discretion. He had this security, and it was his only security, that having been once appointed to that office, he could not be removed from it unless two-thirds of the committee of management concurred in the propriety of his removal. If two-thirds of the committee of management did concur in the propriety of his removal, it appears to me that he was validly, in point of law, legally and effectually removed from the office, and that he has no claim for compensation. June 12. 1829.

It is the more important to advert to what appears upon the articles of partnership, from the consideration that this was a company the shares of which were assignable, and any person purchasing a share would look at the articles of partnership, for the purpose of knowing in what situation he stood, and what were his obligations; and therefore it was natural to expect, indeed it was proper, for the purpose of guarding against imposition and fraud, that the precise terms of the stipulation should appear on the partnership deed, and such appears to have been the understanding between these parties.

I am of opinion, therefore, that the judgment of the Court below was correct, as far as relates to the decision that this gentleman, Mr Pollock, was removable at the discretion of two-thirds of the committee of management; but I think that they went too far in stating, that it was their opinion that Mr Pollock was entitled to compensation in the event of his removal. I am therefore of opinion, as far as relates to the former part of the judgment, that it should be affirmed, and that it should be reversed as far as relates to the latter.

With regard to the cross appeal in this case, Lord Pitmilly was of opinion that there was not sufficient ground to sustain the charge, or to make out a prima facie case. With respect to the charge, as far as related to a supposed conspiracy, I have looked through the papers, and I am quite satisfied that there is no sufficient ground to make out that charge, which relates to the merits of the cross appeal; and that decides the whole case.

MONCREIFF, WEBSTER, and THOMPSON—RICHARDSON and CONNELL,—Solicitors.

JAMES CAMPBELL of Kilberry, and Others, Appellants. No. 30.
Lushington—Hunter.

DONALD BROWN, Respondent.—*Spankie—Napier.*

Jurisdiction—Statute.—Held, (affirming the judgment of the Court of Session),—1. That the Court of Session have jurisdiction to review, and set aside, the proceedings of a presbytery, under the 43. Geo. II. c. 54. where these proceedings have been irregular and informal. 2. That the omission to take in writing the evidence led before the Presbytery, is an informality inconsistent with the enactment of the statute, and open to correction by the Court of Session.

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1st Division.
Lord Alloway.

THE heritors of the parish of Kilberry, conceiving that they had ground of complaint against Donald Brown, schoolmaster of the parish, presented a complaint against him to the Moderator and members of the Presbytery of Kintyre, charging him with habitual neglect of duty, and other misconduct as schoolmaster. A full copy of the libel was served upon Brown, who thereon appeared in Court, and lodged his answers, denying the subject-matter of the complaint. The Presbytery having considered the libel and answers, found the libel relevant, and proceeded to examine witnesses in support of the complaint and of the defence. After the witnesses had been examined and cross-examined, and both parties heard on the evidence adduced, the Presbytery 'found certain articles of the said libel sufficiently proven by the 'oath of several witnesses, lawfully summoned, solemnly sworn, 'purged of malice, and interrogated thereupon: That the said 'Donald Brown has been found * guilty of habitual neglect of 'duty by engaging in other occupations,' and so forth. 'Therefore the said Presbytery did unanimously depose the said 'Donald Brown from the office of parochial schoolmaster in the 'parish of Kilberry, prohibiting and discharging him from exercising the same, or any part thereof, in all time coming; and 'declaring, that his right to all the emoluments and accommodations of the said office shall cease from this period; and the said 'school is hereby declared vacant.' The evidence taken on this occasion was not committed to writing, and consequently there existed no record, authenticated or unauthenticated, of the depositions of the witnesses adduced.

Brown, dissatisfied with these proceedings, and considering them null and void through informality, charged the heritors for one year's salary subsequent to the date of the deposition. Being met with a suspension, he brought a reduction of the Presbytery's sentence, on various grounds; but particularly, that there was no record of the evidence led. In defence, the Presbytery pleaded, that the reduction was incompetent by the 43. Geo. III. c. 54.† which declared that the Presbytery's judgment shall

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* Means 'proved.'

† This Act, entitled 'An Act for making better provision for the parochial schoolmasters, and for making further regulations for the better government of the parish schools of Scotland,' contains, inter alia, the following clause, § 21.: 'And be it enacted, that when any complaint from the heritors, minister, or elders, against the schoolmaster, charging him with neglect of duty, either from engaging in other occupations, or from any other cause, or with immoral conduct, or cruel and improper

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be final, without appeal to, or review by, any Court, civil or ecclesiastical. To this it was answered, that the Court of Session have a jus supereminens entitling them to review when there has been informality in the proceedings.

The Lord Ordinary found, that 'although by the statute 43. 'Geo. III. c. 54. § 21. the judgment of the Presbytery is declar-'ed to be final, without appeal to or review by any Court, civil 'or ecclesiastical; yet, if the proceedings upon which judgment 'was pronounced were contrary to law, or if that Court exceed-'ed the powers committed to it by the statute, they may be re-'viewed and set aside in this Court;—that it is required by the 'statute that the Presbytery take the necessary proof;—that it was 'necessary, according to the forms of the proceedings in Church 'Courts, that the proof should be taken upon oath;—that it is 'admitted by both parties that the proof was taken upon oath;— 'that any proof taken upon oath must be authenticated by the 'subscriptions of the witnesses, if they be able to subscribe, and 'by the subscription of the moderator;—and that the defenders 'have founded upon no statute by which this rule of law can 'be dispensed with in the proceedings of a Presbytery; and there 'is no such dispensing power in the statute in question. On 'the contrary, the statute expressly reserves the former rules of 'procedure, in so far as not expressly authorized to be departed 'from by that Act. Therefore, as the depositions of the wit-'nesses were not taken down in writing, nor duly authenticated, 'and the extract of the proceedings of the Presbytery produced 'is totally deficient in these respects, reduced and decerned in 'terms of the libel.'

From the shape of the process, the reductive decerniture was

'treatment of the scholars under his charge, shall be presented to the presbytery, they 'shall forthwith take cognizance of the same; serve him with a libel, if the articles 'alleged appear to them to be of a nature to require it; and, having taken the neces-'sary proof, they shall acquit or pass sentence of censure, suspension, or deprivation, 'as shall appear to them proper upon the result of such investigation; which judgment 'shall be final, without appeal to or review by any Court, civil or ecclesiastical: and in 'case they shall depose the incumbent from the office of schoolmaster, his right to the 'emoluments and accommodations of the same shall cease from the time of his deposi-'tion; and in case he shall fail or refuse to remove from the school, school-house, and 'garden, within the space of three months from the date of such sentence of deposi-'tion, the sheriff of the shire, or stewart of the stewartry, upon having an exact or 'certified copy of the sentence of deposition by the presbytery laid before him, shall 'forthwith grant letters of ejection against such schoolmaster, of which no bill of sus-'pension or advocation, nor action of reduction, shall be competent; and in case of 'such deposition, the school shall immediately be declared vacant, and the election of 'another schoolmaster shall take place.'

June 12. 1829. premature; the question before the Lord Ordinary merely being that of competency. But after some farther necessary procedure the Inner-House reduced and decerned, with expenses; and in the suspension found the letters orderly proceeded, with expenses.*

The heritors appealed.

Appellants.—1. The civil Courts never had power to review in matters purely ecclesiastical. Review is competent only to the superior ecclesiastical Court. But the evils of protracted litigation having become intolerable, and the Legislature being anxious to make better provision for the parochial schoolmasters, and for making farther regulations for the better government of the parish schools in Scotland, the statute 43. Geo. III. c. 54. declared the judgment of the Presbytery to be absolute, and incapable of appeal. There is no exception of any jus supereminens of the Court of Session. If such a corrective power vested any where, it would be in the superior ecclesiastical Court; for it was the latter that formerly had the appellate jurisdiction: the civil Court never had in matters ecclesiastical, and it would be extraordinary, on mere implication, to give it now.

2. There was no deviation from the statute; and therefore no occasion for the exertion of the jus supereminens. A proof was taken upon oath. The Court satisfied their minds, so as to enable them to decide upon the merits of the complaint and the defence; and they acted accordingly. The statute requires no more. It contains no injunction that the proof should be in writing; but, cutting off the power to appeal, made the reducing the proof to writing superfluous. There was no longer a Court of review to which the record could be carried. The Presbytery may be compared to a jury, whose verdict cannot be challenged; and the evidence led before which is therefore not made matter of written record.

Respondent.—There are two questions here, the competency of the Court of Session to entertain the appeal, and the legality of the proceedings of the Court sought to be reviewed.

1. It is admitted, that the power of review *on the merits* is taken away from Courts ecclesiastical and civil. But the statute does not also exclude all relief, if the Presbytery have proceeded

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* 3. and 4. Shaw and Dunlop, Nos. 337. and 150.

erroneously in the *forms* or preparatory orders whereby they reach their final judgment. The statute contemplates an exact observance of form in the procedure; and these forms, notwithstanding that the appeal be cut off as to the merits, must be scrupulously adhered to. The absence of the right of appeal on the merits, makes it the more essential that no looseness should be allowed to creep into the preparative procedure. But the greatest injustice would be worked if there was no remedy in a case like the present, or where there had been an excess of power. In such a case, the jus supereminens of the Court of Session interposes, in the same way that it keeps other inferior tribunals (from which there may be no appeal on the merits) pure and regular in the course of procedure. No Church Court has the jus supereminens which could give the relief here required, which is merely protecting the rules of the civil procedure whereby the judgment is reached. That involves no ecclesiastical question; and the less pretence have the superior Church Court to this power of administering a corrective, seeing that, in the present instance, the Presbytery may be fairly considered as acting entirely ministerially vi statuti, and not in virtue of any powers inherent in them as a mere Church Court.

2. Holding that the Court of Session possess the jus supereminens, there can be no doubt of the departure from all wholesome form exhibited by the proceedings. Where a party seeks redress from the Presbytery, he must proceed regularly by libel, and take the necessary proof. The excuse, that serving with a libel is a mere matter of discretion, and that 'taking necessary proof' merely means such parole testimony as may answer the purposes of the moment, is in opposition to the intendment of the statute, and adverse to all the recognized proceedings of the Church, or any other Court possessing such important jurisdiction. By enactments, both of the Legislature and of the Church,—by practice, civil, criminal, and ecclesiastical,—an authentic record of the proof led is essential in all Courts not exempted by express Act of Parliament; and this rule does not depend on the necessity of having a record to take up to the Court of appeal. There are many equally cogent reasons why parole evidence should be taken in writing. It induces caution and regularity, and is at once a check upon the Judge, and the security of the party.

The House of Lords ordered and adjudged, that the Interlocutors complained of be affirmed.

June 12. 1829. LORD CHANCELLOR.—My Lords, There was a case argued some time since, in which John Campbell, Esq. of Kilberry, and others, heritors of the parish of Kilberry in the county of Argyll, were appellants, and Donald Brown, schoolmaster of the same parish, was respondent. This, my Lords, was the case of an appeal from a decision of the First Division of the Court of Session. It appears that the respondent, in 1806, was appointed schoolmaster to the parish of Kilberry, and that he continued to occupy that office till the year 1820. The heritors of the parish of Kilberry thought that they had some reason to complain of the conduct of the respondent, and accordingly they instituted proceedings before the Moderator and Presbytery of Kintyre, alleging certain complaints against the respondent. A regular libel was served upon him. The cause came on for trial; and the result of the trial was, that the Court pronounced a sentence of deposition against the respondent. It appears, and is not disputed, that in the course of these proceedings no written evidence was taken; and in consequence of that defect, or that supposed defect, in the proceedings of the Court, a process of reduction was instituted in the Court of Session, for the purpose of setting aside the proceedings.

Now, my Lords, there can be no doubt whatever, that, previous to the Act of the 43. of Geo. III., the proceedings in the Court of the Presbytery, if irregular, would have afforded a ground of an appeal. The appeal would have lain to the church Courts; and if it had turned out that no written evidence was taken for the purpose of supporting the charge, there can be no doubt that upon such appeal the judgment would have been reversed; and one question, and one important question is, whether any alteration in this respect has been introduced by the operation of this statute of the 43. of Geo. III.? By that Act, in proceedings of this description, the appeal to any Court, civil or ecclesiastical, is taken away, and the judgment of the Presbytery is declared to be final. But the question remains, whether, under such circumstances, if the Presbytery pursue a course different from that which they ought to have pursued, and would have been bound to pursue, before the Act of the 43. of Geo. III., they are to be considered as proceeding irregularly; and whether, if they so proceed in a point that is essential, there is not a mode of setting aside those proceedings?

I think, my Lords, that it is perfectly clear, that no alteration whatever in the course of proceedings was intended to be introduced by the Legislature, when the statute of 43. Geo. III. was passed. The only object of that statute was to take away the successive appeals to the the different church Courts, and to declare, that the decision of the first tribunal, the decision of the Moderator and Presbytery, should be final. It did not intend, as I apprehend, to make any alteration. If that be so, then it is equally necessary now, as it was before the 43. of Geo. III., that the Court should proceed on written evidence. It is argued, that it is unnecessary to take the evidence in writing, the

appeal being taken away; and that the object of having the written evidence was, that the appellate tribunal might have a correct document to which it might refer, for the purpose of seeing whether the evidence supported the charge. But, my Lords, there are other advantages requiring the evidence to be taken in writing. The necessity of its being taken in writing produces much more deliberation,—produces also a much greater degree of responsibility in the parties by whom the judgment is pronounced,—and renders them much more cautious with respect to the course they are pursuing. When the appeal is taken away, it appears to me, (and in that I concur with the Judges of the Court below), that it is still more important that this particular provision should be adhered to. I think therefore, my Lords, that it is now as necessary as it was before the passing of the statute, that the evidence should be taken in writing. June 12. 1829.

But, my Lords, reference was made to the language of that Act, and it will be proper that I should read the clause upon which the argument has been built. The Act is entitled, 'an Act for making better pro-'vision for the parochial schools in Scotland.' It enacts, 'that when 'any complaint from the heritors, minister, or elders, against the 'schoolmaster, charging him with neglect of duty, either from en-'gaging in other occupations, or from any other cause, or immoral con-'duct, or cruel and improper treatment of the scholars under his 'charge, shall be presented to the Presbytery, they shall forthwith take 'cognizance of the same, serve him with a libel of the articles alleged 'to appear to them to be of a nature to require it; and having taken 'the necessary proof, they shall acquit or pass censure, suspension or 'deprivation, as shall appear to them proper upon the result of such 'investigation; which judgment shall be final, without appeal to, or re-'view by any Court, civil or ecclesiastical.' Now, my Lords, I think, not merely with reference to the general spirit and scope of this statute, but referring to the very letter and terms of it, it is quite obvious that the Legislature did not intend to introduce any alteration with respect to the course of proceeding. In the first place, it is stated, that when a charge against a party is preferred to the Presbytery, they shall serve him with a libel, if the articles alleged appear to them to be of a nature to require it; they must proceed therefore by way of libel, serving the party with a libel. It was argued indeed from those words, 'if 'the articles alleged appear to them to be of a nature to require it,' that it was left to the discretion of the Court whether or not the libel should be served; but I do not consider that as a correct interpretation of the Act, but that if the charge be of such a nature as to lead the Court to think it ought to be proceeded in, in that case a libel should be served; and that if there are any proceedings whatever leading to a censure, leading to a deprivation, or leading to any other ecclesiastical sentence, in that case the party himself must be served with a libel.

The Act then goes on to state, 'and having taken the necessary 'proof;' it does not say, having heard the evidence, but having taken

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the necessary proof; the very phraseology appears to be made use of as applicable to the course of proceedings which has been previously in use in the Court of Presbytery, namely, taking the evidence in that Court in the ordinary way before those tribunals in writing. It does not appear to me, therefore, that there is any thing either in the object of the Act,—the language of the Act,—or in any circumstances connected with this cause, which leads to the conclusion, that the Legislature intended that any alteration should take place, in respect of the mode of proceeding before tribunals of this description.

The remaining question, then, for your Lordships' consideration will be this; viz. whether, the Court having proceeded in such a way as would have subjected their decision to an appeal to the church Courts, before the Act of the 43. Geo. III.,—whether, that appeal being now taken away, and the judgment declared to be final,—there is no mode whatever of interposing in a case of this nature, for the purpose of correcting the course of their proceedings? It is said, that there never was an appeal from the decision of the Court of Presbytery to the Court of Session, and that therefore it would be extraordinary, if, the appeal having been taken away from the church Courts in a case of this description, you should give jurisdiction and authority to the Court of Session, which Court had no jurisdiction before that statute. But I apprehend, that (particularly from the circumstance of the appeal being taken away) a jurisdiction is given in this case to the Court of Session, not to review the judgment on the merits, but to take care that the Court of Presbytery shall keep within the line of its duty, and conform to the provisions of the Act of Parliament. There is in the Court of Session in Scotland, that superintending authority over inferior jurisdictions, which is requisite in all countries, for the purpose of confining those inferior jurisdictions within the bounds of their duty; and the only question here is, whether this case is of such a nature and description as to justify the calling into action that authority of the Superior Court? Cases were cited at the Bar, and mentioned in the printed papers now on your Lordships' table, in which the Court of Session has exercised a superintending authority over inferior jurisdictions, when they have been guilty of an excess of their jurisdiction, or have acted inconsistently with the authority with which they were invested. Now, in this particular case, the power of final judgment is given to the Presbytery, under certain limitations and certain restrictions. The party is to be served with the libel,—the necessary proof is to be taken,—and unless the inferior tribunal pursue the course pointed out by the Act of Parliament, they have no authority to proceed to judgment; and if, without pursuing the course pointed out, they do proceed to a judgment, in that case all their proceedings will be so inconsistent with the authority with which they are invested, that the superintending authority of the Court of Session may be interposed, for the purpose of setting aside those proceedings. My Lords, it is upon these grounds that I think the Court of Session, in the present case,

was justified in what they did. The case came on, in the first instance, before the Lord Ordinary; and he pronounced a judgment, reducing the judgment in the proceedings before the Presbytery. The case came on afterwards on two successive hearings before the Lord Ordinary; and he adhered to his former judgment. It afterwards came on before the Court of Session; and the Court of Session were of opinion, that it was a case that called for the interposition of their authority for the purpose of setting aside the proceedings; it appearing to them to be inconsistent with the provisions of the Act of Parliament, which gave a jurisdiction and authority to the Presbytery to pronounce a final judgment. Under these circumstances, my Lords, I humbly submit to your Lordships the propriety of confirming the judgment of the Court below. In this case I should not recommend to your Lordships to give costs. June 12. 1829.

Appellants' Authorities.—Act of Convention, 1560; Statutes, 1567, c. 11.; 1581, c. 1.; 1592, c. 16.; 1690, c. 5.; 1707, c. 6.; Acts of Assembly, 1565, 1567, 1638, 1642; Book of the Kirk, 1567, p. 31.; Book of Policy, 1578, c. 9. § 10.; Spottiswoode, p. 164. 297.; Kames, Stat. Law, App. No. 3.; 1633, c. 5.; 1662, c. 4.; 1693, c. 22.; 1. Ersk. 5. 24.; 1. Pardovan's Coll. 5.; M'Culloch, Dec. 26. 1793, (7471.); Acts of Assembly, June 3. 1799, May 28. 1809; Deer, May 24. 1813, (in General Assembly); Hume, p. 42.; Robertson, Aug. 11. 1780, (7465.); M'Queen, July 25. 1781, (7466. and 7469.); Corstorphine, March 10. 1812, (F. C.); Dumfries, July 7. 1818, (F. C.); Moodie, May 18. 1819, (F. C.); Rutherford, Nov. 17. 1785, (7469.); Allardice, Feb. 18. 1809, (F. C.); Milne, June 28. 1814, (F. C.); Chivas, July 11. 1804, (No. 12. App. voce Jurisdiction); 2. Hume, p. 368.; M'Kenzie's Crim. voce Privy Council, § 6. p. 191.; Maclaurin's Crim. p. 28. and 586.

Respondent's Authorities.—Young, June 28. 1814, (F. C.); 1686, c. 18.; Dickson, Feb. 6. 1768, (7464.); Pardov. c. 2. and 4. § 14.; Act of Ass. April 18. 1807; Robb, Nov. 19. 1824, (3. Shaw and Dunlop, No. 218.); Corstorphine, March 10. 1812, (F. C.); Russell, Jan. 18. 1764, (7353.); Loudon, May 18. 1793, (7398.); King, July 9. 1515, (7318.)

MONCREIFF, WEBSTER, and THOMPSON—RICHARDSON and CONNELL,—Solicitors.

No. 31.

WILLIAM BENNET, (Trustee for the Creditors of JOHN CRAWFORD and Company), Appellant.—*Adam—Ivory—Keay.*

ROBERT M'LACHLAN, (Assignee in trust for the Creditors of JOHN CRAWFORD), Respondent.—*Sol. Gen.* (*Tindal*)—*Brown.*

Bankrupt—Stat. 1661, c. 21.—54. Geo. IV. c. 137.—Held, (affirming the judgment of the Court of Session), that a general adjudication under the Bankrupt Statute, of the estates of an heir in favour of the trustee on his sequestrated estate, within three