REPORT

OF A

COMMITTEE

OF THE

FACULTY OF ADVOCATES,

APPROVED AND ADOPTED

AT A MEETING OF FACULTY,

HELD FEBRUARY 10, 1827.

EDINBURGH:

M.DCCC.XXVII.

REPORT, &c.

AT a Meeting of Faculty, called, by order of the DEAN, for the purpose of taking into consideration, both the communication of the LORD PRESIDENT to the late DEAN OF FACULTY, as appointed at last meeting, and generally the present state of the judicial procedure under the late statute 6 Geo. IV. c. 120, and all matters connected with the conduct and duties of the Members of the Bar therein; it was unanimously

RESOLVED BY THE FACULTY,

" THAT a COMMITTEE be appointed to take into
" their consideration, and to make all necessary in-
" quiry and investigation concerning the past and
" present state of the practice in the Court of Ses-
" sion, in carrying into effect the provisions of the
" statute 6 Geo. IV. c. 120, having a particular
" regard to the conduct and duties of the members
" of the Bar in all such proceedings: That the
" Committee be instructed to direct their attention
" to the address delivered by the Lord President at
" the commencement of the winter Session, 1825,

" and the act of sederunt therein referred to, in so
" far as these may relate to the professional rights
" and duties of the Bar—to the respectful repre-
" sentation submitted to the Court by the Fa-
" culty, through their late Dean, on the subject of
" the hearing of Counsel—to the communication
" made by the Lord President to the late Dean in
" July 1826, and which his Lordship was pleased
" to put in writing at the particular request of the
" Dean—and to the substance of the remarks made
" in Court by the Lord President, in relation to
" the conduct and duties of the Bar, soon after the
" commencement of the present Session: And that
" the Committee do make inquiry concerning the
" following points.—1. On the subject matter of
" the Lord President's address from the Bench in
" November, 1825, and in connection with it, his
" Lordship's subsequent communication to the Dean
" in July last; and how far the proposed modifi-
" cation of the existing rule, as to the hearing of
" Counsel, may be calculated to remove the objec-
" tions to which the Faculty were formerly of opi-
" nion that that rule was exposed:—2. Whether
" the provisions of the statute in regard to the pre-
" paration of condescendences and answers, have
" been generally observed or not; and if it shall
" be found that they have not been observed, to
" what extent such failure to comply with them
" has prevailed:—3. What difficulties have been
" found by the Bar in carrying into effect the
" provisions of the statute; and particularly those

" which relate to the preparation of condescend-
" ences and answers, and pleas in law, and the
" closing of the record:—4. How far any instances
" of departure from the rules of the statute which
" may be found to have taken place, are to be at-
" tributed to the professional conduct of the Bar,
" or to difficulties connected with the duty imposed
" on them:—And 5. The nature and extent of any
" personal responsibility which may attach to indi-
" vidual members of the Bar, on account of the man-
" ner in which the condescendences and answers,
" and other preliminary pleadings may have been pre-
" pared, after the record has been closed in presence
" of the Lord Ordinary, and authenticated by his
" signature in terms of the statute:—And farther,
" that, in case the Committee shall find, that great
" or considerable evils or difficulties do at present
" exist, in the practice under the said statute, they
" be instructed to inquire and report, by what mea-
" sures or arrangements such evils or difficulties
" may be removed, consistently with the provisions
" of the act itself: That the Committee be empow-
" ered to appoint Sub-Committees for facilitating
" the inquiries which may be necessary: That they
" do report to the Faculty on the several matters
" above expressed, on or before the first sederunt
" day in January next; with power to them to
" make *interim* reports on particular points, if they
" shall deem it expedient."

It was farther resolved, that the Committee consist of the Members of the Dean's Council, and the

other Gentlemen whose names are subscribed to this Report.

In consequence of this appointment, your Committee, in order that the important inquiries thereby directed might be made as effectually and expeditiously as possible, proceeded without delay to appoint two Sub-Committees; one of which was instructed to take into their consideration all matters connected with the Hearing of Counsel in the Inner-House, and the communications of the Lord President on that subject; and the other was directed to institute all necessary inquiries into the Practice in making up the Records under the late statute, and to report on the various points referred to in the foregoing Resolution of Faculty. The Sub-Committees immediately entered on the duties severally intrusted to them. Some difficulties occurred to occasion delay in an important part of the subject matter of the inquiries; but your Committee having now received the reports of the Sub-Committees, and having duly weighed and considered them, beg leave to Report on the whole matter, as follows:—

I. In taking into their consideration the notes and communications of the Lord President, and the former Report of the Faculty on the subject of the hearing of Counsel, your Committee have thought it their duty to institute a more particular inquiry into the privileges of the Bar, as established by the previously existing regulations under the authority of statute, and into the *powers* of the Court to con-

trol or alter them. The Report of the Sub-Committee does accordingly contain a condensed view of the result of their investigations on this point. Your Committee, however, do not deem it necessary at present to report the details brought before them on this part of the subject. They think it sufficient to state, that, while they fully admit the power of the Court to stop Counsel when they are prepared to decide in favour of the party whose Counsel is addressing them, and to check and control irrelevant argument; the additional inquiries which have now been made, have tended strongly to confirm the doubts expressed in the former Report of the Faculty, as to the *power* of the Court to limit, by Act of Sederunt, the number of Counsel who shall be heard in a cause, or to regulate, by any general enactment, the course or line of argument to be pursued by Counsel. All the information which they possess leads them to the conclusion, that the right of parties to be fully heard by a competent number of Counsel, having been established both by common law and statute, that right can only be restricted by express statute; and that the regulation of the Act 1672, as modified by practice, has not been abrogated by statute, and cannot be taken away or impaired, under any of the powers of regulation, conferred on the Court by the late Acts of Parliament.

While your Committee, however, think it necessary to report to the Faculty the strong impression which they have received to this effect from the farther consideration of this subject, it appears to them

to be of more importance to consider, how far the alterations lately made by order of the Court in the course and manner of hearing counsel, are justified by any existing necessity or strong expediency; and whether the modifications of the existing rule proposed in the note of the Lord President, are calculated to remove the grounds of objection to it, which were expressed in the former Report of the Faculty.

Your Committee have always been strongly impressed with the conviction, that the new system of procedure, established by the late Act of Parliament, instead of calling for or admitting of any restriction of the previously established course of pleading, did, by its nature and whole spirit, suppose and require, that Counsel should be heard in all cases more fully and deliberately than they had ever been under the former practice of the Court. When it was thought expedient to abolish to a great extent the written pleadings, by which both the facts and the law of the case were formerly brought before the Court in detail, and at the same time to make the first judgment of the Court final and conclusive, it seemed necessarily to follow, that the fullest opportunity should be given for the discussion of every cause *vivâ voce*. And, from all the experience which has yet been had, your Committee feel satisfied, that, without such full opportunity being given, and the utmost patience and deliberation in hearing and in judgment, justice cannot be administered under the new system, in a manner that will be satisfactory either to

the parties, or to those to whom the defence of their rights and interests is professionally intrusted.

It appears to your Committee, that the present restricted order of debate, by which one Counsel only is allowed to be heard on each side in the ordinary discussion of causes in the Inner-House, and by which the same Counsel who opens for the reclaiming party also replies, while the Respondent can be heard but once only, and by a single Counsel, is not well adapted for obtaining a deliberate discussion; but, on the contrary, is in great danger of producing, in many cases, the most hasty and imperfect debates, and of leading in the end to precipitate and unsatisfactory judgments. However sincerely desirous, and however fully prepared, the senior Counsel may be to present the whole strength and merits of his case in the opening, many circumstances may occur to prevent this from being at all times fully done. He himself does not always see the full bearing of the points, or the precise application of the facts and authorities, with the same force and clearness, with which they are presented to his mind, after hearing the case sifted by the opposite Counsel. And the consequence is, that the first statement of the argument is often *necessarily* imperfect; and either a strong impression unfavourable to the party, though perhaps not justified by the merits of the case, is received at first, or the respondent's Counsel is misled as to the nature of his adversary's case, and, having no opportunity of replying, finds the argument materially altered and enlarged in the concluding speech of the

petitioner's Counsel. Your Committee feel convinced, that the old form of debate, so long established in the Court, and still continued in the Outer House, is eminently calculated for obviating these dangers; and for leading, by the gradual unfolding of the whole merits of the cause, to a sound and deliberate judgment at last. But, whatever may be thought as to what is absolutely the best course, your Committee beg leave to report their decided and confirmed opinion, that the hearing of *one* Counsel on each side in all ordinary causes, under a general rule to that effect, before giving a judgment which is to be final and conclusive, is *not* sufficient for securing deliberate and well-ordered Decisions.

On the suggestions contained in the note of the Lord President, your Committee have to observe,

1. That the proposal of making it depend on the opinion or wish of the senior Counsel, whether the junior Counsel shall be heard or not, seems, on the one hand, to impose a new and most embarassing duty on the senior Counsel, and, on the other, to be inconsistent with the just rights and privileges of the junior members of the profession; while it is calculated to lessen the usefulness of both to their clients, from the uncertainty as to the course of debate, and the impossibility of obtaining in all cases an opportunity for sufficient previous arrangement.

2. That the suggestion, which proposes to limit the duty of the junior Counsel to the statement of the facts of the case, seems also to be contrary to the rights of the Bar generally, and is, at the same time, in the opinion of your Committee,

by no means calculated to remove the objections to the present practice, or generally to advance the ends of justice, and promote the progress of knowledge and forensic skill among the great body of the profession. And they beg leave to observe, that, as, under the new system, all the facts which can be founded on in debate are already embodied in the Condescendence and Answers, a mere statement of facts by Counsel, without any application of the law or reference to authorities, would in most cases be unnecessary, and would not tend in any material degree to the elucidation of the questions on which the Court have to decide.

Your Committee are fully aware, that the views of the Court, in passing the regulation, were directed to the public interest, and the dispatch of business under the expected multiplication of oral debates; and that it was dictated by an apprehension, that, under the new method of discussion, it would be impossible for the Court to admit of the hearing of Counsel beyond the limits prescribed, consistently with their duty to decide all the causes brought before them without any unreasonable delay. Your Committee fully appreciate this feeling; and they believe, that there is no member of the Faculty, who is not equally desirous of preventing the delay of judgment, wherever the proceedings can be so conducted, as at once to afford a fair probability of justice being done in all cases, and a conviction on the part of the public that it is done. And in reporting on this subject, they think it very

important to observe, that in maintaining their privileges for insuring the full and deliberate treatment of the causes intrusted to them, the chief duty of the Faculty relates to the interest of the public, which, as a privileged body, they are bound to maintain, much more than to any private interests, however important to themselves, which may be involved in such questions.

But, while your Committee do not doubt that the views of the Court, in passing the regulation, were such as they have now stated, they are humbly of opinion, that so great an alteration in the practice of pleading in the Court of Session, (more especially under the new system,) ought not to have taken place, without at least some *trial* of the ancient course of debate according to that system, and some experience of positive evil arising from it. And they still think, that the change is particularly liable to this objection, that it took place without trial of the old method of debate, which, for the reasons already expressed, appears to them to be particularly necessary under the new system, and, of course, without any experience of public mischief from the use of it. So far as the opinion of your Committee may go, they feel perfectly convinced that, if more reliance had been placed in the discretion of the Bar in the exercise of their undoubted rights, no real difficulty would have been found in the general course of practice.

But your Committee have farther to report their opinion, that, assuming it to be quite clear that the

new methods of discussion would require a larger portion of time to be occupied in the public sittings of the Court than had been found necessary under the former practice, it ought not to have been inferred that this additional time would be best gained by abridging or altering the order of debate previously established. Your Committee have thought it their duty, in order to do justice to this most important part of the subject, to attend very particularly to the time during which the Court is occupied in public sittings, and which has been found necessary by each of the Divisions of the Court for the hearing of causes, during the twelve months which have elapsed from the 12th November 1825, when the new system came into operation. The number of days during which the Court hold their sittings, is well known to be exactly five in each week, during five months and one week in the year; and your Committee believe, that they have ascertained with reasonable accuracy the time which each of the Divisions has employed in the actual hearing and decision of causes, during the days on which the Court have sat in the same period. They do not consider it to be necessary at present to give any detailed statement on this subject. But, on the information which they possess, and are ready to exhibit if required, they beg leave to report their opinion on this particular point to the following effect:—

(1.) That if, upon due trial, it should be found that the permission of Debate, by four Counsel, (under the reasonable discretion of the Bar,) would require

more time for the dispatch of business, than the present Sessions of the Court admit of, the remedy might be more safely and effectually found in lengthening the sittings of the Court, than in restraining and limiting the hearing of Counsel.

(2.) That the business of the Teind Court being now very much diminished, nearly the whole of those days which are allotted to it (being one every fortnight,) might, without any inconvenience, be added to the sittings of the Court of Session.

(3.) That, considering the great diminution of the written pleadings which has already taken place, and which must become still greater when all the old cases have been disposed of, and considering also the actual practice in each of the Divisions, more time in each day might be devoted to the hearing and determination of causes, if such time were required for the full discussion of them, than has hitherto been found necessary in the proceedings of the Court.

(4.) And your Committee do more particularly affirm, that, looking to the average sittings of the Court during the whole year preceding the 12th November last, it is impossible to state, that the arguments of Counsel, since the commencement of the new system, have unreasonably, if indeed at all, prolonged them; or that a large portion of time in each day has not been left, in one Division of the Court or the other, which, if necessary to the purposes of justice, might have been employed, without any unreasonable pressure on the Court, in the more extensive hearing of Counsel.

Your Committee know, from their experience, that dispatch is of great importance in the administration of justice. They believe that every reasonable dispatch may be attained for all the business of Scotland, by two Supreme Courts, with the aid of the Jury Court, and of the Sheriff Courts in all the counties, consistently with the fullest discussion of every cause. But they have been led to believe, that though dispatch is an important point, it is neither the only nor the principal point, in judicial procedure. The first object in every arrangement must be, to secure decisions, not only right and just in themselves, but so pronounced, that the litigants shall be convinced they have been fully heard, and all their pleas duly considered. This last consideration your Committee regard as of the very greatest moment. And they think they may be allowed to remark, that, considering the great disadvantage under which Scotland labours in having the final Appellate Jurisdiction, (which could no otherwise be had under the roof of Parliament,) in a Court in which judges principally cognisant of a foreign law preside; the great confidence which is notwithstanding placed in the judgments of the House of Lords, and the satisfaction with which they are generally submitted to, must be mainly attributed to the great pains which are bestowed on each single cause, and to that dignified patience with which the Counsel of the parties are uniformly heard in maintaining their rights and interests.

II. The Sub-Committee appointed to inquire into the practice under the late Statute of George the IV. as to the preparation of condescendences and answers, and the difficulties which may have occurred with regard to the execution of the statute in these points, have given in a very full report of facts. The utmost pains have been employed to ascertain these facts with accuracy and perfect fairness; and your Committee, having duly deliberated on the subject, do very confidently report, according to the statement of the Sub-Committee, as follows:—

(1.) The Committee were directed to inquire, "Whether the provisions of the statute in regard "to the preparation of condescendences and answers "have been generally observed or not; and if it "shall be found that they have not been observed, "to what extent such failure to comply with them "has prevailed."

With a view to resolve these points, an application was made to the Clerks of the Lord President and Lord Justice Clerk, for a list of all the cases having closed records, which stood in the Rolls, or were boxed for the Inner-House of each Division of the Court, previous to the 14th of November 1826, and which then remained undisposed of. In consequence of the indisposition of the Clerk, some difficulty was found in procuring a list of the cases in the First Division. This, however, was at length partially prepared by him, and was completed, as far as the Sub-Committee had it in their power,

from other sources of information. The number of cases contained in this list is forty. A list of the cases in the Second Division, was immediately furnished by the Clerk, and amounted to thirty-one.

The printed pleadings in all these cases were then distributed among six Committees, for the purpose of being minutely examined, and in this way the Sub-Committee obtained an articulate report upon each case. It has not been thought necessary to lay these detailed reports before the Faculty at large; but it will be understood that they form the basis of the results and views now to be stated.

With regard to the cases in the First Division of the Court, which have been under the consideration of the Committee, they are of opinion,

1st, That, in *twenty* cases, the record has been prepared substantially in conformity to the regulations of the late statute and acts of sederunt. They do not mean to say, that there may not be (as there probably always will be) single words or phrases admitting of criticism or observation. But they feel quite sure, that the records, in these twenty cases, have in substance, been made up in fair and correct compliance with the statute.

2d, That, in *four* cases, these regulations have been slightly departed from; while in *ten* the pleadings composing the record have been improperly drawn; but, with one or two exceptions, not so as to render the cases unfit for the decision of the Court, although the records were prepared soon after the introduction of the new system, and before the ap-

plication of its details to practice could be thoroughly understood, either by the Judge or the Counsel.

3d, That to *five* cases the new forms ought not to have been applied; and, that in *three* of these, the pleadings have not been prepared in conformity with the late regulations.

4th, That, in *one* case, the form of closing and authenticating the record was applied by the Lord Ordinary, where the only pleadings were memorials prepared, seen, and interchanged, in the old form. Upon this ground, the case has since been disposed of by the Court with marked disapprobation.

Of the cases in the Second Division of the Court, the Committee are of opinion,

1st, That in *twenty-four* the record is substantially correct; this being understood in the fair sense already expressed.

2d, That in *four* cases the regulations of the statute and acts of sederunt have been partially, and in *two* cases in a greater degree, overlooked, but in no instance so as to impede the decision of the cause, although the records were prepared at an early period, and before the new system was at all matured.

3d, That in *one* case the record was closed, where all the pleadings, with the exception of the pleas in law, had been prepared and revised under the old system, and that these pleadings are not drawn in conformity to the late regulations.

Taking a general view of the whole cases in both Divisions of the Court, they appear to the

Committee to have been as properly prepared as could have been expected, under the inexperience of the new system, and the want of uniformity of opinion, both on the Bench and at the Bar, upon nearly all the points in which any of the Records may be considered as objectionable.

(2.) The Committee are next required to report—
" What difficulties have been found by the bar in
" carrying into effect the provisions of the Statute,
" and particularly those which relate to the prepar-
" ation of Condescendences and Answers, and pleas
" in law, and the closing of the record."

The *first* difficulty which the Bar have had to encounter, in carrying into effect the provisions of the statute, has unquestionably arisen from the Novelty of the regulations introduced by it. These, while they imposed higher responsibility upon practitioners, in as much as they operated more immediately and conclusively on the interests of parties, effected nearly a total change in the forms of process with which the members of the profession were previously acquainted; and they were thus called upon to commence of new the very rudiments of judicial practice. This implied a course of discipline, under which the immediate attainment of skill, far less of perfection, in the application of the new forms, could not reasonably be expected.

A *second* difficulty, which the Bar have had to encounter, may be traced to the Imperfections inseparable from every new system. It does not fall within the proper province of the Committee either

to point out defects in the new forms, or to propose remedies; but they may take leave to suggest, for the consideration of the Faculty, that great practical inconvenience has arisen;

1*st*, From a want of precision in the language of the Regulations, describing the *form* in which different pleadings are to be prepared.

2*d*, From the want of adequate opportunities of pointing out irregularities in pleadings, (where such irregularities are supposed to exist) before these improper pleadings are answered.

3*d*, From finally adjusting the Record, in some instances, of consent of parties, and without any examination of the pleadings by the Judge—and always without a debate or discussion between the parties upon the merits; which, in the opinion of your Committee, would afford the readiest, if not the only mode of clearing the pleadings of all irregularities, at the proper stage of the cause.

The Bar have had to encounter a *third* difficulty in the multiplicity of Acts of Sederunt, which amounted, between the 12th of November 1825, and the 14th of November 1826, to no fewer than *fifteen*, including those for all the Courts. The greater number of these have been passed without communication with the Bar, to provide for sudden and accidental emergencies; and, with the utmost deference, they appear to the Committee to have, in many instances, had the effect of rather complicating than clearing the system. The practice of every day continues to raise points of doubt and embar-

rassment, which can only be determined by that understanding, which a considerable course of practice and train of decisions will alone produce among Judges, as well as Agents and Counsel.

A *fourth* difficulty has arisen, from attempts, of which the Committee have observed several examples, in the cases laid before them, to apply the new forms to causes in which some progress had been made before the Statute was passed, and which had thus got into a shape to which these forms were manifestly inapplicable. One familiar example of this is, when Condescendences, Answers, and Pleas in Law, have been ordered in causes where a proof had been led and concluded in the *Inferior* Court, and where no farther investigation was demanded by either party in the Court of Session. The application of the new forms to such a case necessarily requires parties to aver, not what they are to prove, but what is already proved; and in the preparation of the cause in this way, it appears to the Committee nearly impossible to comply with the regulations of the statute. Another not uncommon misapplication of the new system is, where Cases have been ordered, while parties differed too widely in their averments, to furnish the proper basis for an argument in law—or where the Record, both as to fact and law, has been closed upon mutual memorials, prepared, seen, and interchanged in the old form. Farther, the Committee think that there is reason to complain generally, of a too indiscriminate

application of the same forms to actions of every description. This has led to much embarassment and inconvenience in questions of accounting, and in processes of multiplepoinding.

The *last*, and by far the most serious difficulty the Bar have had to encounter, in carrying into effect the provisions of the Statute and acts of Sederunt, arises from the differences of opinion which are known to have prevailed among the Lords Ordinary, and in the Courts, and in the minds of the same Judges at different times, regarding the import of these provisions. The points to which the Committee here more particularly allude are, the quotation of documents in Condescendences and Answers—the introduction, in these pleadings, of remarks and minute details, not forming proper and substantive matter of averment in the cause—the form of preparing Reasons of Advocation and Suspension, and the answers to these pleadings—the construction of pleas in law—and the form of preparing Cases. Upon all these matters a diversity of view prevails among Counsel, which is the less remarkable, as they have been warranted by the Judges in adopting almost any given opinion. In short, the *form* of preparing a cause, in so far as committed to Counsel, has hitherto necessarily varied according to the known views of the particular Judge before whom the case has depended. The opinions of their Lordships in the Outer House have been in general very unequivocally intimated from the bench, and they have been so opposite and

discordant, as fully to warrant what has now been stated.

With regard to the views of the Courts, the Committee must profess themselves to be somewhat at a loss, as they have observed several of the most objectionable Records that have come under their notice, disposed of in the Inner House, either with expressed or silent approbation.

(3.) The Committee are farther directed to report "how far any instances of departure from "the rules of the Statute which may be found to "have taken place are to be attributed to the pro-"fessional conduct of the Bar, or to difficulties con-"nected with the duty imposed upon them."

An anxious examination of the cases previously adverted to, enables the Committee to give a deliberate opinion, that there are no grounds for any general imputation, either of ignorance or of negligence, against the Bar; and that the errors which have been committed in framing records are to be traced to the difficulties already enumerated, joined to an over-anxiety on the part of Counsel in the discharge of their duties, arising from the higher degree of *professional* responsibility which the statute imposes, and from the serious and penal consequences, to parties, of any omission, either in fact or law, in the earlier stages of a cause.

It must not be left out of view, that all the closed Records before the Courts at the commencement of the present Session, had been previously authen-

ticated by the different Lords Ordinary, in terms of the statute. The chief object of this form certainly is, to attest, that, in the opinion of the Judge, the pleadings on both sides have been correctly framed, and the cause in all respects properly prepared. It is plainly incumbent upon him to ascertain this by an examination of the Summons and Defences before ordering farther papers,—and by an examination of the whole pleadings in the cause before closing the record. No case, therefore, upon a concluded record, can have come before the Courts, unless where the preparation of the cause in all its details, either had been, or ought to have been, sanctioned and approved of by the Lord Ordinary. In this way, an objection taken to a Record in the Inner-House must be viewed as affecting not so much the Counsel in the cause, as the Judge in the Outer-House, under whose absolute control it has been prepared. It is quite certain, that wherever a record has been thought objectionable by the Court, if it had appeared in the same light to the Lord Ordinary, it might have been corrected at his sight, without occasioning any additional trouble, delay, or expense to the parties.

While, then, the Committee strongly recommend to the profession in general, to adhere closely to the strict principles of the new system,—they must conclude, by expressing an earnest hope, that the Judges will do what in them lies to facilitate this end, by exercising great patience and forbearance towards

practitioners, during the infancy of the system,—and by coming to some common understanding, and adhering to it, with respect to the mode in which pleadings are to be drawn, and causes prepared.

III. In addition to the points, the investigation of which was intrusted to the Sub-Committees, the appointment of the Faculty requires your Committee to report, as to "the nature and extent of "any *personal responsibility* which may attach to "individual members of the Bar, on account of the "manner in which the Condescendences and Answers, "and other preliminary pleadings, may have been "prepared, after the record has been closed in pre-"sence of the Lord Ordinary, in terms of the statute."

On this subject, your Committee have, in the *first* place, to report, that it is impossible, in their opinion, to suppose for a moment, that, in any thing which may have been said from authority on this matter, it could be intended to state, that Counsel are subject to *any* personal responsibility whatsoever to the parties litigants, on account of the exercise of their discretion, however erroneous, in the discharge of their professional duties. Your Committee have always understood, and they are convinced there can be no idea anywhere of disputing the proposition, that the profession of an Advocate in Scotland is a *liberal* profession, in which, while no action for emolument can be maintained, the parties, who resort to the advice and professional skill of the individual members, rely in every thing on the character and the honour of

the person whom they consult and employ. They must submit, that the public of Scotland have hitherto had such confidence in the security of this principle, that they have never failed to acquiesce with cheerfulness and every kindly feeling, in the established rule of the total absence of *personal* responsibility on the part of the Counsel to whom they intrust their interests. It would be, indeed, in the opinion of your Committee, a very serious matter, to make any the faintest approach to a different principle. The whole strength,—the whole estimation and dignity, of the Faculty of Advocates, as a body of educated Jurists,—but, above all, the whole confidence which the country places in them for fidelity, purity, and honour,—depend essentially upon the principle established for ages, that it is on the known powers and acquirements, and on the conscience and honour alone of the individual Advocate whom any party may select, that he implicitly relies, for obtaining justice in the management and discussion of all the interests involved in his cause. Your Committee believe this to be a rule of profound wisdom. But, at any rate, they beg leave to report their decided opinion, that it is unquestionably the principle, which has been established in the law of Scotland as long as the profession of an Advocate has been known in the country.

In regard to any personal responsibility which Counsel may incur, as under the control of the Court in their professional duties, there is no doubt,

that they are answerable to the Court for any impropriety of conduct, or any malversation in the exercise of their public office. But your Committee are humbly of opinion, that, though the Court may at all times express disapprobation of any incorrect or irregular proceeding, and are positively called upon to do so where the rules of a statute have not been observed, the Counsel, who, in the exercise of their discretion, may have fallen into such errors, cannot be held to be any otherwise affected thereby, after they have been sanctioned by a Judge, than in so far as their general Professional character may suffer by the opinion of the Court. And your Committee are farther of opinion, that, as the late statute, in the 10th section, expressly requires, that the Lord Ordinary shall personally examine the whole record, and thereafter sanction it, as duly authorized, by his signature; it cannot, in any case where this solemn proceeding has taken place, be just or reasonable, to impute either *personal* delinquency, or marked incapacity, to the Counsel who have been engaged in the preparation of such a record. The Court are undoubtedly entitled to express their disapprobation, and to refuse to act upon the record, when they find it to be wrong. But, in the humble apprehension of your Committee, the statutory duty, and the unquestionable knowledge and diligence of the Lord Ordinary, who has sanctioned it by his signature, ought in all cases to protect the Bar against any farther or larger responsibility in this matter.

Your Committee, in concluding their Report, beg leave to make one general observation. They believe that no Society of Advocates ever were tried more severely than the members of this Faculty have been, by the great and manifold changes in the practice of the profession, which have taken place, for the benefit of the public, during the last twenty years. Those of them who were educated in an earlier period have been obliged to unlearn all their former habits, and to train themselves to new and frequently varied systems: And the younger Members of the profession have had no means of education at all, from any previous practice or rules of Court. Your Committee are fully sensible of the difficulties which the same changes have imposed on the Court. But it must be admitted to the Faculty, that they have not resisted or complained of any of them on their own account; and that, whatever differences of opinion may have existed on particular matters, the Faculty of Advocates generally, have entered with the most perfect liberality into every scheme of Judicial improvement for the public interest, without in any instance considering their own advantage, ease, or convenience. They take to themselves no particular credit for this liberality. But your Committee are humbly of opinion, that they are at least entitled to some forbearance and indulgence for any errors which, in the practice of so large a body, must inevitably occur, in the very commencement of a new system. And your Committee conclude with expressing their firm trust and

confidence, that, in all the proceedings of the Court, and in all the duties of the Bar, the members of the Faculty will be maintained in that place of dignity, honour, and estimation, which they have at all times held in this Kingdom.

JAMES MONCREIFF, Convener.
JOHN DICKSON.
JOHN CONNELL.
JOHN MACFARLAN.
RO. FORSYTH.
JOHN B. GREENSHIELDS.
THO. THOMSON.
F. JEFFREY.
JOHN FULLERTON.
JAMES KEAY.
JOHN A. MURRAY.
H. COCKBURN.
J. S. MORE.
ANDw. SKENE.
R. JAMESON.
A. RUTHERFURD.
THOMAS MAITLAND.
A. ALISON.
ROBERT HUNTER.
PAT. ROBERTSON.
E. DOUGLAS SANDFORD.
ALEX. E. MONTEITH.
DUNn. M'NEILL.
W. MENZIES.
J. IVORY.
H. J. ROBERTSON.
HAMILTON PYPER.
GEO. GRAHAM BELL.
R. DUNDAS.

At a meeting of Faculty, called by order of the Dean, it was moved, seconded, and unanimously Resolved, "That the foregoing Report be approved of; "and the Faculty did, and hereby do, approve of the "same accordingly, and Resolve in terms thereof." It was farther Resolved, "That the Report, as amend-"ed and approved of, be printed—and that the Dean

" be instructed to lay this Report before the Lord
" President as the Head of the Court, and also to
" transmit copies of it to the other Judges, in such
" manner as may appear to him most consistent both
" with the respect that is due to their Lordships, and
" with the dignity of the Faculty."

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