " duced, and thereupon requested the Presbytery, and the " individual members thereof, forthwith to take trial of the " qualifications of the Reverend Robert Young, as presentee to " the church and parish of Auchterarder, in common form, and " if found qualified, to admit and receive him minister thereof: " and to enable the Presbytery, and the individual members, to " do so, the said Reverend Robert Young intimated that he " was ready and willing to present himself for trial and examina- " tion as aforesaid, at any time or place that the Presbytery " might be pleased to appoint. That nevertheless the said " Presbytery, and individual members thereof, at least the " majority of the members present at and composing the meet- " ing held on second July, did refuse, and do still refuse, to take " trial of the qualifications of the pursuer, the Reverend Robert " Young, or to fix any time for his examination, and trial, and " settlement, if qualified as aforesaid; whereupon the pursuers " caused a notarial protest to be served upon the Presbytery, " and upon each individual member thereof, intimating that

" they and each of them should be held liable to the pursuers " for all the loss, injury, damage, and costs already sustained, or " that may hereafter be sustained, by and through the illegal " refusal of the said Presbytery, and individual members thereof, " to implement and give full effect to the judgments of our said " Lords, and of the House of Lords, by taking trial of the " qualifications of the pursuer, the Reverend Robert Young, and " admitting and receiving him minister of Auchterarder as " aforesaid. That at the meeting of the Presbytery of Auch- " terarder held on second July last, there were present the " Reverend John Ferguson, minister of Monivaird, moderator; " Thomas Young, minister of Gask; Peter Brydie, minister of " Fossaway; James Walker, minister of Muthill; William " M'Kenzie, minister of Comrie; James Thomson, minister of " Muckart; John Reid Omond, minister of Monzie; John Clark, " minister of Blackford; William Laing, minister of Crieff; " Alexander Maxtone, minister of Fowlis; William Stodart, " minister of Maderty; Alexander Hill Gray, minister of " Trinity Gask; Alexander Laird, minister of Ardoch; Andrew " Morrison at Fordun, A M'Gregor at , John " M'Leish at Crieff, Thomas Millar at Ardoch, Andrew Bon " or Bayne at Dunning, and Andrew Lawson at Millearn, " elders; and after the memorial of the pursuers was read, it " was moved by the Reverend Mr Maxtone of Fowlis, and " seconded by Mr Laing of Crieff, 'That the Presbytery having " 'received a presentation from the Earl of Kinnoul in favour " 'of Mr Young, to the church and parish of Auchterarder, " 'and having sustained the same, that they proceed, in terms " 'of the decree of the Lord Ordinary, to appoint a day, and " 'they hereby appoint the first Tuesday of August, to take " 'trial of his qualifications as presentee to said parish, in order " 'to being collated or inducted to the secular rights and " 'emoluments of the benefice.' That it was also moved by the

" Reverend Mr Walker, and seconded by the Reverend Mr " Young, 'That the Presbytery refer the above documents " '*simpliciter* to the ensuing meeting of the Commission in " 'August.' And on a division the second motion was carried, " the Reverend John Ferguson, Thomas Young, Peter Brydie, " James Walker, William Mackenzie, James Thomson, John " Reid Omond, and Alexander Laird, ministers; and Andrew " Morrison, A M'Gregor, John M'Leish, and Thomas " Millar, elders, having voted for that motion; while the " Reverend John Clerk, William Laing, Alexander Maxtone, " William Stodart, and Alexander Hill Gray, ministers, and " Andrew Bon or Bayne, and Andrew Lawson, elders, voted " for the first motion. That to the aforesaid protest by the " procurator for the pursuers, as patron and presentee re- " spectively, the following answer was lodged with the notary, " by the minority of the Presbytery, at said meeting, " and also by the Reverend Dr Russell of Dunning, who " was absent from indisposition, conform to the extended " instrument of protest to be produced:—'We whose names " are hereunto subscribed, some of the individual members of " the Presbytery of Auchterarder, in answer to the representa- " tion and protest served upon us upon the second day of July " 1839, by the Right Honourable Thomas Robert Earl of Kin- " noul, patron of the church and parish of Auchterarder, and " the Reverend Robert Young, preacher of the Gospel, presentee " to said church and parish, hereby intimate, that at the meeting " of Presbytery referred to in said protest, we, upon the memo- " rial of the protesters being read and considered by the Presby- " tery, expressed our readiness to comply with the request there- " in contained, and to obtemper the decree of the Court of " Session, and we voted to that effect accordingly: That we have " always been, and are still ready to do so: and we therefore " protest that we shall not be liable for any loss, injury, or

" damage, which the said noble patron or presentee may incur " or sustain, in consequence of the refusal or delay by the majo- " rity of the members of the said Presbytery to comply with the " request in the said memorial and finding in the decreet of the " Court of Session. (Signed) John Clark, minister; William " Laing, minister; Alexander Maxtone, minister; W. Stodart, " minister; Alexander H. Gray, minister; Andrew Bon, elder; " Andrew Lawson, elder.' '*Dunning Manse, July* 9, 1839.— " As I was prevented by indisposition from attending the meet- " ing of the Presbytery of Auchterarder, upon the second day of " July 1839, and voting with the minority, I hereby express my " readiness to comply with the request contained in the memo- " rial presented to the Presbytery on that day: That I have " always been, and am still ready to do so, and I therefore pro- " test that I shall not be liable for any loss, injury, or damage, " which the noble patron or presentee may incur or sustain, in " consequence of the refusal or delay by the majority of the " members of the Presbytery of Auchterarder to comply with the " request in the said memorial, and finding in the decreet of the " Court of Session. I am,' &c. (Signed) 'James Russell.' " Addressed to 'Robert Hope Moncrieff, Esq. writer, Perth.' " That the said Dr Russell has again, by letter produced, intimated " his willingness to go on to take the said Robert Young on " trials, having the highest opinion of his qualifications, and " having frequently resorted to his aid and services to officiate at " the church of Dunning. That said Presbytery, and the indi- " vidual members thereof, at least those who composed the " majority of said meeting held on 2d July 1839, have, from " thence, and do still illegally refuse to make trial of the quali- " fications of the pursuer, the said Robert Young, as presentee " foresaid. That, in consequence of the illegal conduct of the " individual members of the said Presbytery of Auchterarder, at " least of the majority composing the meeting held on 2d July

" 1839 as aforesaid, in refusing to obey and give effect to the " foresaid judgments of the Court of Session and of the House " of Lords, and in respect of their illegal and continued refusal " to take the pursuer, the Reverend Robert Young, on trial as " presentee to the church and parish of Auchterarder, the pur- " suers, as patron and presentee aforesaid, have suffered, and are " continuing to suffer, serious patrimonial loss, injury, and " damage, for reparation of which the individual members of " said Presbytery, at least those individual members who com- " posed the majority at the meeting of Presbytery held on 2d " July last, and who do still continue to refuse to take the said " Reverend Robert Young on trials with a view to judge of his " qualifications for the office and benefice to which he has been " validly presented, are, conjunctly and severally, or severally, " liable to the pursuers respectively, according to their several " rights and interests as patron and presentee of the said parish " and church of Auchterarder: And although the pursuers have " often desired and required the defenders to make such repara- " tion, yet they refuse, at least delay so to do: And therefore " the said Reverend John Ferguson of Monivaird, and the said " Thomas Young, Peter Brydie, James Walker, William " M'Kenzie, James Thomson, John Reid Omond, and Alex- " ander Laird, ministers; and Andrew Morrison, A " M'Gregor, John M'Leish, and Thomas Miller, elders, who " composed the majority at said meeting, ought and should be " decerned and ordained, conjunctly and severally, or severally, " by decree of the Lords of our Council and Session, to make " payment to the pursuer, the Earl of Kinnoul, as patron of " the church and parish of Auchterarder, and as interested in " supplying said church and parish, under the presentation by " him in favour of the said Robert Young, of the sum of L.5000 " Sterling, in name of damages, and in reparation of the wrong " done to, and injury and damage sustained by, him, in respect

" of the illegal refusal of the defenders to take trial of the qualifi-
" cations of the pursuer, the Reverend Robert Young, as pre-
" sentee to the church and parish of Auchterarder, as aforesaid;
" and the said defenders ought and should be decerned and
" ordained, conjunctly and severally, or severally, by decree
" foresaid, to make payment to the pursuer, the Reverend Robert
" Young, of the sum of L.8000 sterling, in name of damages,
" in consequence of his having been illegally, and through
" the wrongful refusal of the defenders to discharge their duty,
" by taking trial of his qualifications as aforesaid, in terms of the
" judgments of our said Lords, and of the House of Lords
" libelled on, kept out of possession of the stipend, manse, and
" glebe of the parish of Auchterarder; and of the farther sum of
" L.2000, in reparation of the injury done to his character and
" usefulness, and to his status in the Church of Scotland, and
" as a *solatium* for the injury done to his feelings, by and
" through the illegal refusal of the defenders, to implement the
" judgments libelled on; together with the legal interest from the
" date at which the said sums of damages shall be ascertained,
" and in time coming till paid;" with expenses of process.

A record was made up on the summons, defences, condescendence and answers, in which the appellants admitted generally the statements in the respondents' summons, and stated in addition, —

" I. The defenders are ordained ministers and elders of the
" Church of Scotland, and, as such, have come under the most
" solemn obligations to conform themselves to the discipline of
" the church, and the authority of its several judicatories.

" II. The pursuer, Robert Young, as a probationer of the
" Church of Scotland, has solemnly bound himself to subject
" himself to the several judicatories of the Church of Scotland,
" and to submit himself to its discipline and government.

" III. The whole procedure complained of by the pursuer was

" adopted in obedience to the express injunctions of the ecclesi-
" astical superiors whom the defenders are bound to obey.

" IV. Neither the patron nor the presentee, the pursuers of
" this action, have suffered, or can qualify damage from the facts
" set forth by them.

The respondents stated as pleas in law, —

" I. It is *res judicata*, that the Presbytery of Auchterarder,
" and the individual members thereof, by refusing to take trial
" of the qualifications of the pursuer, the Rev. Robert Young,
" as presentee to the church and parish of Auchterarder, and by
" rejecting him exclusively in respect of the *veto* of a majority
" of male heads of families, acted to the hurt and prejudice of
" the pursuers, illegally, in violation of their duty, and contrary
" to the provisions of certain statutes, and in particular of the
" statue 10th Anne, c. 12.

" II. That in consequence of their refusal to give obedience
" to the judgments of your Lordships and of the House of
" Lords, and of their continued refusal to discharge their duty by
" taking trial of the qualifications of the pursuer, the Rev.
" Robert Young, as presentee, when duly called upon to do so,
" the defenders are liable in reparation of the loss, injury, and
" damage sustained by the pursuers, as patron and presentee, in
" terms of the conclusions of the libel.

The appellants, on the other hand, pleaded, —

" I. The summons is irrelevant. In particular,

" 1. The conclusions of the libel are directed against the
" defenders solely as individuals, in consideration of acts alleged
" to have been done by the Presbytery of Auchterarder in their
" official and corporate capacity, and, as the defenders as indi-
" viduals could not competently have taken the pursuer Mr
" Young on trial, they cannot be made individually responsible
" for the alleged refusal of the Presbytery to do so, unless it
" were libelled that they acted maliciously.

" 2. It is altogether imcompetent to pursue the individual " defenders for acts done in a lawful court by the Presbytery " itself, on the allegation that they constituted the majority " present at a particular meeting, especially as the Presbytery " and its members are not parties to this action, either individu- " ally or as a body.

" 3. Even if this action had been directed against the Presby- " tery in its corporate capacity, its individual members cannot " be rendered responsible in damages for acts done by them as " a court, concerning the subject-matter of their jurisdiction, " and under the direction of the superior ecclesiastical judicatory " of this country, unless malice be averred.

" 4. There was no order on the Presbytery to take the pur- " suer Mr Young on trials on the 2d of July 1839, nor indeed " was an order upon them ever pronounced to any effect what- " ever. They were therefore fully entitled to refer the matter " to the Superior Church Court at their meeting of the 2d of " July 1839. Nor did they, in doing so, refuse to obey any " order of the Court of Session or of the House of Lords. As " this is the sole ground of damage libelled against the defenders " as forming the alleged majority of the said meeting, the action " ought to be dismissed.

" 5. By the constitution of the Church of Scotland, and the " statues relative thereto, it is not competent for any patron or " presentee to sue a Church Court, or its individual members, " for damages on the grounds libelled in this action, nor have " the pursuers any sufficient title to pursue the same.

" II. The pursuers are not entitled to damages from the " defenders. In particular,

" 1. The pursuer the Earl of Kinnoul, as patron of the " church and parish of Auchterarder, in the event of the Presby- " tery refusing to receive his presentee, is only entitled to retain " the vacant stipend under the Act 1592, c. 17.

" 2. The Presbytery are by law the only competent court by " whom the right of a presentee to the fruits of the benefice can " be completed by ordination, and unless the pursuer Mr Young " can establish that he would have been ordained by the Presby- " tery, or could have compelled them by action to ordain him, " he can qualify no damage in this matter.

" 3. The pursuer Mr Young is barred *personali exceptione* " from challenging the acts of his ecclesiastical superiors in a " civil court.

" 4. Generally no damages are due under this libel."

Cases by the parties were then ordered, which the Lord Ordinary (Cuninghame) reported to the Court, subjoining a very elaborate note, which will be found in 16 *F. C.* 852.

On the 5th March, 1841, the Court pronounced the following interlocutor : —

" The Lords, on report of Lord Cuninghame, having advised " this case, and heard counsel for the defenders, find, the action, " as laid in the summons, is relevant at the instance of both the " pursuers, and repel the objections to the relevancy thereof, and " to the jurisdiction of this Court to entertain and give effect to " the same, as stated in the pleas in law for the defenders, in the " revised answers to the revised condescendence: Find that, " after the judgments libelled on, it was not within the compe- " tency of the Presbytery, as a Presbytery of the Church, to " refuse or decline to take the presentee on trials; and after the " judgments libelled on, the Presbytery were not entitled to re- " fuse to take the presentee on trials: Find, that the acts founded " on in the summons do form grounds of damage in law: Find " that it is not necessary to aver malice in this case; Repel the " plea of personal exception pleaded against the pursuer Mr " Young, and decern *ad interim*, and reserve all question of " expenses, and remit to the Lord Ordinary.

The appeal was against this interlocutor.

Mr Attorney General and Mr Pemberton for the appellants. — Whatever feelings may have been exhibited elsewhere, or perhaps have found their way even where justice is administered, we shall endeavour to guard against viewing the questions embraced by this appeal in any other light than as mere legal technical questions; but we cannot help observing in the outset, that the judgment of the Court below seems to be founded rather on what in their views might be convenient and proper to be done, than upon those broad principles on which alone the law ought to be administered.

As the Presbytery of Auchterarder has not yielded obedience to the opinion of this House, they do not stand in any favourable situation at this bar. But your Lordships will still afford the case the same calm and dispassionate consideration which your Lordships would have given it if you had now heard of it for the first time. It is no part of our duty to impeach the soundness or the binding obligation of the judgment your Lordships then pronounced. We admit it to be entirely binding, and the question, the only question we now appear at your Lordships' bar to argue, is the present action, and the form in which it is brought. We have to argue that question with regard to the parties by whom, and the parties against whom, the action is brought. We have to argue the question whether this is an action which, by the law of Scotland, or the law of England, it is possible to maintain.

The points we maintain are, that the Presbytery was the competent Court for adjudicating what was before them, and that no action will lie against a court, or the members of it, for doing or for not doing any thing in the proceedings brought before it; that no action will lie against the individual members of a public corporate body for doing, or for not doing, what is, or may be considered, the duty of the body to do; or at all events, that

action will not lie without express averment of malice; that mere error of judgment will not affect the parties. The subordinate points we make are, that the judgment in the former case imposed no duty to do any thing in obedience to it, and was not against the present appellants; the action was against the Presbytery and the members individually, but the judgment was against the Presbytery collectively only; and that the act complained of by this action was nothing more than a reference by the Presbytery of the question before them to a superior court, which it was perfectly competent for them to make, having already come to a decision themselves.

I. By the act 1592, cap. 117, as restored after the Revolution by the act 1711, cap. "all presentations to benefices are to be "direct to the particular presbyteries, with full power to give "collation thereupon." In this the Presbytery came in place of the Bishop, when episcopacy was the established religion of the country. No doubt the Presbytery has a species of civil jurisdiction, as to tax that there may be things decent in the sight of all men; and in this respect they may be subject to the civil jurisdiction; but their ecclesiastical jurisdiction, and specially in regard to ordination to the ministry, is quite distinct from this civil jurisdiction, and is purely ecclesiastical. And in the administration of this ecclesiastical jurisdiction, the Presbytery exercises its functions as a court constituted in that behalf: this position is established by reference to *Ersk.* I. 5. 24, and *Bank.* I. 2. p. 51. Assuming the Presbytery, then, to be a court, the question is, whether the particular act complained of came within the exercise of the jurisdiction of the court, in regard to which the members must be responsible to the public justice of the country, if they failed to do that which they ought to do; but for which they could not be responsible to the individual who might complain of the doing or not doing of the act.

As there is an appeal from every act of the Presbytery to a

superior court, it is difficult to conceive how they can be said in any respect to have powers purely ministerial.

II. If the Presbytery be a court, action cannot lie against the members for doing or for not doing any particular act; the proceeding must be by compulsory process on the court itself; the individuals composing the court may be punished by a criminal proceeding against the court for disobedience of the orders of a higher tribunal, but no individual member is liable in any action for the non-obedience. The authorities in the law of Scotland are very meagre upon this subject, but the principle on which the position is founded is common to both countries, as it is essential to the free and independent administration of justice. In the trial of Governor Picton, 30 *Howel's State Trials*, p. 225, it was laid down, that if the act of the Governor complained of was of a judicial character, its illegality or motive was of no importance, a jury could not be permitted to speculate upon it, or be trusted to adjudicate as to the damage sustained. In Passett *v.* Godschall, 3 *Wilson*, 121, it was held, that action would not lie against Justices for refusing to grant a party a license to keep an alehouse, however corrupt or malicious the motive they might have for so doing. In Lowther *v.* Radlaw, 8 *Ea.* 113, it was held, that a party appealing to the Quarter Sessions was not concluded against objecting to their jurisdiction, but that trespass would not lie against Magistrates acting upon a complaint made to them on oath, by the terms of which they have jurisdiction. In Beaurain *v.* Scott, 3 *Camp.* 388, which was the case of an action against an ecclesiastical judge for excommunicating a party for disobedience to an order of his court, the action was no doubt sustained, but that was because the matter was not within the jurisdiction of the judge; he had exceeded his jurisdiction. But in Ackerly *v.* Parkinson, 3 *Maule* and *Sel.* 411, it was held, that action would not lie against the Vicar-General for excommunicating a party for not taking upon him administration of an

intestate's effects, after being cited so to do, though the citation was void, as the Vicar had jurisdiction over the matter.

[*Lord Chancellor.*— You may take for granted that when the Judge has jurisdiction, action will not lie for mistake or error in judgment.]

Can it be doubted, then, that the Presbytery had jurisdiction in this matter?

[*Lord Campbell.*— Can you make out that the Presbytery have a discretion to take on trial or not to take on trial, as Magistrates have to grant or to refuse a complaint?]

We are not bound to do so; the case of the Presbytery is within the principle of every one of the cases cited. A judge has no discretion as to whether he will exercise his jurisdiction or not, but you cannot compel him by action to exercise it; that can only be done by *mandamus* from the King's Bench.

[*Lord Campbell.*— Trying is a solemn act, in which the Presbytery have a discretion. If they had decided that the presentee was unfit or immoral, that would have been an act in the exercise of their discretion, and no action plainly would have lain against them.]

It is the duty of the Quarter Sessions to hear an appeal, but if they should refuse to do so, the only remedy would be by mandamus; no action would lie against them. Or if a Bishop, observing a person at first sight to be deformed, were to refuse to examine him, and return *non idoneum*, no action would lie against the Bishop. Both of these cases are strictly analogous to the present, and, indeed, not so favourable, for the Presbytery did not say they would not entertain the matter, but having entertained it, they could not examine the presentee, as he had not got the consent of the communicants, but they would refer the matter to their superior tribunal. In none of the three cases can it be suggested that there has not been a judgment exercised and delivered; it may be absurd—it may be unreasonable—it may be

bad in law — and subject to correction according to the forms prescribed by law, — but still a judgment has been exercised.

[*Lord Chancellor.* — The complaint is not because of the refusal before the judgment of this House, but for the refusal after it. This House has found that the Presbytery must take this particular individual upon trial. Taking upon trial seems to be merely a ministerial act, deciding on the trial may be a judicial one.

Lord Brougham. — Suppose the Court of King's Bench were to prohibit the highest ecclesiastical Judge, should he in the face of that prohibition pronounce a judgment that he had jurisdiction in the matter, he would be attached by the body.]

That is our argument ; we do not question that a judge acting judicially may be impeached or attached in this country, or punished according to the form known in the law of Scotland, but we deny that any action will lie against him by the private party. If the Court of Session, for instance, on being asked to apply a judgment of this House, were to refuse, saying there must be some mistake, the judgment being contrary to their notions of the law, would that not be a judicial act ? and yet no one would be bold enough to say, that an action would lie against the Court at the instance of the private party. In the present case the refusal of the Presbytery before the judgment of this House was as much actionable as that after it. The judgment did not make the law, it only made more clear what existed before. In Doswell *v.* Impey, 1 *Bar.* and *Cr.* 163, it was held, that action would not lie against Commissioners of Bankruptcy for having committed a bankrupt for not having answered sufficiently, inasmuch as they were acting within the limit of their authority.

[*Lord Chancellor.* — Was not the act there judicial ?]

We think it was ; but suppose the Judge had repeated the act, would he have been liable in an action ? we apprehend not, yet

it seems impossible to draw a distinction between that case and the present. The judgment of this House did not give the Presbytery a mere ministerial duty to perform, but only pointed out how they were to act, and no wilfulness, however perverse, or stupidity, however gross, in the following out of that advice, can change the character of the act from being judicial to ministerial. The other cases which bear upon the question are, Tinsley *v.* Nassau, 1 *M.* and *Mal.* 52; Garnett *v.* Ferrand, 6 *B.* and *Cr.* 611; Fawcet *v.* Fowlis, 7 *B.* and *Cr.* 394; Mills *v.* Collet, 3 *Moo.* and *Pay.* 242; Ashcroft *v.* Bourne, 3 *B.* and *Ad.* 684. None of these cases even suggest that an action would lie against a judge, and the silence both of the reports and the text writers carries the matter far beyond any of the cases, as shewing that action will not lie. If the mode by which obedience to peremptory mandamus might be compelled be by action, the occasion has frequently occurred, and yet the reports shew no instance of it.

[*Lord Chancellor.* — Suppose a party is commanded by act of Parliament to do a ministerial act, and he refuse; he might be ordered by mandamus, or he might be indicted, but could the party injured by the refusal not bring an action against him?]

If the act were purely ministerial, we admit he could; but there is no instance of an action for acts done judicially, though erroneously, as ascertained by a superior court. If the act were purely ministerial, the minority should have performed it; they should not have allowed it to be put to the vote, or they should have treated the votes of the majority as a nullity.

III. But if action were competent, it can only be upon an express averment of malice, Orr *v.* Currie, 18 *F. C.* 624. Of this there is not the slightest hint in the present pleadings, and not only must there be an averment of malice, but that the party acted upon it alone in what he did.

[*Lord Cottenham.* — This is like a demurrer here; it is an

objection to the relevancy. This House has decided, that the Presbytery had no judicial power to take on trial; after taking on trial they may have a judicial duty.]

The judgment of the Court below in the former case was, that the Presbytery had refused to take upon trial in respect of the Veto act, and that was the essential part of the judgment. But it does not appear from any part of this record, that the refusal now was upon the same ground, or upon what ground. If the act of deciding when the party is before them be admitted to be judicial, the whole must be so, as much as the proceedings of any other court from the assembling to hear to the giving of judgment.

[*Lord Campbell.* — Lord Murray, applying the judgment of this House, found that the Presbytery was bound to take this individual upon trial.]

They might be ministerial to meet together, but when they did meet and begin their proceedings, they must be judicial. If a Judge were to strike a case out of the paper, or refuse to allow it to be entered, or abstain from sitting in judgment; though the consequences to a party might be ruinous, and the Judge knew this, and even intended it, would not these be judicial acts? but could action be maintained upon them? it is impossible to separate the acts of a Judge into ministerial and judicial; they must all be judicial.

[*Lord Campbell.* — Suppose a peremptory mandamus issued to the Bishop to grant a license, and he were to refuse obedience, would not an action lie against him by the party injured?]

The Bishop there would not be acting judicially.

[*Lord Campbell.* — In that case the mandamus would do neither more nor less than order him to take the party upon trial.]

IV. This action is further incompetent. 1. The present summons is framed upon the narrative of the proceedings in the first action,

and the ground of complaint is disobedience to the judgment there given. But neither the judgment of the Court below, of this House, nor of the Lord Ordinary applying that judgment, gave any orders upon the parties to do any act whatever; and were it otherwise, it is competent to the party to obtain his civil remedy under the conclusions of the summons in that action, which were not confined to mere declarator of right; the first action is still in dependence, and in it the respondents may still prosecute the petitory conclusions which remain undisposed of; while this is the case the present action is an attempt to obtain relief by a double remedy at one and the same time.

2. The Presbytery is a corporate body, fluctuating in its members. This action complains against certain members only of the body for disobedience to what is assumed to have been ordered in the first action, but it is not competent thus to sue a corporate body. What is done by it, is not the act of the individuals composing it, for which each may be made responsible, but of the body itself, which alone can be sued in respect of any corporate act. Some of the parties to the first action guilty of the wrong there complained of, are not now members of the presbytery; this only shews the impracticability of dealing with a fluctuating body of this kind in any other way than in its corporate capacity only. According to *Ersk.* I. 5. 16, letters of horning might in times of episcopacy have been directed against the Ordinary to compel performance of his duty; but he says, that this has never been resorted to against Presbyteries coming in place of the Ordinary. If such a form of execution could be resorted to, it could only be by the form of general letters against the corporate body, *Ersk.* IV. 3. 11. This passage shews, that relief cannot be had against the individual members. The letters of horning here spoken of, are done away; whatever the remedy be which has come in place of them, it must have the same direction.

FERGUSON *v.* KINNOUL. — 11th July, 1842.

[*Lord Campbell.* — Could the minority have been included in the charge of horning?]

We apprehend they could; the act of the majority of a corporation, is the act of the minority. The allegation in the summons is, that "the Presbytery" and the members thereof, refused and "still refuse," suggesting of itself the necessity for the whole body being called, and it was called in the first action.

[*Lord Cottenham.* — There the object was to establish a right against the body.]

Be it so — it is the body which has disturbed the exercise of that right, and that only in a way consistent with the execution of the functions of the body; the Presbytery is subject to the jurisdiction of the superior Courts, and after referring the matter to the superior Courts, they were *functi* — without the authority of their superiors, they had no power.

[*Lord Chancellor.* — When this House declared the act to be lawful, they required no authority; that made it lawful.

Lord Brougham. — They don't refer to the Commission for power; they refer the documents. Suppose the Court of Chancery to order A to pay over money which belonged to B, would it be any answer for not paying over the money to say that he could not without the authority of B? The thing is absurd.]

V. As to the right of the parties. 1. The patron cannot have any right to maintain such an action as this. The statute has provided the remedy by detention of the temporalities. In England, the patron may compel induction of his nominee, but, in Scotland, the law is different; and though there have been many instances of induction against the rights of the patron, there is not one instance in the books of an action by the patron, to enforce his right. 2. The presentee is licensed, but not in holy orders, and his complaint is, that something was not commenced which might have ended in his institution and induction; but the proceeding might also have ended in the opposite way; what damages

then can he qualify. No such remedy exists in England, and there is no instance of it in Scotland, and it is against principle that there should be. The law supposes the party to seek his induction upon much higher and more solemn grounds than can be involved in a claim of damages.

Mr Solicitor General, the Honourable Mr Wortley, and Mr Cook for the Respondents. I. It is assumed by the appellants, that the Presbytery is a corporation, but this they have yet to establish.

[*Lord Chancellor.* — The Lord Ordinary seems to treat them as a corporation.]

That may be so; but there is no evidence of their being such a body. For some purposes they may be *quasi* a corporation, but they have not the characteristics of such a body according to the notions of law, even in Scotland, where the nature of a corporation as distinguished from other bodies is not well defined. The Presbytery is merely an assembly of a part of the church, to whom are intrusted certain powers.

II. It has also been assumed, that the Presbytery was acting as a Court. No doubt it is a Court for certain purposes, but its duty in regard to the matter now in question, as in the case of the trial of the parish schoolmaster under 43 Geo. III. cap. 54, is distinct from its duties as a Court, and is purely ministerial — merely to take the presentee on trial, and determine whether he is properly qualified, and fit to be admitted. In this matter the Presbytery came in the place of the Bishop, who, no doubt, had contentious jurisdiction, but had other duties merely ministerial.

[*Lord Brougham.* — If you look at the finding of the Court, you will see that they are dealt with as no Court ever is dealt with. It is not immaterial to this inquiry to look at the terms of the presentation, which is in the ordinary form, and on the assump-

tion that the Presbytery is a Court having a discretion, addresses them as no Court ever was addressed.]

Certainly. And the judgment treats the body as having a duty to perform, and as having acted illegally in refusing to perform it. How could it do otherwise? there was no contention there between two parties in regard to which the Presbytery had to exercise any judgment.

[*Lord Campbell.* — At a farther stage, I don't know whether that would hold. The parishioners might bring a charge against the presentee?]

That would be quite a different proceeding. The duty at trial is strictly analogous to that exercised by the Bishop, who has a discretion as to his return upon examination, but none as to taking the party upon trial, if a peremptory mandamus have issued to grant a licence. But even if the Presbytery shall be held to be a Court, an inferior judge acting beyond his jurisdiction, and wilfully, is liable to an action, though he may also be indicted.

[*Lord Chancellor.* — What do you mean by "wilfully?"]

We mean "knowingly," as if an inferior judge, after prohibition by the King's Bench, should nevertheless proceed as if he had jurisdiction, disregarding the prohibition. The question of liability must be determined by the law of Scotland, which contains no principle opposed to such an action as this; but many authorities have been referred to, in analogous cases in England, to shew that the action will not lie.

[*Lord Chancellor.* — We have not had a single reference to the law of Scotland, except the case of Orr.]

Certainly not. Because there is none to make. In that case the party was not only a judge, but was held to have acted rightly. But even in England such an action would lie, *Comyn's Digest*, Art. "Actions on the Case." And in *Buller's Nisi Prius*, reference is made to the case of the Justice refusing to examine

a servant who had been robbed — the distinction there taken was, that when the judge has a discretion, he may exercise it; but if not, he must discharge his duty.

[*Lord Chancellor.* — If it *may* be a mistake, no action will lie — if it *must* be wilful disobedience, it will lie.]

Just so. And the principle has been recognized in Herbert *v.* Paget, 1 *Lev.* 64; Henley *v.* Corporation of Lyme, 3 *Bar.* and *Ad.* 77; Starling *v.* Turner, 2 *Lev.* 50; Herring *v.* Finch, 2 *Lev.* 250. In Ashby *v.* White, 2 *Raymond*, 958, and 14 State Trials, 785, "it is laid down, that where any statute requires an "act to be done for the benefit of another, or to forbear the "doing of an act which may be to his injury, though no action "be given in express terms by that statute, for the omission or "commission, the general rule of law in all such cases is, that "the party injured shall have an action." And again, at p. 794, "Where a man is injured, if he cannot bring his action "to recover the thing itself he hath lost by the injury, the law "will always give him damages in lieu thereof." And the competency of action, where there is absence of any discretion, was illustrated in the case of Schinotti *v.* Burnsted, 6 *Ter. Rep.* 646, where the Lottery Commissioners, having by statute a judicial jurisdiction in the matter, were held not to have any discretion as to declaring which was the last drawn ticket of the lottery, as the statute had declared which was to be so; and various authorities to this effect are to be found in *Comyn*, *voce* Misfeasance, A. 1, and "Negligence," A. 1. These authorities establish, that by the law of England, all persons who have a public duty to perform, and refuse to perform it, are liable to an action.

III. If the liability be established, then what was the nature of the act here which the Presbytery had to do? Was it one in which they might exercise their discretion? To shew that it was not, it is only necessary to read the judgment in the former case, and the interlocutor applying it. Whatever may be said

of the character of that part of the duty, in regard to judging of the qualifications, their first duty is, the taking upon trial. By the Acts 1592 and 1711, independently of the judgment of the Court below, and of this House confirming it, the Presbytery were bound to take the party upon trial: they had no discretionary power left to them in the matter, whether they were judges, or whatever might be their character; and these judgments fixed their duty in regard to this individual party.

IV. As to malice, if the party had been acting judicially, no doubt an averment of malice is necessary, but where there is a duty to perform, without any discretion, the mere refusal to perform is sufficient, without the presence or averment of malice. In Drewe *v.* Colton, 1 *Ea.* 563, *note*, it was laid down, as sufficient to maintain action, "if malice may be inferred from the conduct "of the officer;" and the competency of an action in such circumstances is shewn by Dawson *v.* Allardyce, 15 *F. C.* 262.

V. It is said that action cannot be brought against certain members only of a corporate body. But what principle is there in law or common sense why action should not be in this form. If three of five Commissioners in bankruptcy were to vote for the commitment of a party, it having been found that they have no such power, would action not lie against the three? how could it lie against the five? So of nonfeasance.

[*Lord Campbell.* — Is there any instance of an action against the majority of a body for nonfeasance?]

We are not aware of any; but, on principle, there must be such an action; as it is the duty of each one to concur in the performance of the duty required to be done. If the body were a corporation, those members refusing to obey a peremptory mandamus would each be liable to attachment, and it is no where laid down that an action also would not lie against them. On the contrary, the dicta are the other way. In King *v.* Ripon,

1 *Raymond*, 563, Chief Justice Holt said, that action might be brought against the members of a corporation who had caused a false return to a mandamus to be made in the name of the corporation. So in Rich *v.* Pilkington, *Carth.* 171, action was sustained against the mayor of a corporation for a return to a mandamus made by the corporation; though it was argued that he might perhaps have voted against the return; the answer being, that that would be matter of evidence on the plea of not guilty; which case shews distinctly that you cannot join in the action those who are willing to perform their duty. Herman *v.* Tappendale, 1 *East*, 555, was a case against the office-bearers of a corporation, but no notice was taken of the objection as to a portion only of the corporation being parties. In the case of corporations you must shew a tortious act in the individual complained against. What course could have been taken in the present case other than has been done? If a decree had been obtained, not only declaring the right, but ordaining the act to be done, such a decree could only have been enforced by imprisonment. Who could have been imprisoned but the recusant members? surely not those who were willing to do what the decree required?

But it is said, that there is no similar instance; that may be, as there never was before such an instance of contumacious resistance to the law, and from an ecclesiastical body especially: but what is there against the competency? is there to be no remedy? could damages be sought against the whole body? it is not pretended they could. This then can only be against the individuals as they act. In Gray *v.* Forbes, 5 *Cl.* and *F.* 356, individuals distinguished from the corporation were recognized, and the right of one alone to appeal to this House. In Edwards *v.* Cruickshanks, 3 *D. B.* and *M.* 282, the majority and minority were the opposing parties, and recognized as entitled to set up separate pleadings and defences. And in

Clark *v.* Henderson, 1 *D.* and *M.* 955, the complaint, the proceedings, and the judgment, were against the majority of the Presbytery.

VI. With regard to the right of the parties; 1*st*, as to the patron, retention of the temporalities works no benefit to him; it is not for himself he does so; it is for their application to pious uses.

[*Lord Campbell.* — That is *vexata questio.*]

Ersk. III. 1. 14. says, "where a delinquent is subjected by "statute to a determinate penalty, without any mention of re- "paration to be made to the private party, his claim of damage "which arises from the common law, is not from the silence of "the statute construed to be cut off." The retention then is a penalty, and does not interfere with the right of the patron to recover damages. 2d, As to the presentee, he had an antecedent right to be admitted on trial, and it cannot be denied that he has sustained a severe patrimonial loss by being kept out of the benefice; but if this action be incompetent, he is without a remedy.

Mr Attorney General. — It is admitted, that trying the qualifications is judicial, and that the Presbytery have a discretion in regard to the return they are to make. But what distinction can be drawn between the inception and the completion of a judicial act? between the act of the judge ordering a cause in his paper to be called, and judging in it, and refusing to allow it to be called at all? is he not as much a judge in the second case as the first, and would action lie against him in the one case more than in the other? But in this record the Presbytery is called "the "only competent legal Court."

[*Lord Chancellor.* — Calling it a legal Court, don't make it a Court of law.]

In Clerk *v.* Presbytery of Dunkeld, 16 *F.C.* the finding was in the exact same terms as are used in the summons here.

But it is said that if this action won't lie, where is the remedy?

— what of that? it is not true that every wrong has its remedy; there are many wrongs which have no remedy, and of all cases this is the most improper one in which to make a new precedent of a remedy, where feelings of a much higher nature than damages could excite, may possibly be involved.

All the cases cited on the other side are plainly inapplicable, as in every one of them the act in question was purely ministerial, involving no exercise of judgment or discretion. But Henley *v.* Corporation of Lyme, is useful, as shewing that the action was not against the individual members who had refused to repair the pier, but against the Corporation as a body. And what is stated in Rolles' abridgment as to the clerk's right to have an action, if the archbishop refuse to induct him, the clerk being already in orders, shews an obvious distinction between that case, and the present, where the presentee is not yet in holy orders, and for aught known, may never be. As to Dawson *v.* Allardyce, that was an instance of excess of jurisdiction, where action would undoubtedly lie.

But assuming the act to be ministerial in this case, action cannot lie against a part only of the corporation.

[*Lord Chancellor.* — Why do you call the Presbytery a corporation? you must establish that first.]

I merely follow the Solicitor General's argument, who, for this purpose, called it a corporation. In all the multifarious cases of *quo warranto* against corporations, was it ever heard or suggested that action would lie against the members? If it would lie, where is it to stop? If the votes at a meeting should be equal, would it lie against a party for staying away, and not turning the vote?

LORD CHANCELLOR. — My Lords, this was a proceeding instituted by the Earl of Kinnoul and Mr Young, for the purpose of obtaining compensation in damages from the defenders, for having refused to take upon trial Mr Young as the presentee of the

church of Auchterarder. The case came before the Court of and Session, they decided in favour of the pursuers, by an unanimous decision. From that judgment, the defenders have appealed to your Lordships' House.

It was not, I believe, from any real inherent difficulty in the case, but on account of the importance of the subject, that your Lordships took time to consider the judgment.

There is one point which is perfectly clear, and that forms the basis of the whole proceeding. It is perfectly clear, that it was the duty of the defenders to take Mr Young on trial of his qualifications, as presentee of the church of Auchterarder. That question was decided by the Court of Session. It afterwards came before your Lordships' House by appeal, and your Lordships confirmed the decision. The law therefore was established by that decision, and it could not afterwards be controverted: it admitted of no further question; no further appeal. Therefore, I say it was a point clearly established, that it was the duty of the Presbytery to make trial of Mr Young's qualifications as presentee to the church of Auchterarder.

My Lords, the defenders cannot plead ignorance of the law in this case, even if that ignorance would have availed them, because they, or at least some of them, were parties to that suit, and that inquiry. Nay more, after the judgment had been affirmed by your Lordships' House, the Lord Ordinary, (Lord Murray,) pronounced another interlocutor, by which he decreed that the Presbytery, and these defenders by name, were still bound to make trial of the qualifications of Mr Young.

That interlocutor became final; it was extracted on the 2d of July; it was served on the defenders, and at the same time, Mr Young presented himself in order that they might make trial of his qualifications. The question was put to the vote; it was decided against accepting him upon trial by a majority, and by evasion, (for I consider it a mere evasion,) the matter was

referred to the General Assembly. I consider, therefore, the facts established, that it was their duty to take him upon trial, and that they refused to do so. Those are two points I think which do not admit of dispute.

Now, my Lords, what is the rule of law as applicable to questions of this kind? When a person has an important public duty to perform, he is bound to perform that duty; and if he neglects or refuses so to do, and an individual in consequence sustains injury, that lays the foundation for an action to recover damages, by way of compensation for the injury that he has so sustained.

My Lords, that was expressly laid down — if it is necessary to cite authority for the purpose — in the case of Sutton *v.* Johnston, by Mr Baron Eyre in delivering the judgment of the Court of Exchequer in that important case; and other authorities might be mentioned to the same effect.

My Lords, a case was cited at the bar, from Leonard's Reports, of this description: — A party had applied to a Justice of the Peace to take his examination under the statute of Elizabeth, the statute of Hue and Cry; the Justice had refused to do this, and the party had in consequence sustained injury, because he was deprived of his right of bringing a suit against the Hundred, in consequence of that neglect. It was held upon the principle I have stated, that he was entitled to recover damages against the Justice for this neglect of his public duty, he having in consequence sustained a personal injury.

Again, my Lords, another case, which was also cited at the bar, was the case of Stirling *v.* The Lord Mayor of London. Stirling was a candidate for the office of Bridge-Master; the Mayor refused to take a poll, in consequence of which he brought an action against him, and it was held, that that action might be sustained to recover damage for the injury. Upon what principle? That it was the duty of the Lord Mayor to take the poll;

that he neglected that duty; that the party in consequence sustained injury, and it was therefore held, that the action might be maintained.

But, my Lords, this is not the rule in England alone; it is a general rule applicable also to Scotland. It is as much the law of Scotland, as the law of England. A case was cited at the bar, to which I have no doubt my noble and learned friends have referred, which was the case of Adam Innes *v.* the Magistrates of Edinburgh. It was a case of this description:—Some buildings were going on in Edinburgh, a pit was dug in one of the lanes for the purpose of these works; the party fell into the pit and was hurt, and he brought his action against the Magistrates of Edinburgh to recover compensation for the injury he had sustained. It was the duty of the Magistrates of Edinburgh to take every possible precaution for the purpose of preventing accidents of this kind; it was considered that they had neglected that duty—that they had neglected a public duty, and that the party had in consequence sustained an injury, and the Court decided that he was entitled to recover damages for the injury he had sustained. So that this principle is applicable both to the law of England and to the law of Scotland; it is a general universal principle.

Now, my Lords, what is the argument of the appellants in this case? It is said that this was the decision of a Court, the Court of Presbytery; that they were acting judicially; and that acting judicially, therefore, if they committed an error, no action can be maintained against them. My Lords, I do not deny that principle as a general principle; and if they had admitted that gentleman upon trial, and after taking him upon trial, had come to the conclusion that he was not properly qualified, in that case it would have been a judicial decision, and might not have afforded a ground for supporting an action, although the party should have sustained damage in consequence of it.

But, my Lords, that does not apply to the present case. Here

they had no discretion to exercise; they had to form no judgment; they were bound by the law to do the act; they could appeal to no tribunal. It was imperative upon them to accept the party upon his trial; it was their public duty. It bears no analogy, no resemblance to a judicial decision; and I apprehend that under such circumstances, it is quite clear that this action can be supported.

But, then, my Lords, it is said that the action cannot be supported against these parties, as the act complained of was the act of the body. How can you bring an action, it is said, against them individually? My Lords, it was these individuals who did the wrong. They all of them refused to take Mr Young upon trial; and they by their vote prevented his being taken upon trial by the others; they are the parties therefore that did the injury, and consequently they are subject to an action. Suppose it had been an unanimous vote — that all had concurred in it, the party sustaining the injury might, if he had thought proper, have brought an action against all of them, or against any one: Because it is laid down as a general principle that torts are joint and several. It would not have been necessary for him to bring an action against all, if all had concurred, but he might have brought his action against any one or more of them as he might think proper. Here he has brought his action against those who did the wrong, and they are clearly liable to make compensation and to give redress.

My Lords, it was suggested at the bar in the course of the argument, that it is possible, as this was put to the vote, that some of these parties might have voted on the other side. Had that been the case, that circumstance, so far as such individuals are concerned, would have been a ground of defence. But that does not appear upon the record. It is not stated; it is not suggested. On the contrary, from the shape of the record, the conclusion is directly the other way.

My Lords, there is a case which I believe was referred to at

the bar, which, with respect to several of these points, appears to me to be closely in point. I allude to the case in *Carthew*, of Rich *v.* Pilkington, Lord Mayor of London. That was an action brought against the Lord Mayor of London for a false return to a writ of mandamus. The objection made to that action, was of this description: — The act was done by the Lord Mayor and Aldermen—"You ought to have brought your action "against all." — "No," said the Court, "it is a tort; it is joint "and several. The party might have brought his action against "all, but he was entitled also to have brought his action against "any one." It was stated that it was a corporation. "No," said the Court, "it is not a corporation; it is a Court, and as a "Court, the action may be brought against all the members, or "against any one of them." Then this suggestion was made: — "But how does it appear that the Mayor did not object to "the return?" What was the reply of the Court? "Had it "so appeared, or should it so appear upon the trial, that will be "a defence to the action, so far as he is concerned, upon the "plea of not guilty."

My Lords, I think I have now adverted shortly, but I hope as clearly as I can, to the different points in this case. The principle is this, that here was a public duty which the parties were bound to perform; they knew that they were bound to perform it. They neglected that duty. Individuals have sustained injury in consequence of their neglect of that duty. It was not a judicial act; it was an act that was imperative upon them, with respect to which, they could exercise no discretion. These are the parties that did the act, and they are the parties therefore against whom the action is sustainable. I would submit therefore to your Lordships, with all deference, that the judgment of the Court below ought to be affirmed.

Lord Brougham. — My Lords, agreeing entirely in the proposition which my noble and learned friend has submitted to your

Lordships, I am quite sure that your Lordships will feel that I owe an apology both to my noble and learned friend, and to you, for entering at all at large into the question, which he has so clearly, so luminously, and so satisfactorily treated. Nor should I have done more than express my entire concurrence, subject to a single verbal alteration, which, in fact, my noble and learned friend himself, from the context clearly intended, that instead of saying, "that had they taken Mr Young upon his trial, and "decided against him, by rejecting him, in that case they would "have acted judicially, and so have been protected." My noble and learned friend, of course, from the context of his argument, could only have intended to say, "that that question not being "now before us, but being shut out by the refusal to take him "upon trial, it might, for aught we know, have been an argument "competent to the Presbytery, in the case supposed." My Lords, I should with that single qualification, which, in fact, is a mere verbal correction, have rested satisfied with expressing my entire agreement with my noble and learned friend, had it not been that the very great importance of the case, and the extraordinary notice which the circumstances of it have naturally excited, lead me to trespass upon the time and patience of your Lordships, by entering a little more fully into the case.

My Lords, the facts of this case are, as my noble and learned friend has justly observed, all admitted, and it is material to note them, and to observe the shape of the action. The Court of Session, in the former suit, which was brought against the Presbytery of Auchterarder, and also against the individual members of its majority, after finding the rights of Lord Kinnoul as patron, the valid presentment of Mr Young, and the continued refusal of the Presbytery to take trial of his qualifications, found, that by this refusal, the Presbytery acted to the hurt and prejudice of both pursuers, illegally, and in violation of their duty. This decree was affirmed by your Lordships upon

appeal. Upon the proceeding below, to apply the judgment of affirmance, the Lord Ordinary pronounced an interlocutor, finding, that the Presbytery, and the individual members thereof, are bound and astricted to make trial of Mr Young's qualifications, and if they find him qualified, to receive and admit him to the church of Auchterarder, according to law. This decree was allowed to become final, and stands as such, unappealed from to this day.

A fresh application was then made by the respondents, (the pursuers below,) to the Presbytery, and the individual members, who still refused to take Mr Young upon trial. Two motions were made at a meeting of the Presbytery; one, that he be taken to trial, the other, that the presentation be referred to the next meeting of the Commission of the General Assembly. The latter motion was carried by the voices of the present appellants, the former motion being rejected. Therefore, the refusal was plain and deliberate.

The present action is brought, — not like the former, against the Presbytery and the individual members forming the majority, who rejected the motion, — but against those individuals only; and it is brought for damages on account of that refusal. But it is observable, that the summons concludes differently on behalf of the two pursuers, (the respondents here.) After setting forth, "that "both pursuers have sustained damage, in consequence of the re- "fusal to obey, and give effect to the judgments of the Court of "Session, and of this House, and also in respect of the illegal and "continued refusal to take Mr Young to trial," the summons concludes "to have it found, that the defenders, (the appellants "here,) should make reparation in damages to Lord Kinnoul, "the patron, for the illegal refusal to take Mr Young to trial, "and that the defenders should make reparation to Mr Young, "the presentee, for the refusal to take trial of his qualifications, "according to the judgments of the Court of Session, and of this

"House;" so that the conclusion for the patron is general, grounded on the illegal refusal of his presentee. The conclusion for the presentee is grounded on the illegal refusal to perform their duty, according to the judgment below, and here.

This difference might be of importance, if it should appear, that the decrees below, and here, in the former suit, did not directly order the Presbytery to take the presentee to trial, (which is certainly true,) and if it should also be held, that the general averment, applicable to both pursuers, extends over the particular conclusions of the summons. But it is clear that this is not the case. The general averment of damage sustained, in consequence of the refusal to obey the judgments below, and here, may be incorrect, inasmuch as these judgments did not order the Presbytery to take Mr Young to trial, but only declared the Presbytery bound so to do. But the conclusions, at least the conclusion in behalf of the presentee, only seeks for damages in respect of the injury arising from the defenders refusing to discharge their duty, by taking to trial "in terms of the judg-"ments;" and these judgments, clearly by their terms, declare that duty. The conclusion "for solatium to Mr Young's feelings, "by the refusal to implement the judgments libelled on," may be rejected as surplusage, if it should be held, that the judgments libelled on do not command the taking to trial.

Thus, it is clear, that there remain sufficient conclusions; one in behalf of the patron without any reference to the judgments; the other in behalf of the presentee, referring to those judgments; but, referring to them as declaratory, and not mandatory. Hence, it is wholly immaterial, were we to admit that no mandatory decree has been pronounced, or can be libelled on, because the case of the respondents must stand upon the right which the patron had to present, and he and the presentee to have trial of qualification, independent of any judgment. Though the judgments make the duty of the Presbytery more plain, and

their refusal to act in conformity with it more contumacious; and though, as regards the presentee, these judgments are libelled on, yet, as regards the patron, the ground is general, and even as regards the presentee, there is a conclusion which does not assume any command in the judgment libelled on. So that the patron might recover upon the breach of duty, were there no judgment at all, and the presentee may recover under the judgment, as the ground, the declaratory ground, of the duty alleged to have been violated.

The question then, and the only question, is, whether the action for damages well lies against them individually for their refusal? The duty is declared by the original judgment affirmed in this House. If that judgment had not been libelled on at all, it would have been decisive of the question, whether the Presbytery were, or were not, bound to take the presentee to trial. If it had been between other parties, that judgment would have been of the highest authority, of the most binding force, as shewing the duty of the Presbytery in the present case. But being a judgment between these very parties, and on this very cause, it has the force of a judgment in the cause, and it estops the parties to aver, that the taking of the presentee to trial was not the bounden duty of the Presbytery.

So it would have been had the judgment not been libelled on at all; so it is in respect of the conclusion for the patron; but so it is yet more emphatically in respect of the conclusion for the presentee, who libels upon that judgment as declaring his right to be taken on trial. He comes not to demand execution of a mandatory decree; had he done so, there might be some ground for the objection that the decree is not mandatory; but he wants no such mandatory decree. He complains of a breach of duty on the part of the appellants, by their refusal to perform the duty; and in proof of this duty, the refusal being admitted, he shews and he relies on the final judgment declaring that duty,

although he might have relied on the same grounds on which that judgment was pronounced, and by which it may still be supported, independent of the respect due to the authority from which it proceeded.

We come then to the only question now properly in issue between the parties: — "Can this action be maintained against "these appellants for their refusal?" If it be said that they are individuals, and not the Presbytery, and that the former action was against the Presbytery, as well as the individuals, but the judgment was given only against the Presbytery, the answer is twofold. First, from what has been said, the patron's conclusion rests on the general breach of duty, and not on the refusal to act according to the judgment; consequently, this objection could at the utmost only affect the presentee's case. But, secondly, it is not applicable to that case either, for the interlocutor of the Lord Ordinary now appealed from, on applying the judgment of this House, expressly finds, that the individual members, as well as the presbytery, are bound and astricted to take the presentee upon trial. Therefore, we come to the only question: "Does this "action lie, in respect of the kind of duty alleged to be "violated, the kind of body to which the appellants belong, "and the kind of proceeding in which they were engaged?"

If the law casts any duty upon a person which he refuses, or fails to perform, he is answerable in damages, — as my noble and learned friend has stated, — to those whom his refusal or failure injures. If several are jointly bound to perform the duty, they are liable jointly and severally for the failure or refusal; and if it is a duty which the majority of the members are bound to perform, those who by their refusal prevent the greater number from concurring, are answerable to the party injured; that is, all those who constitute a majority, such majority committing the non-feasance, violate the duty imposed, disobey the law, occasion the injury, and are answerable for it.

Nor are these propositions the less true generally, and as the rule, because there are exceptions, and a very few exceptions introduced into the law and constitution of this, and indeed of every country, from the necessities of the case. Thus, the legislature can of course do no wrong. But so its branches are placed beyond all control of the law. And the courts of Justice, that is, the superior Courts, Courts of general jurisdiction, are not answerable either as bodies, or by their individual members for acts done within the limits of their jurisdiction. Even inferior Courts, provided the law has clothed them with judicial functions, are not answerable for errors in judgment, and where they may not act as judges, but only have a discretion confided to them, an erroneous exercise of that discretion, — however plain the miscarriage may be, and however injurious its consequences, — they shall not answer for. This follows from the very nature of the thing. It is implied in the nature of judicial authority, and in the nature of discretion, where there is no such judicial authority. But where the law neither confers judicial power, nor any discretion at all, but requires certain things to be done, every body, — whatever be its name, and whatever other functions, of a judicial or of a discretionary nature, it may have, — is bound to obey, and, with the exception of the Legislature and its branches, every body is liable for the consequences of disobedience; that is, its members are liable, through whose failure or contumacy the disobedience has arisen, and the consequent injury to the parties interested in the duty being performed.

The distinction, in this respect, seems to vanish, even between the higher and inferior courts, — those of general, and those of limited jurisdiction; but, for things done in the exercise of judicial functions, inferior courts are answerable where the higher are not. The case in 3d *Leonard* shews, that for doing a judicial act, — that is, a proceeding to judgment and execution pending an appeal, namely, a *habeas corpus cum causa* to remove the plaint, —

the steward of a court, having jurisdiction in the matter, is liable to an action of damages.

It was at one time held, that commissioners of bankrupt were protected by their supposed judicial functions; but this being fully considered in the case of Miller *v.* Seare, 2d *W. Blackstone*, 1141, the *Lord Chief Justice*, and *Mr Justice Blackstone*, and *Mr Justice Nares* held, (*Mr Justice Gould* dissenting,) that those commissioners were liable in an action of false imprisonment for having improperly committed a bankrupt, who, in the opinion of the Court, had given a satisfactory answer, the commissioners not having deemed it satisfactory.

It is true, that in Doswell *v.* Impey, in 1st *Barnewall* and *Cresswell*, 163, the Court so far differed with the former decision as to hold that the commissioners had the authority vested in them of determining whether they should be satisfied or not. But this was upon the words of the statute, (5th George II,) "that "the bankrupt shall full answer make to the satisfaction of the "commissioners." And even in this view, the Court expressly said "that they did not decide how it would have been, had an "action on the case, and not trespass, been brought;" and they expressly did hold, that the commissioners were liable to criminal prosecution for any abuse of their authority. So that there was nothing decided, nor any thing said, to shake the main part of the decision in Miller *v.* Seare, — that the commissioners had not the protection enjoyed by Judges for their acts. Accordingly, in the subsequent cases of Isaac *v.* Impey, in 10th *Barnewall* and *Cresswell*, 44, and Crowley *v.* Impey, in 2 *Starkie*, 261, no objection was taken to the action against the Commissioners, but the contest arose upon whether or not the bankrupt or the witness had refused to answer.

It was afterwards by the new bankruptcy acts provided, that the Commissioners should have the protection of Courts of Record, that is, of the higher Courts, for the protection extends

to all these, whether Courts of Record or not, as the High Court of Admiralty, and Courts of Vice Admiralty.

It has also been held, that persons clothed with judicial authority, not being Judges of the Higher Courts, are liable to an action for not executing duties cast upon them, of a kind very nearly approaching to judicial, as in the case to which my noble and learned friend has referred of Green *v.* Buccle, in 1st *Leonard*, 323, which was an action against a Justice for refusing to examine a witness, necessary to give the party a remedy under the 27th of *Elizabeth*. The Courts have said "these duties are not judicial, "and therefore the action lies, though it is not easy to distinguish "them from their judicial functions, and though it is quite certain "that no such action would lie against Judges of the superior "Courts." Certainly, both the functions of the Commissioners of Bankrupt, and those of Justices of Peace, and those of Stewards of Courts having local jurisdiction, are much more of a judicial nature than those of the Presbytery are in the matter of receiving a presentee, and taking him to trial of his qualifications.

It is not denied that the Presbytery has certain functions of a judicial, or *quasi* judicial nature. It is not necessary for the purpose of the present question, to inquire how far the discretion is vested in them of deciding absolutely on the qualification of a presentee. It is not necessary now to go into the question, how far the Presbytery, being commanded to receive and admit the presentee, are compellable to do whatever is necessary for his reception and admittance. These questions do not here arise; because the Presbytery have resisted in the outset by refusing to take the presentee on trial; and until they do so take him, no such question can arise. No discretion is vested in them to refuse the trial. The law has been declared both generally and in this particular case, the Court below and your Lordships have decided that there is no such discretion, and that the Pres-

bytery are bound without any option to take the presentee on trial.

But that which seems to make an end of this defence, — the defence grounded on the alleged judicial character of the Presbytery,—and which indeed goes far to make an end of the whole defences together, is the finding of the Court below, and affirmed in this House. When, I would ask, was such a finding ever applied to the proceedings of a court having the protection of judges for all their judicial acts? When was an act, either judicial or *quasi* judicial, of one tribunal, ever so dealt with by another and a higher tribunal? The judgment is, that the "said "Presbytery have refused, and continue to refuse, to take the "presentee to trial, on the sole ground that the majority of male "heads of families, communicants in the parish, have dissented, "without any reason assigned, from his admission as minister."

This is the alleged judicial act. The finding sets forth the act of refusal, and the reason assigned for that refusal. Then how does the judgment proceed to deal with this alleged judicial act, "Find that the said Presbytery, in so doing, have acted to the "hurt and prejudice of the pursuer, illegally, and in violation of "their duty, and contrary to the provision of the statutes." And this finding is affirmed by your Lordships on appeal.

Now, if any person will shew me a similar judgment, lawfully pronounced by competent judicial authority; still more, a judgment from which there can be no appeal, pronounced upon the conduct of another body inferior, and which was a party to the suit in which the judgment was given,—if any person will shew me a judgment so pronounced, by a superior tribunal, declaring the proceedings of the inferior body to have been had illegally and in violation of its duty, and to the injury of the party complaining, I shall then have no difficulty in knowing how to deal with the inferior body, and with any pretence which it may set up to the character of a judicial body, or any protection

which it may claim for its acts as judicial acts. The judgment, in truth, by its frame, as completely negatives the taking on trial to be a judicial act, as distinctly declares the presbytery, in refusing a trial, to have been acting in a capacity other than judicial, as if it had in terms negatived the one of these propositions, and affirmed the other.

Cases and extreme cases have been put in the argument with much ingenuity, and they share the fate of such suppositions when forced into the service of an untenable contention. They either may be admitted, and do not touch the question in hand, or they are so far doubtful as not to decide it. Thus it is asked, if any one ever heard of a judge being sued for not going into court to try a cause, when the parties were ready, at a great expense, to proceed. The case in 1st *Leonard* shews, that this at least will not apply to all the acts of inferior judges. But suppose it were admitted, that in the case put no remedy lies against judges of the superior Courts, the law and constitution has provided a remedy, by their removal, for a breach of duty, or neglect of duty. What remedy is there against the Presbytery? None but by appeal to the Synod, and ultimately to the General Assembly; and they who deny the Presbytery's responsibility to the municipal law, of course will also deny the responsibility of the Synod and the General Assembly, and deny also, that the three branches of the Legislature, concurring, could remove the offending Presbyters as they can remove the delinquent judge, without any new law, or by a mere proceeding pointed out by statute. Here then would be a complete case of *imperium in imperio*—of bodies existing in the country, and exercising important functions — functions nearly affecting the rights, the civil and patrimonial rights of the subject—and yet, not placed under any control of the law, or rendering any obedience to those intrusted with the office of administering it. Nor must it ever be forgotten, that to this conclusion the whole arguments of

these Church Courts lead; that this is the very claim which they set up more or less covertly as suits the different stages of their contention, that, more or less concealed from our view, this is the doctrine which pervades their whole reasoning.

We have been assuming, that the extreme cases put are clear in themselves, and have been admitting that they resemble the one in hand, which they do not. But is it quite certain that these extreme cases are so clear and incontestable, as at once to dispose of the present question even upon that admission? I greatly doubt it; even as to Judges of the higher Courts I doubt it. The case put, of members of this House not attending a Committee of Privileges, is quite clear by the Common Law of Parliament, and also by the declaratory words of the statute, (the Bill of Rights.) But if asked, whether a judge is or is not liable to make reparation for the injury he may occasion, by wilfully, and without reasonable cause, or any cause whatever, but his own caprice, refusing to act judicially on a day when parties are prepared, at great expense, to try their cause before him, and then leaving the circuit town without performing his duty?—I can only say, that when such a case comes before me I shall be ready to deal with it; that at present I am not called upon to determine it, but that I am by no means prepared to admit it as clear law, that no action will lie for such a breach of duty; and unless it is perfectly clear, the reference to such a forced case nowise helps the argument or speeds us towards a conclusion. That the superior Judges, even acting judicially, and in a matter of which they have unquestioned jurisdiction, may render themselves answerable to parties, appears to be admitted in the opinions delivered by the Judges in the case of Hagart's trustees *v.* Hope, in 2d *Shaw's House of Lord's Cases*, 125. Their Lordships there put cases in which a Judge would be liable to an action for injury done to a practitioner in deciding a cause, such injury being the statement of slanderous matter not necessary for the decision.

It would be difficult for the same Judges to have adopted, as quite clear, the positions assumed in the present case as incontrovertible on the absolute protection of Judges in acts of misfeasance, and acts of nonfeasance, as connected with their judicial functions.

But it is far more fruitful, and more calculated to throw light upon the question, that we should look a little at cases more resembling the present, and at the rights of bodies whose functions more nearly approach those of the Scotch Ecclesiastical Courts. The Presbytery closely resembles the Bishop, and its functions resemble his functions in respect of the trial and admission of presentees. Now, as to the Bishop, he exercises his judicial functions by officers whom he appoints; and these are to all intents and purposes Judges, exercising, indeed, very high judicial powers. If they exceed their jurisdiction the temporal Courts interfere to prohibit them. If they persist, the temporal Courts punish them as for a contempt, by attaching them and imprisoning them. So indeed do they the Judges of Admiralty Courts — even the Judge of the High Court of Admiralty itself, if he prove refractory, and disregards their prohibition. And, in all these cases, the party aggrieved by the contumacy has his remedy by action against the Judge.

But this may be said to be a case where the Judges are acting without jurisdiction. If, however, after being commanded to desist, those Judges were to proceed, and to say that they proceeded because they judicially decided that they had jurisdiction, this would not avail them an instant even in shewing cause why they should not be attached by their bodies for their contempt, nor could any such averment be sustained or pleaded in justification to an action for the injury sustained. And yet, what else than this is the defence now set up by the Presbytery against the complaint, that they have refused to take upon trial according to their duty, declared by the supreme judicial authority of

the country, an authority as competent to restrain them as the Temporal Courts are to restrain the Spiritual or Admiralty? That authority says, "You are bound to take the presentee on "trial, you have no discretion, no jurisdiction to refuse it." The Presbytery says, "We will not, because it is our province to say "whether we will take him on trial or not." And be it observed, unless the Presbytery says as much as this, they say nothing at all to maintain their defence. But wherein does this differ from the case supposed, but which certainly involves too great a contumacy ever to have happened, of the Bishop or his Judge, or the Judge of the Admiralty refusing to obey a prohibition, upon the ground that it is his province to determine whether or not he shall attend to it?

But this is not all. The present question regards only the refusal to take on trial, — the refusal to proceed. Nothing now arises upon the discretion of the Presbytery, in conducting the trial. On that I give no opinion. Certainly I give none, that differs from the dicta thrown out by some of the Judges below, particularly the Lord President. I only say, that we are not at present called upon to decide either way upon the point. The question before us merely regards the refusal of the Presbytery to proceed at all. Now the Bishop with us, in whose place the Scotch Presbytery stands, is answerable in an action for not admitting a Clerk; and though damages could not be recovered at common law, but only by the statute of Westminster the second, from the law's extreme jealousy of Simony, as Lord Coke says, in second institute, 362, the patron alone being the party demandant in such an action — from another refinement of our law, which regards the interest of the Clerk, before institution, as merely spiritual, (a refinement wholly unknown in the law of Scotland,) — yet the liability of the ordinary to the real action by the common law, shews plainly that he had no power such as that claimed by the Presbytery, of absolutely refusing the Clerk,

for whatever reason he might choose to assign, or without any reason at all.

A case however exists, more closely resembling the one in hand, and which is indeed considerably stronger, for the control of the Courts over Ecclesiastical authorities. I refer to the King *v.* The Archbishop of Canterbury, in 15th *East*, 117; and the King *v.* The Bishop of London, in 13th *East*, 419. By the statute of 13th and 14th of Charles II., chapter 4th, (the Uniformity Act,) it is provided, that no person shall be received as a lecturer unless "he be first approved, and thereto licensed by the "Archbishop of the province, or Bishop of the diocese;" and upon an application to the Court of King's Bench for a mandamus to the Bishop of London, commanding him to receive a person duly chosen to an endowed lectureship, and a rule *nisi* granted, it was discharged, upon a preliminary objection taken, that it should have been directed to the Archbishop as well as the Bishop. We, however, who were of counsel for the rule on renewing the application, were apprehensive that the Court could not compel the Bishop to license, and therefore, only moved for a mandamus, calling upon the Archbishop, or Bishop, to admit the lecturer to trial before them, (for that was truly the substance of the application) and to license him, if he should be found a fit and proper person, to preach the lecture. The affidavits against the rule set forth, that the Bishop had repeatedly admitted the lecturer before him, and that, after having heard him, and having made diligent inquiry respecting him, he had been convinced that he was not a fit person, and for no other reason had refused to license him. A great many particular facts were set forth in the affidavit, and the Court held, that if the mandamus had issued, and if the matters on which the Bishop relied, and the statement of his having heard and inquired, had been returned to the writ, such return would have been con-

clusive, wherefore they discharged the rule and refused the mandamus.

Lord Ellenborough, in the powerful and elaborate judgment which he pronounced on the part of the whole Court, stated the authority of the Bishop to be by the statute so absolute, and the grant or refusal of a license to be so entirely within his discretion, that he might have formed his opinion even upon matters within his own personal knowledge, such as recollections of what had passed when acquainted with the party at College. Nevertheless he laid it clearly down, that if the Bishop had not inquired, — if the Court had reason to believe that he had not effectually examined and deliberated before deciding, or that any thing was defectively done in this respect, — then "the Court would interpose its autho- "ritative admonition;" that is, grant a mandamus calling on the Bishop to inquire and examine; and the whole argument really turned upon this, — whether that which had been done amounted to an inquiry and examination; it being on all hands admitted, that such preliminary inquiry, or some personal knowledge which superseded its necessity, was required, although the statute says nothing of inquiry or examination, merely giving the Bishop the power of approving; in order to the exercise of which power the Court clearly held an inquiry of some sort necessary, but left the manner of conducting it to the Bishop, as well as the decision upon its result.

So in the case of visiters, whose power and discretion is absolute, the Court will interfere by mandamus to put that power in motion, calling upon them to hear and determine, though after they have determined the Court cannot interfere, as in the case of The King *v.* The Bishop of Lincoln, 2 *Term. Reports*, 338; The King *v.* The Bishop of Ely, 5th *Term. Reports*, 475, and many other cases.

It surely never can be contended that the Presbytery are

invested with a more absolute discretion, nay, with so absolute a discretion, as these cases recognize in the Bishops under the uniformity act, and the visiters at common law; and yet the rule is clear that they will be compelled by mandamus to proceed in a court of inquiry.

It is equally clear that an action would lie at suit of the party injured by a refusal to obey the writ in such cases, as an action would also lie for a false return to the mandamus. In what respect does the action against the Presbytery differ from an action against an ordinary for refusing to hear and inquire in order to licensing, unless it be in this, that there may be no such absolute discretion vested in the Presbytery, as has been recognized in the ordinary and the visitor?

It is however contended, that the Presbytery, being a corporate body, its individual members are not answerable in an action for corporate acts of misfeasance, or of nonfeasance. To this it seems enough to answer, "that unless they are so made answerable, "there is no remedy whatever for those whom the illegal conduct "of the body may most seriously injure." There is a great laxity in the Scotch law as regards corporations. Almost any set of persons authorized in any way to act together, or continuing to act together for a length of time, seem to be regarded as a corporation. The entire merger of the individual member in the corporate existence, according to our English doctrine, may render the suing them separately difficult; and new corporations with us can only be created by statute, or by grant from the Crown. But when it is considered, that almost every Royal Borough in Scotland, and even the superiors of many Boroughs of Barony, that is, many private persons, have the power of granting what is termed "seal of cause," which creates a corporation, surely it is impossible to allow a proposition that would lead to consequences so utterly inconsistent with all good government, nay, with all social order, as those which must flow from

the notion that no individual corporator can be sued for wrongs done by the illegal conduct of the corporation, to which conduct he was a necessary party. That the whole corporate body should be liable to process and to action, as in the case of a bishop, parson, or other corporation sole, and no one member of a corporation aggregate acting wrongfully, and preventing the corporation from performing its duty, or joining in its illegal and tortious acts, — seems an inconsistent and untenable position.

But there seems no ground for the position, that even in England individual corporators cannot be sued. In the case of the King *v.* the Mayor of Ripon, in 1st *Lord Raymond*, 564, Lord Holt cited Enfield *v.* Hills, (which is also reported in 2 *Levinz.* 236, and in *Sir T. Jones*, 116,) to shew that an action for a false return lies against particular persons, a mandamus having gone to a corporation, of which it appears by the report of the same case in 2 *Levinz.* 236, the defender was a member, and he having procured the false return.

In Rich *v.* Pilkington, in *Carthew*, 171, an action for a false return to a mandamus was held to lie against the Lord Mayor of London, the return having been made by the Lord Mayor and Aldermen. And though in this case it was said that the Lord Mayor and Aldermen were not a corporation, but only a court, there can be no question that the corporate character belongs as little to the Presbytery as to such a body.

In Harman *v.* Tappenden, in 1*st East.* 559, although Lord Kenyon and Mr Justice Lawrence expressed doubts how far an action lay, yet Mr Justice Lawrence appears to hold that the action lay, if the defendants had, in their corporate capacity, tortiously procured the acts complained of to be done by the corporate body; and both he and Lord Kenyon agree, that for injurious acts wilfully and maliciously done, the corporators were liable in their individual character, though not for mere error of judgment.

Now, in the present case, that is alleged and proved which is tantamount to malice, — illegal conduct in violation of duty, and injurious to the party; and the conduct is alleged to be continued refusal to do an act declared by a judgment to be imperative. "The defenders have, from the 2d of July, 1839, and do "still illegally refuse to make trial."

In Drew *v.* Coulton, in 1st *East.* 563, and indeed, in Ashbey *v.* White, in 6th *Modern Rep.* 46, such averment seems to have been held sufficient allegation of malice. If the acts alleged to be illegal and in violation of duty, had been alleged in terms to have been wilfully done, there can be no doubt that this would have come up to an averment of malice. But the word "wilful" needs not to be used any more than the word "malice." The continued illegal refusal is clearly equivalent to wilfully doing an illegal act.

In Grey *v.* Forbes, in 5th *Clarke* and *Finelly*, 356, the individual liability of corporators appears to have been both supported by the interlocutors of the Court of Session, and sanctioned by the authority of this House upon appeal. An old case to the same effect was there referred to, The Burgesses of Rutherglen *v.* Latch, 8th July, 1747.

The Court below in giving, and this House in affirming, the decree against the majority of the Presbytery, do not incur in the present stage of this unhappy controversy, the charge so freely brought elsewhere of violating the conscience of the Church Courts and their Members. That topic has been abstained from since the answer was more than once, and in other kindred cases, given to it, respectfully suggesting, that if any individuals should find obedience to the law of the land repugnant to their conscientious scruples, they had, if not a remedy for the grievance, at least an escape from its pressure, placed within their reach, and open to them of their own free will.

But other appeals of a like nature have been made. It has

been said, that to suppose the legislature, which acknowledged the Divine origin of the Church's powers, would ever intend to enforce their exercise by the sanction of temporal penalties, is to charge that legislature with conduct as profane as it is absurd. Yet the compelling men, and bodies of men, to exercise faculties which they have received from Heaven, is one of the most ordinary acts of legislative, of executive, and of judicial power; not to mention that it is the act of ordination itself, and not the preparatory process of trial, which the Church claims to have received from above.

But when these men seek to excuse themselves, to palliate, or rather to deny their contumacy, by asserting that they only desired to consult the General Assembly, their ecclesiastical superiors, they have fallen into a much more practical error, — an error wearing a more sinister aspect, come of more base parentage, and fruitful of more dangerous offspring. "We "had," say they, "on the one hand the opinion of the civil "court; on the other the positive injunctions of our ecclesiastical "superiors, and all we did was to refer to them for advice." Advice on what point? In what difficulty — touching what nice and perplexed matter — involved in what entangled controversy was it, that they required such a resort for light and help? No less nice, and difficult, and perplexing a question, than whether they were to perform the duty in terms declared to be incumbent on them,—declared by the supreme tribunals of their country,—or to follow the advice of other persons who had set themselves in opposition to the tribunals, and had commanded or enjoined them to disobey their decrees. And to whom do they resort for advice in this emergency, for a solution of this difficulty? Not to any impartial and unbiassed adviser, whose counsels it would be safe to follow, but to the party whence had proceeded the unwholesome advice to disregard the law. It is fit that these men learn at length the lesson of obedience to the tribunals which

have been appointed over them; a lesson which all others have long acquired, and which they, on learning it, should also practise. It is just that they should make reparation to those whom their breach of a plain duty has injured. The duty is not doubtful; the Courts have laid it down. Their failure is not a mistaken opinion; their fault is not an error of judgment. They knew what they ought to have done, and they refused to do it. The penalty of their transgression is to make compensation to those whom they have injured by their pertinacious refusal to perform their duty, and yield obedience to the law.

Lord Cottenham. — My Lords, I feel much satisfaction at finding that this case has been so deeply considered, and so fully discussed by the noble and learned lords who have preceded me. A very few sentences will be sufficient to express the grounds on which I concur in the opinions which they have stated to your Lordships, and upon which I consider that the interlocutors appealed from should be affirmed.

My Lords, I have not found during this discussion any real difficulty as to any of the propositions which were raised by the appellants at the bar. The principal ground of defence which the defenders relied upon was, that they were exercising certain judicial functions which, as a court, they were competent to exercise; and that therefore they were not liable if they had fallen into any error in the exercise of those judicial functions. My Lords, the interlocutor in the Auchterarder case, affirmed by this House, entirely excludes any such ground of argument. They indeed assumed in that case, as they have in this, that the law had reposed in them some discretion as to whether they should or should not take the party duly presented upon his trial. The interlocutor of the Court of Session decided that they had no such discretion, but that it was their bounden duty to do so; that they had no option; that it was a right which the

party presenting was entitled to claim as against them; a public duty which they were bound to perform.

That then must be considered as the declared law of the land. In violation of that right, and in disobedience to that law, the proceedings in this case shew, that the Presbytery have refused to do that which, by that decision of the Court, they were bound to do. The result is an injury accruing to the party who claims to be at least entitled to be examined, for the purpose of its being ascertained whether he was a person fit to be received into that piece of patronage for which he had been presented to the Presbytery.

Then if that be removed, the only other ground which was even open for argument was, that although that might be so, although the law had so declared, yet that they were not individually answerable for the course which had been adopted by the Presbytery at large; that is to say, that the individual members of the Presbytery were not liable for that which was the act of the body of which they formed a part.

My Lords, when the authorities in this country, but more particularly in Scotland, were examined, it appeared that there was no foundation whatever for that ground of defence. My noble and learned friends have referred to cases which have arisen in this country, but those which they have referred to as having been decided in Scotland are of course much more applicable to the present case.

We have had in this House, instances of actions brought against persons standing in the situation of trustees, for acts of omission on their part. And the case which my noble and learned friend on the woolsack referred to, meets that objection to which I have last referred in its very terms. In the case of the Magistrates of Edinburgh, there was a duty to be performed; they had neglected to perform that duty, (and it is certainly not a less strong way of putting it where there is a positive refusal to

perform it;) from the neglect of duty by those Magistrates of Edinburgh, an individual had sustained damage, and he brought his action, and sought his remedy against the individuals, and it was held, that he had a right so to do. Similar decisions have taken place in other cases, in this country.

Then, my Lords, if there has been a wrong sustained, if that wrong has arisen from the body of which these individuals form a part, having refused to do that which the law has stated they are bound to do, and damage has been sustained by an individual in consequence; and if, in such cases, the law be that the individual members are all answerable in their own persons for the damage and injury so sustained, the whole case is exhausted, and the propriety of the interlocutor appealed from, is established.

My Lords, there has not in my mind been raised any doubt as to the law applicable to these several branches of the case; and I have no hesitation in stating my opinion to be, that the interlocutor ought to be affirmed.

Lord Campbell. — My Lords, I am likewise of opinion, that this interlocutor ought to be affirmed. The action is brought to recover a compensation for the loss which it is alleged the pursuers have sustained by reason of the defenders having refused to perform a duty cast upon them by act of Parliament, and the decree of a Court of competent jurisdiction.

Lord Kinnoul, the undoubted patron of the parish of Auchterarder, in due form presented to the living Mr Young, a preacher of the gospel, but not in holy orders. The presentation being intimated to the Presbytery, they refused to take Mr Young on trials, because a majority of the male heads of families in the parish in communion with the church, disapproved of the presentation. An action was then brought by the patron and presentee against the Presbytery, with a view to enforce upon them the performance of their duty — to take the presentee on trial — that

they might judge whether he was duly qualified to be ordained and inducted. In that action, it was found and adjudged by the Court of Session, "that the defenders, the Presbytery of Auchterarder, did refuse, and continue to refuse to take trial of the qualifications of the said Robert Young, and have rejected him as presentee, on the sole ground that a majority of the male heads of families, communicants in the said parish, have dissented, without any reason assigned, from his admission as minister; and that the Presbytery, in doing so, have acted to the hurt aud prejudice of the pursuers, illegally and in violation of their duty, and contrary to the provisions of the statutes libelled on." The Presbytery having appealed against this interlocutor, it was affirmed by this House.

The judgment of your Lordships was to be applied by the Lord Ordinary, who pronounced a judgment, finding and declaring, "That the Presbytery, and the individual members thereof, are still bound and astricted to make trial of the qualifications of the pursuer, Robert Young; and if in their judgment, after trial and examination in common form, he is found qualified, to receive and admit him minister of the parish, according to law." This judgment of the Lord Ordinary, against which there was no appeal, was duly intimated to the defenders, who are members of the Presbytery of Auchterarder, at a meeting of the Presbytery; and they were requested to take Mr Young on trial accordingly, but they refused to do so, and referred the matter to the Commission of the General Assembly. In consequence, Mr Young has never been taken on trial, or admitted as minister of the parish, and has lost the profits of the living.

On these facts, my Lords, I am of opinion, that this action is well brought. I conceive, that by the law of Scotland, as well as by the law of England, and I believe by the law of every civilized country, where damage is sustained by one man from the

wrong of another, an action for compensation is given to the injured party against the wrong-doer.

In this case, if there be injury, there seems to be no doubt of the damage, for Mr Young is thereby deprived of the status of minister of Auchterarder, together with the temporalities of the living. The patron likewise must be considered as suffering a damage, for which he is entitled to compensation, if there be an illegal refusal to admit his presentee, in violation of the rights conferred upon him both by common and statute law.

My Lords, is it not equally clear, that the defenders were guilty of a wrong when they refused to obey the law, as declared and adjudged by the Court of Session, and this House? The duty of taking on trial, and admitting if duly qualified the presentee of the lawful patron, was cast upon the members of the Presbytery, who ought to have been aware of that duty, when they themselves being presented by the patrons of their respective parishes, were taken on trial, and admitted members of the Presbytery. They ought to have been aware, that while they continued members of the Presbytery, they could not get rid of the duties incumbent upon them in that capacity. They might have known that the law of the land affecting the civil rights of the lieges, can only be altered by the legislature, the supreme authority in the state. The rights of patrons, recognized by the most ancient and venerable authorities in the law of Scotland, are anxiously guarded by the Acts of Parliament, establishing the Reformed Presbyterian Church of Scotland; and by the Act of 10th of Anne, chapter 12, which we must consider binding, although it has been said to be *ultra vires* of the British Parliament, it is expressly enacted, "That the Presbytery of the bounds "shall receive and admit such qualified person minister, as shall "be presented by the patron."

But whatever doubt may be supposed to have existed, was removed by the solemn judgment of the Court of Session and of

this House; and the Lord Ordinary was unquestionably authorized, in pronouncing the interlocutor, whereby the defenders must be considered to have been required to make trial of Mr Young's qualifications, and if he were found qualified, to admit him minister of the parish. The refusal to obey the lawful decree of a court of justice is certainly a wrong. We have here therefore the conjunction of wrong and loss; — of wrong committed by the defenders, and loss suffered by the pursuers, out of which an action arises, and *primâ facie* the action is maintainable.

I will now consider the several objections to the action brought forward on the part of the appellants.

In the first place, it is said, that the Presbytery is a Court, and that this was a judicial proceeding, wherefore, no action can be maintained against the members of the Court, although their judgment be erroneous. There can be no doubt that for many purposes the Presbytery is a Court, and that it has not only ecclesiastical functions, but jurisdiction in certain civil matters, such as the allotting of glebes, and the repairs of kirks and manses. Where the Presbytery is acting judicially, or in any matter where they have a discretion to exercise, no action could be maintained against the members; at least, without malice expressly charged, and clearly proved. If they had taken Mr Young on trial, and adjudged that he was not qualified, from being *minus sufficiens in literaturâ*, or from any objection to his orthodoxy or his morals, or that from some personal defect he was incapable of satisfactorily serving the cure, their judgment could not have been reviewed by any civil court, and certainly no action would have lain against them, on the allegation, that in truth he was well qualified and free from all objection. The church judicatories, acting within their jurisdiction, must ever be respected and upheld. But when the Presbytery were required to take Mr Young on trial, in my opinion they were required to do a mere ministerial act. Touching that act, — they had no dis-

cretion, they had no judgment to exercise. How then could it be judicial? There is no difficulty whatsoever in separating the act of appointing him to appear before them to be examined, and the act of forming a judgment upon his qualifications when he has appeared before them and been examined. It is for a refusal to do the first act that this action is brought, and the first act is purely ministerial.

Where there is a ministerial act to be done by persons who on other occasions act judicially, the refusal to do the ministerial act is equally actionable, as if no judicial functions were on any occasion intrusted to them. There seems no reason why the refusal to do a ministerial act, by a person who has certain judicial functions, should not subject him to an action in the same manner as he is liable to an action for an act beyond his jurisdiction. The refusal to do the ministerial act is as little within the scope of his functions as judge, as the act where his jurisdiction is exceeded. In the act beyond his jurisdiction he has ceased to be a judge. As to the ministerial act which may be initiatory to a judicial proceeding, he is not yet clothed with the judicial character.

In the able argument on behalf of the appellants at the bar, it has hardly been denied that the action is maintainable, if the act to be done was of a ministerial nature; for the general proposition, that public functionaries appointed to act ministerially, are liable to an action at the suit of any one who suffers damage from their breach of duty, was not disputed. Every thing, therefore, turns on the quality of the act; and how is the act of the Presbytery, in taking the presentee on trial, to be distinguished from the act of the archdeacon, or of the bishop in inducting to a living? The archdeacon and the bishop have both judicial functions, but in inducting to a living where the right is ascertained, they have to do a ministerial act, and for wrongfully refusing to do that act, the law gives an action to recover damages against them, to the parties aggrieved.

At common law, there were no damages in *Quare Impedit*, because this was in the nature of a real action, to try the right of advowson; but for a refusal to admit, after a judgment in *Quare Impedit*, I have no doubt that damages might have been recovered at common law.

Is there not a ministerial duty cast upon the Presbytery by 43 George III., chapter 54, section 16, to take a person elected parish schoolmaster on trial, as to his sufficiency for the office, in respect to morality, religion, and literature; and would not a person so elected, have a remedy against the members of a Presbytery, who refused so to do, whereby he could not be admitted to his office?

The members of Presbytery need not feel their dignity hurt by this doctrine, for I humbly apprehend, it would apply to the supreme Judges of Scotland, the Senators of the College of Justice. By the Scots statutes, 1579, chapter 93, and 1592, chapter 134, it was enacted, that "when the place of any ordi-
" nary Lord of Session became vacant, the Crown was to present
" and nominate a man that feared God, of good literature, and
" other qualifications enumerated; who should be first suffi-
" ciently tried and examined by the Lords of Session, and in
" case the person presented should not be found so qualified by
" them, it should be lawful to the said Lords to refuse the per-
" son presented to them, and the King's Majesty was to present
" another, so oft as he pleased, till the person presented were
" found qualified."

After the case of Haldane, in *Robertson's Appeal Cases*, 422, who in 1722, being appointed a Lord of Session by the Crown, was rejected by the Court as disqualified, but found on appeal to be well qualified by this House, the British statute of 10th George I., chapter 19 passed, by which the examination of the person nominated judge, by the Judges of the Court of Session, is continued, and if the person so nominated, shall, on such examination, be found duly qualified, then they shall forthwith

admit and receive him; but if they think there is just ground to object to the qualifications of the person so nominated, they are to lay the whole matter before the king, who may either order him to be admitted, or may nominate another in his place.

The trial is still necessary, and, as is well known, the judge appointed by the Queen's letter, must first give proof of his learning and skill as Lord Probationer, before he takes his place on the bench, and is admitted as a member of the Court. During the present session, your Lordships have had the advantage of having laid before you, two most excellent experimental judgments by Lord Probationer Ivory, and Lord Probationer Murray.

Now, my Lords, if we may conceive, (what can never happen,) that the Judges of the Court of Session should pass an act of sederunt, to the effect, that Judges ought not to be intruded on the College of Justice, and that the Court would not take on trial any one appointed by the Crown to be a judge, if a majority of the Advocates and Writers to the Signet practising in the Parliament House, should, without assigning any reason, dissent to the appointment, and afterwards putting the veto act in execution, should, on the sole ground of the dissent, refuse to take on trial a person duly appointed a Judge of the Court by the Queen's letter — still more, if upon appeal to the House of Lords, this veto act being adjudged to be illegal, null and void, there should be a declaration by this House, that the Judges of the Court of Session were bound and astricted to take the party on trial, and they were still positively to refuse to do so, — I cannot doubt, that having been thereby guilty of a breach of the law, they would be liable in an action to make reparation in damages to him who had suffered a loss from their wrong. Of law, I hope it may ever be said, with truth in this country, "all things "do her homage; the very least as feeling her care, and the "greatest, as not exempted from her power."

But it is said, that this action is an interference with the right of the Church, to confer holy orders. God forbid that a Civil Court should exercise a judgment as to whether any one is qualified to preach the gospel, or to administer the sacraments! But I entertain no doubt as to the jurisdiction of Civil Courts, to command the proper Ecclesiastical Authorities to inquire whether a person is so qualified, who, if he be so qualified, is entitled by law to a certain *status* in the Church, and if they find him so qualified, to do what is necessary to enable him to enjoy his preferment.

By the act of uniformity, 13th and 14th Charles II., chapter 4, section 19, no one may preach as lecturer in any church, unless he be first approved, and thereunto licensed by the archbishop of the province, or the bishop of the diocese. Can the archbishop and bishop refuse their license as they please? No. The Court of King's Bench will compel them to grant a license to a person appointed to a lectureship, or to give a sufficient reason why they refuse to do so.

In the case of the King *v.* the Churchwardens of St Bartholomew, in 12th William III. reported in a note in 13th *East.* 421, it was held by Salt, Chief Justice, "That though it was punish-
"able by the statute for any person to be lecturer, and preach
"without license, yet the ordinary had no power over the right,
"nor has he an arbitrary power to license or not, but was bound
"*ex justitiâ* to license if the person were orthodox, an honest
"liver, and loyal."

So, upon an application for a mandamus to compel the bishop to grant a license under the act of uniformity, Lee, Chief Justice, said, "There can be no question but this Court hath jurisdiction
"in all cases of this nature, but the question is, whether this be
"a proper case for the Court to exercise that jurisdiction?
"Where a person appears to have a right, this Court will com-
"pel the bishop to grant a license, or shew good reason to the

" contrary." In the King *v.* Blower, 2 *Burr.* 1043, Lord Mansfield said, " If the bishop had refused, without cause, to " license him, he might have had a mandamus to the Ordi- " nary, to compel the Ordinary to grant him a license."

In the King *v.* the Archbishop of Canterbury, and the Bishop of London, in 15 *East.* 117, which was referred to by my noble and learned friends, Lord Ellenborough lays down the law upon this subject with his usual force and perspicuity. — " The bishop has " not an arbitrary power of refusing a license, but he must exer- " cise his discretion fairly upon the fitness of the person applying " to him *secundum æquum et bonum.* Suppose he should return " *non idoneus*, generally, can we compel him to state all the par- " ticulars from whence he draws his conclusion? Is there any " instance of a mandamus to the Ordinary to admit a candidate " to holy orders, or to specify the reasons why he refused? If, " indeed, it had appeared that the bishop had exercised his juris- " diction partially, or erroneously; if he had assigned a reason " for his refusal to license, which had no application, and was " manifestly bad, the Court would interfere."

In that case, the rule for a mandamus was discharged on an affidavit by the Bishop, that the party applying had been admitted to his presence with a view to his being approved and licensed; that he had made diligent inquiry concerning his conduct and ministry, and being convinced from such inquiry, that he was not a fit person to be allowed to lecture, he had conscientiously determined, after having heard him, that he could not approve or license him.

The English authorities differ as to whether the Bishop is bound to specify his reasons, it having been held in Specots' case, reported by Lord Coke in 5th *Reports*, 57, that he must; but they all agree, that if an insufficient reason is assigned, he may be compelled to proceed to do the acts as Ordinary, which are necessary to enable the party, with the inchoate right, to enter into full possession of the benefice.

So, if the Ecclesiastical Court, in a process of deprivation, is proceeding within its jurisdiction, to deprive for what would be just ground of deprivation; as immorality, heterodoxy, or disobedience to the Canons of the Church, no civil Court would interfere, and an erroneous judgment would only be ground of appeal to a superior Ecclesiastical Court. But Free *v.* Burgoyne, 5th *Barnewall* and *Cresswell*, 538, and in 8 *Bligh*, 65, shews that prohibition will be granted by the Civil Courts, if the Ecclesiastical Courts are proceeding to deprive for that which is not just cause of deprivation, and a sentence of deprivation, shewing *ex facie*, that it was founded on that which would not be just cause of deprivation, would be a nullity.

All proper respect is to be shewn to Ecclesiastical authority; but authority must be defined, or despotism would be established, and true religion would be sacrificed to the ambition of those who delude themselves into the belief, that they are consulting its best interests.

The counsel for the appellants strongly urged, that they were only liable to be dealt with criminally, for what was acknowledged to be disobedience to the law; and it was assumed, that in England, no action would lie from a refusal to obey a mandamus. The common remedy is certainly by attachment, because it is more speedy and more effectual. But I by no means agree to the position, that if after a mandamus ordering an act to be done, or cause shewn to the contrary, and a return made, being set aside as insufficient, an absolute mandamus were to go and to be disobeyed, an action would not lie. Suppose a mandamus to churchwardens, to make a rate under the Church Building Act, for the purpose of paying off a debt charged upon the church rates, it might be no remedy to the creditor merely to put the churchwardens in prison, but an action would enable him to get at their property, and according to all principle and analogy, such an action is maintainable. Where an award is made under a rule of Court, there may be an attachment for the contempt, or an

action for non-performance of the award. The rule propounded by the Attorney General that there is no mandamus where there is an action, and no action where there is a mandamus, is not universal, and at any rate applies only to the original grant of the mandamus, and not to the remedy for disobeying it. Although there might be a charge of horning against these defenders for disobedience to Lord Murray's interlocutor, no authority has been cited to us to shew, that an action to be repaired in damages is incompetent.

The difficulty pointed out, of finding on which side the different members of the Presbytery voted, would apply to a criminal as well as a civil proceeding; for those members of the Presbytery who were desirous of obeying the law, could not be liable to punishment, and it would be incumbent on the prosecutor to shew who were contumacious. It seems strange to make this objection, when the defenders admit on the record, that they were members of the Presbytery of Auchterarder, and that they refused to take the presentee on trials. I must observe, likewise, that the action is not brought for the act of the majority, but against each defender for his own *delict*, from which damage has accrued to the pursuers.

This reasoning answers the objection, that the Presbytery are not sued as a body. It would have been preposterous to have sued the Presbytery as a body, or to have made the Presbytery as a body, co-defenders with the individual members sued. Proceedings may be taken against the Presbytery as a body, to compel them to do an act, which as a body they must do. But as a body, they cannot be sued *ex delicto*. Suppose a Court is constituted of a single judge, if an action is brought against him for any excess of jurisdiction, he is not sued as a judge, but as an individual who assumed to act without authority. If the court consisted of several who concurred in the act, they would likewise be sued as individuals, and those only are to be sued who

concurred in the act. The action is not against the court, but against individuals who have committed a wrong; so if the members of the Court are required by law to do a mininisterial act, and they refuse, the wrong is by the refusing individuals, and against them only is the remedy. Each dissenting member of the Presbytery would have beerr guilty of a wrong, even if a majority had taken the presentee on trial. But that would have been a case of *injuria absque damno*, and no action would have arisen; but when there is a conjunction of wrong and damage, the injured party may, at his election, sue the whole or any portion of the wrong-doers.

Next, it is said, the summons is bad, as it contains no allegation of *malice*. Where the judge of an inferior court, acting within his jurisdiction, from corrupt motives, gives a wrong decision, malice is the fou[redacted]tion of any action against him, and malice must be alleged and proved. But this action is for a refusal to do a ministerial act, and the summons shews that the defenders have committed a wrong, which has worked damage to the pursuers. I must likewise observe, that malice, in the legal acceptation of the word, is not confined to personal spite against individuals, but consists in a conscious violation of the law, to the prejudice of another. The facts charged and admitted in this case, amount to a deliberate disobedience of the law of the land, the necessary consequence of which is a prejudice to the pursuers, and it is a well-established maxim, that every one must be taken to intend the necessary consequence of his deliberate acts.

Then we are told "that the action cannot be maintained "because there was no mandate in the original interlocutor of "the Court of Session, affirmed by this House, or in the last "interlocutor of the Lord Ordinary, from which there was no "appeal, and that without a mandate the Presbytery were at "liberty to refer the matter to the General Assembly." I conceive that the declaration, that "the refusal of the Presbytery to take

" the presentee on trials was illegal, and in violation of their duty ;
" and that they were bound and astricted to take him on trial,
" and if found qualified, to admit him minister of the parish,"
is equivalent to a mandate to that effect. The duty being declared to do a specific act, the law commands that it shall be done. The reference to the General Assembly, was, under these circumstances, a mere evasion, and tantamount to a direct refusal ; it may be likened to the resolution of a vestry to adjourn for a year, when a motion has been made for a church rate, which has been clearly held to amount to a refusal to grant any rate. The reference to the General Assemby, the authors of the veto law, adjudged to be invalid, was a mere defiance of the Courts which had pronounced that judgment.

Perhaps I ought to notice the argument, " That, at all events,
" this is a case of *injuria absque damno*, because the patron is in-
" demnified by the vacant stipend ; and the presentee, with respect
" to the temporalities of the living, (which alone can be the subject
" of compensation,) till in holy orders, has neither *jus in re*, nor
" *jus ad rem.*" But without at all considering the question, whether the patron, under the circumstances, is entitled to the vacant stipend, or the uses to which it is to be applied, this boon never could be given to him as a satisfaction for the wrongful act of the presbytery in violating his right of patronage, and cannot be considered the measure of the damage which he thereby sustains. As to the presentee, he is debarred from his status as minister of the parish of Auchterarder, to which, in the absence of all objection to him, we are bound to suppose he is entitled, together with the profits of the living.

The doctrine has been hinted at by the counsel for the appellants, rather than explicitly announced, that the spiritual office of minister of a parish in Scotland may be entirely separated from the temporalities, and that the church renouncing the temporalities may dispose of the spiritual office as they please. To

this doctrine, I for one, beg leave to express my dissent. By the law of the land, in framing which the church was a party, the temporalities are united to the spiritual office, and this office with the temporalities is to be enjoyed by the person duly qualified presented by the patron, the church being the sole judges of his qualifications. There is a civil right to this office, which the civil courts will recognize and vindicate. A renunciation of the temporalities of the church, with a view to retain spiritual jurisdiction, cannot be made by those who continue members of the Establishment.

But the defence is explicitly and broadly put forth, that the defenders are bound by the veto law, and not by the decrees of the Court of Session, or of this House, because "they have "come under the most solemn obligations to conform themselves "to the discipline of the church, and the authority of its several "judicatures."

My Lords, it is impossible not to respect those who are actuated by the construction they conscientiously put upon an oath, however erroneous it may be. But, my Lords, it is my duty to say, that all oaths of obedience to superiors are attended with the implied condition that their commands are lawful. From the time of St Thomas-a-Becket till now, there has been no such pretension in any part of this island, as that ecclesiastics, in the exercise of a *liberum arbitrium* inherent in them, are, of their own authority, conclusively to define and declare their own power and jurisdiction, and that no civil tribunal can call in question the validity of the acts or proceedings of any ecclesiastical court. In the most palmy days of Popery in England if "the Courts "Christian" exceeded their jurisdiction, as if they were seeking to enforce an unlawful canon, instead of appealing to the Archbishop or to the Vatican at Rome, an application was made to the Courts of Westminster Hall for a prohibition, the prohibition was granted, and the law would easily have vindicated its dignity

if the Bishop, had insisted on proceeding in the face of the prohibition. I am not aware that the Roman Catholic Church in Scotland claimed a higher exemption from civil authority than the Roman Catholic Church in England, or that the founders of the Reformed Presbyterian Church in Scotland claimed a higher exemption from civil authority than the Roman Catholic Church to which it succeeded.

The controversy out of which this action springs depends upon the construction of certain Acts of Parliament which regulate and protect the rights of patrons. It is surely for the supreme court of this empire to put a construction upon those acts. Having done so, and declared the veto act to be illegal and void, can the defenders be heard afterwards to say that they are still ordered by their ecclesiastical superiors to be guided by the veto act, and that they are bound to obey their ecclesiastical superiors?

Finally, we were much pressed with the hardship to which the appellants are exposed, by being held liable to actions for acting according to their consciences. I do not think, my Lords, that where the law is clear, the hardship of being obliged to obey it is a topic that can be listened to in a court of justice. There can be nothing more dangerous than to allow the obligation to obey a law to depend upon the opinion entertained by individuals of its propriety, that opinion being so liable to be influenced by interest, prejudice, and passion, — the love of power, still more deceitful than the love of profit, — and that most seductive of all delusions that a man may recommend himself to the Almighty by exercising a stern control over the religious opinions of his fellow men. The danger of setting conscience against law has been recently illustrated, both in Scotland and in England, by the refusal, on the score of conscience, to pay contributions for the maintenance of the clergy and the Church, which the law has enjoined. Whilst the appellants remain members of the Establish-

ment, they are, in addition to their sacred character, public functionaries appointed and paid by the state, and they must perform the duties which the law of the land imposes upon them. It is only a voluntary body, such as the Relief or Burgher Church in Scotland, self-founded and self-supported, that can say they will be entirely governed by their own rules.

In conclusion, my Lords, I hope I may be permitted to express my heartfelt grief at the unfortunate course which the appellants have pursued, in resisting the authority of the Court of Session and of this House, to enforce the acts of the legislature. The son of a minister of the Church of Scotland, and reared in her bosom, I have ever professed and felt for her the deepest veneration and the warmest affection. I believe that no church ever more effectually attained the great ends of an Establishment, in instructing the people in the truths of religion, and edifying them by its consolations. I believe it is mainly owing to the ministrations of her clergy that the mass of the inhabitants of Scotland have been so remarkable for orderly, industrious, and pious habits. I earnestly wish permanence and prosperity to her, and that she may dispense the blessings of the true faith to distant generations. But for this purpose her present members must respect the supremacy of the law, as their predecessors have done, and it can be no disparagement to them to follow such illustrious examples as Moncrieff and Erskine, Robertson and Blair.

If there be any acts of Parliament on the statute book which are supposed to stand in the way of salutary reform in the Church, let there be an application to Parliament that they may be modified or repealed, and I am sure that it will be received with the highest respect for the applicants, and the most sincere desire to comply with their wishes. But a defiance of courts of justice and of the legislature inevitably leads to confusion and mischief, and a perseverance in such ill advised counsels must either end

in the total subversion of the establishment, or in a schism which would for ages impair its respectability and usefulness.

Ordered and Adjudged, That the petition and appeal be dismissed this House, and that the interlocutor therein complained of, be affirmed with costs.

SPOTTISWOODE and ROBERTSON — RICHARDSON and CONNELL, Agents.