

GARDENSTON. This is not a question as to crimes, but as to police and good order. There are many examples of the Court of Session judging in such matters. There was great expediency, and even necessity for this, and it was introduced by the prudence and wisdom of the Court. If we were to reduce every thing to the original principles of rectitude, we would make alterations great indeed, but much to the worse. If this practice of the Court is to be altered, it ought not to be altered on a *Saturday's view* of the cause. Our neighbours in England are as jealous of liberty as we can be, but they do not insist on such niceties of form. Inferior magistrates ought to proceed summarily; if they do wrong they may be corrected by the deliberate judgment of this Court.

KAIMES. The Magistrates of Edinburgh daily storm bawdy-houses, and no objection is ever made. They are the best judges in matters of police. Nothing disturbs the police of a town so much as bawdy-houses. This Court attends to nothing which regards life or corporal punishment: all other things fall within its jurisdiction.

AUCHINLECK. The city of Glasgow would be in a miserable state if there was no jurisdiction in the suburbs of Gorbals: *interest reipublicæ* that such offenders should be summarily tried. If we insist on strict form, there will be nothing effectual done.

The first question was as to the jurisdiction of the Bailie of the Gorbals. As to it the Court was *unanimously* of opinion for sustaining the jurisdiction.

The second question was as to the jurisdiction of this Court. The Court found itself competent. *Diss.* Coalston, Covington.

The third question respected the mode of procedure; and that also the Court found to be sufficiently regular. *Diss.* Coalston, Covington, Hailes.

On the 16th December 1775, "the Lords refused the bill;" adhering to Lord Kennet's interlocutor.

For the Charger, Ilay Campbell. *Alt.* A. Crosbie.

1775. December 19. JOHN, ROBERT, and DAVID SCOTLANDS *against* MR JAMES THOMSON.

DELINQUENCY—REPARATION.

Limits of liberty of the Pulpit, with regard to censure.

[*Fac. Col. VII. 277; Dict., App. 1, Delinquency, No. 3.*]

HAILES. The liberty of the press and the liberty of the pulpit are equally sacred. Liberty of speech in common conversation is as sacred as either. A man may print or utter from the pulpit whatever he may say in common conversation. If his words would not be actionable when uttered in common conversation, neither will they when published from the press or from the pulpit

An exception has been made, which I approve, namely, that words, faulty in themselves, may be more easily excused when uttered of suddenty, or from provocation, than the same words will be when, after premeditation, they are printed or uttered from the pulpit. This, however, only respects the degrees of offence, not the offence itself. But to say that a man may safely print or rehearse from the pulpit what he may not safely utter in common conversation, seems to me to be the same thing as if one should affirm that a man is at liberty to convey ideas by *marks* which he must not by *sounds*, and that he may say *ex suggestu* what he must not *de plano*. There has been an attempt to justify what is called *the liberty of the pulpit*, by examples drawn from our history. Not one of the examples is in point, as I could easily show. But, supposing that all of them were, they would prove nothing. They relate to fierce and turbulent times, and cannot be applied to that regular state of government under which we live. It is said that a minister ought to preach to the times. He certainly may, and ought; it is his duty and his privilege; but he must speak against sin, and not address his discourse to the case of individual sinners. Thus the greatest drunkard in Dunfermline ought not to be reprov'd by the minister by his own authority. The offence must first be tried by the kirk-session, and, being proved, may be published, and censured by the minister from the pulpit. The reason is obvious: by the ecclesiastical law of Scotland, the trial precedes the sentence of condemnation. I think then that Mr Thomson could not, with safety, utter from the pulpit what he would not have been by law permitted to utter at the cross of Dunfermline. Let me then consider what passed between Mr Thomson and Robert Scotland, as having passed in any place of common resort, the fishmarket for example. Mr Thomson first uses some general words, which he declares were not meant of Robert Scotland, which were not generally understood in the burgh to apply to him, and which do not indeed seem applicable to him, according to his own account of the matter. Robert Scotland answers in the Caledonian Mercury, "These are falsehoods, uttered by an old blustering blunderbuss of a military chaplain." It is in vain to pretend that Mr Thomson was not here meant. Mr Thomson replies from his pulpit, "You are as much a blundering blunderbuss as myself, and you lie." Robert Scotland replies, "you have told notorious lies. I wish you would tell us what bribe you have received for uttering so many scandalous falsehoods;" and then he brings an action of defamation and damages. Now, I think that the two scales are so equally filled with scurrility, that justice cannot say *which* preponderates, unless so far that the first precise attack seems to have been made by Scotland, in his advertisement, concerning the lying, blustering blunderbuss. This seems sufficient to justify the interlocutor of the Ordinary on the merits of the cause. But I think that no expenses ought to have been found due. There was indeed a greater breach of decorum on the part of Mr Thomson than on the part of Robert Scotland; for Mr Thomson spoke from the pulpit; Scotland in the newspapers, and from his pew. I think that the procurator-fiscal ought to have concluded against *both* as violators of the public peace, and of the good order of society, and that in such an action both would have been censured. Mr Thomson has offered a separate defence, which I do not at all like. He says that *veritas convicii* is a defence against an action for damages at the instance of the private party, and he offers to prove

that this Scotland was guilty of the offences charged against him in the speech from the pulpit, 30th October 1774. He says, that in the case of *Provost Hamilton* a majority of the Court was of opinion to sustain that defence. I do not like to hear mention made of the *majority* in any case. In a particular manner I do not like it when the Court gave no judgment. I know that that notion concerning the restricting the rule in our law, that *veritas convicii non excusat*, was ably urged from the bar, and listened to on the bench, but I doubt very much how the numbers would have stood had the question been tried. What shall be the opinion of the Court will be known when that question comes to be tried. As to the other two pursuers, I am not prepared to give any opinion, for it is not yet ascertained whether they or Mr Thomson gave the lie first.

COALSTON. The liberty of the pulpit has been abused by Mr Thomson in a most egregious manner in the first discourse in which Scotland is pointed at; in the second, which is outrageous beyond measure, and indecent. It is highly improper for ministers to interfere in politics, and it is still more improper to bring dirty burgh politics into sermons. We are called upon to check such abuses. I have not the least doubt of our jurisdiction. I expected that this would have been taken notice of in the proper Court, the Ecclesiastical. I am sorry that it has not. It is said that Mr Thomson had met with provocation by the advertisement. I do not approve of the advertisement; but that is not sufficient to justify Mr Thomson, even supposing that Mr Thomson had not previously attacked Robert Scotland. This is no defence as to the other two Scotlands. As to the retaliation by Scotland, it was natural. I know not how such an unexpected attack could be otherwise received.

COVINGTON. I have observed, with pleasure, the candour and moderation of the clergy of the Church of Scotland in this age. But I think that Mr Thomson was a trumpeter of one of the political parties at Dunfermline. This is shocking, and inconsistent with the character and honour of the Church of Scotland, a church to which I sincerely wish well, though I happen to be no member of it. The *first* sermon related to Scotland, as appears from the *second*. What Thomson said in the first sermon was a justification of the advertisement.

KAIMES. I am surprised that the Ecclesiastical Court did not interfere. As it did not, we must. A minister prostitutes his character by such behaviour. I think that *veritas convicii* is no excuse as to the minister. Yet, if the Scotlands have been guilty of the things laid to their charge, how can they have damages? I am therefore for granting a proof. If the things are not proved, the minister will be more guilty; if they are proved, the Scotlands will have no damages.

GARDENSTON. I could not think so unfavourably of the minister. I judged the cause upon its own circumstances, as all causes ought to be judged, not upon general topics. I did not see that the minister had taken a side. The libel in the Caledonian Mercury was a gross attack, and not justified by what Mr Thomson had said in his first discourse. If both sides had been fined, I should have concurred in the judgment, but I would not give one a triumph over the other. Shall we stroke Scotland's head, and send him out of the Court with approbation?

ALEMORE. The time was, when the clergy directed the judges, and even the Parliament, and when they used very great liberties in the pulpit. But these times are now over. The provocation was not sufficient here. There can be no excuse for the minister's conduct; he began the attack. Scotland was provoked when he published the advertisement; but this cannot defend Mr Thomson. We all know the credit that is paid by the people to whatever is uttered from the pulpit. If ministers are permitted to behave in this manner, they will be worse than mad dogs running about the country. What Robert Scotland said was not properly retaliating, but only denying what Mr Thomson had said. As to the question concerning *veritas convicii*, there was a new doctrine broached in the case of *Provost Hamilton of Kinghorn*, and it was well supported. That, however, will not apply to the present case, where the attack was malevolent, and from the pulpit. It was not a *convicium*, but a gross injury.

[Here was a distinction, in order to reconcile different opinions; but the case of Provost Hamilton was, in appearance, a malevolent attack, by a libel published in writing at the cross of the burgh, or in some other place of general resort. It was just as much a gross injury as was here proved, with this difference indeed, that it was published against the chief magistrate, and that it was not avowed to his face. I do not believe that the supposed English doctrine, that *veritas convicii* excuses in certain cases, will make its way amongst us, though there is one very worthy and intelligent judge, who quotes Sir William Blackstone as an authority in the law of Scotland, even where his opinion is inconsistent with a maxim established with us even to a proverb, and supported by numerous decisions.]

AUCHINLECK. I am one of those who choose to go to church, because I think it right and decent. But if we are to be entertained in church with ribaldry and scolding, I should choose to give over going to church. If Mr Thomson was a young man, his youth might be some sort of excuse for him; but we are told that he is seventy-seven. We learn, from the greatest authority, that the gospel is *peace*. I can see little peace here. Mr Thomson seems to have retained his military disposition. I am surprised that the Church of Scotland has not laid hold of this man. I wish we had the power of taking his blazon from him. A man who will thus profane the Lord's Day, and prostitute the pulpit, deserves not to be a minister. I could scarcely have believed that any minister of the Church of Scotland, unless disordered in his judgment, would have been guilty of such an offence.

MONBODDO. I am sorry that I am so hoarse that I have not a voice to express my indignation against this minister; but that has been very well done to my hand.

On the 19th December 1775, "the Lords found Mr Thomson liable to the pursuers in damages and expenses;" altering Lord Gardenston's interlocutor.

Act. D. Rae. *Alt.* A. Crosbie, James Boswell.

Diss. Gardenston, Hailes; [on a particular view of the fact, but not on the principles of the judgment.]