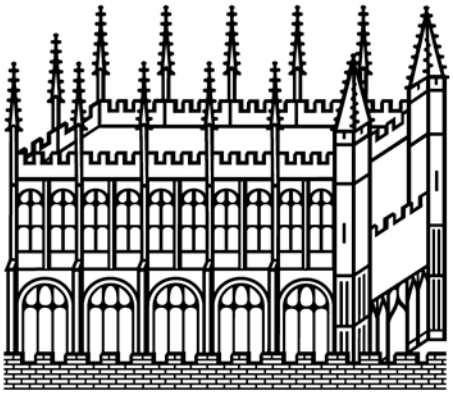

STEWARTON CASE.

REPORT

OF

THE PLEADINGS,

BY

PATRICK ROBERTSON, ESQ.,
DEAN OF FACULTY,

AND

ANDREW RUTHERFURD, ESQ.,
ADVOCATE,

IN THE PROCESS OF SUSPENSION AND INTERDICT,

WILLIAM CUNINGHAME, ESQ., AND OTHERS, HERITORS OF THE PARISH OF STEWARTON,

AGAINST

THE PRESBYTERY OF IRVINE.

JUNE AND JULY 1842.

TAKEN IN SHORT-HAND BY
SIMON MACGREGOR.

2.

EDINBURGH:
W. P. KENNEDY, 15, ST ANDREW STREET.

1842.

MURRAY AND GIBB, PRINTERS, GEORGE STREET.

The following Report was submitted in proof for their revisal to the learned Counsel, whose pleadings it contains. The Dean of Faculty has kindly consented to go over the proof; but in the multiplicity of his avocations, Mr Rutherfurd has found it impracticable to revise the proof which has been in his possession for some time. As, however, the publication could no longer be delayed without disappointing the public, the utmost care has been taken by the Reporter to render the Report as correct as possible, and he trusts that the anxiety with which this has been done, will leave no room for objection in any quarter.

STEWARTON CASE.

TUESDAY, JUNE 21, 1842.

Mr PATRICK ROBERTSON.—My Lord President, I feel that the extent of time which I shall be under the necessity of consuming in stating this case, renders it imperative on me to give no general introductory matter, and not to detain the Court with any thing which I do not think essential to my present object. Therefore, I shall not trouble you with an outline or division of what I mean to advance, and far less with any general statement as to the vast importance of the question now to be discussed; trusting that, when I have concluded, you will be able to see distinctly the line of my argument, and that the order in which I proceed shall be sufficiently clear as I advance.

I shall first of all, then, endeavour to bring under the consideration of the Court the precise facts of the present case, as at the date when the suspension and interdict before your Lordships was presented.

The parties for whom I attend, are the patron of the parish of Stewarton, and the heritors of about three-fourths of the parish. The parish of Stewarton has been one parish from time immemorial, with one parish church, one minister, and one kirk-session, being situated in the Presbytery of Irvine, and in the Synod of Glasgow and Ayr. In 1825 the parish church of Stewarton was enlarged, and it is capable of containing 1400 sitters. The accommodation is sufficient for the parishioners connected with the establishment, exclusive of those, of course, who belong to the Dissenting congregations. There were in the parish three different congregations, one of which is the congregation of Mr Clelland, who was connected with the Original Burgher Associate Synod. Upon the record it is admitted, or at least not denied, that, with the exception of this congregation, the church is complete and sufficient for the parishioners. This is our allegation. They say in answer—"Denied that the church is sufficient for the accommodation of the

parishioners adhering to, and in communion with, and attendants upon, the public worship in the Established Church, or *at least* that it has been so since the union of Mr Clelland's congregation with the Established Church." The denial of the sufficiency of the church is thus rested upon taking into account the congregation of Mr Clelland.

The property of this church of Mr Clelland is vested in the congregation adhering to the principles of the Burgher Associate Synod. At page 10 of the record you will find the terms on which the property is so vested. It is in five trustees, who are there named. Your Lordships will see the meaning of my reference to this hereafter. At the same time, to make you aware of the manner in which the property of that chapel is vested, I may call your attention to a meeting of the Presbytery, held on 6th August 1837. Be good enough to turn to the appendix of the record, p. 1, where you will find the proceedings at that meeting of Presbytery thus stated :—"The Presbytery of Irvine met and constituted. *Inter alia*, a memorial and petition from the Rev. James Clelland, minister of the Associate Church in Stewarton, and from the managers and members of said congregation, praying to be received into union with the Church of Scotland, were laid on the table. The Presbytery having found the matter regularly proceeded in, did, in terms of the act of Assembly (act 8, Ass. 1839), styled an act anent re-union with Seceders, receive and admit the memorialists to the status and privileges of a minister, elders, and members of the Church of Scotland, respectively. Mr Clelland signed the Confession of Faith, his name was added to the roll of the Presbytery, and he took his seat accordingly."

Now, I pray your Lordships to observe that, in the first place, this act was done entirely in absence of the heritors. It was, moreover, done without notification to the heritors, or, so far as appears, to any one else,—it was done by the assumed power of the Presbytery, without notice to any human being, and without any appearance on the part of the heritors. I also think it right to notice in passing, that Mr Clelland is thus admitted and added to the roll of the Presbytery, merely on signing the Confession of Faith, without having taken any oaths to government of any kind or description. This is a circumstance which, I shall show you afterwards, is of material importance in the argument on the present case. In the meantime, I merely state that he appears to have taken no oath, and to have taken his seat in virtue of an act of Assembly of 1839, and which act does not require that any oath shall be taken.

Then follows in the appendix this entry from the minutes of Presbytery. " Irvine, 1st October 1839.—Draft articles of consitution for the new church at Stewarton were laid before the Presbytery, together with a petition from the managers, relative to the allocating of a parochial district to said church. The Presbytery appointed a committee to consider said articles of constitution, to perambulate the

bounds of a district to be annexed to said church, and to report at next meeting." So this step was to allocate a parochial district out of the parish of Stewarton; and a committee was appointed to perambulate the bounds to that effect. This proceeding was also entirely in absence of the heritors, and without notice being given to them, or to any other party whatever. The committee thus appointed gave in their report on the 26th November 1839 (appendix, p. 1), which is in these words; "At Stewarton, 22d October 1839.—The committee appointed by the Presbytery on the 1st instant met, and constituted; Mr Bryce, moderator; Mr Steven, clerk. Mr Robert Miller, writer in Stewarton, appeared as agent for Matthew Paton and David Picken, to stop procedure in this case, on the ground of said clients having vested rights in the church in High Avenue Street, lately in connexion with the Associate Synod, which they are unwilling to resign to any body in connexion with the Church of Scotland; and in face of this representation the committee agreed to proceed, because satisfactory evidence was produced from the records of the kirk-session, Presbytery, and Synod, that the said clients of Mr Miller were not in communion with the Associate body at the time of its union with the Church of Scotland." So that the commencement of this matter is a vindication, or an attempt at vindication of their procedure, in going in the face of the right of these dissentient parties, who were not inclined to join in communion with the Church of Scotland, and were opposed to the property of their meeting-house being taken for any such purpose. The Presbytery think fit to judge of the ecclesiastical qualifications of these gentlemen, and to say that, notwithstanding the protest and the demand that the property shall not be taken for any such purpose, they will proceed in the allocation of this district, and in the taking of the chapel. Then the report proceeds thus:—"The committee considered the constitution of Mr Clelland's church, and, with certain amendments, agreed to transmit the same to the Presbytery. The committee then proceeded to consider the allocation of a parochial boundary to the above church, when it was resolved to perambulate that part of the town of Stewarton, which lies between John Smith's house on the west, Matthew Young's on the north, and the house of David Ramsay, elder, on the east,—all upon the north side of the town of Stewarton; and, further, it was agreed to refer to the determination of the Presbytery, whether in the face of opposition from the minister of the parish, it is legal to proceed also with the allocation of a *landward part*, to form a new parish in conjunction with the perambulated part of the town. The committee having perambulated the part of the town bounded as above, agreed to recommend the same as a suitable parochial district to the new church, in the event of no landward part of the parish being assigned in connexion with it."

It seems, then, that on 26th November 1839, there was an appearance of persons claiming, and who afterwards vindicated civilly the right of property in this chapel, objecting to the union of the

congregation with the Church of Scotland. There was a resolution in the face of this to perambulate a certain part of the town of Stewarton, and to assign it as a parochial district, reserving the consideration whether it was also competent to assign a landward part in connexion with it.

Lord JEFFREY.—Had the minister of the parish opposed the taking of the landward part?

Mr ROBERTSON.—Yes, he had opposed it. In all those proceedings there was no notice given to the heritors, or to any of the other parties. The minute then goes on to say :—" The Presbytery having heard said report, did, on the point submitted therein, appoint a committee to consider the laws of the Assembly as to the allocating of a *landward district* in face of opposition from the minister of the parish, and to report at next meeting,"—taking it for granted that they could allocate a town district. Then, on the 7th January 1840, the committee report. They refer in their report first to the acts of Assembly 1833, anent Parliamentary churches; 2*d*, to the act 1834, anent chapels of ease; and 3*d*, to the act 1837, anent new churches. Then having got thus far they refer to the act of Assembly 1835 as to the union with Seceders. Then having made their report to the effect that they were entitled to take the landward district, observe what follows (p. 5, appendix): " The Presbytery approved of the diligence of the committee, and proceeded to deliberate upon a division of the parish of Stewarton, when James A. Snodgrass, Esq., writer in Stewarton, appeared at the bar, in behalf of William Cunninghame, Esq. of Lainshaw, and others, heritors in said parish, and intimated the determination of said heritors to take all legal measures to interdict the Presbytery in the dividing of said parish." Your Lordships will observe, we thus appeared as early as this meeting of January 1840. Then, having recorded that intimation, the minute proceeds :—" It was moved and seconded, 'that as this is a novel and difficult case, and as in certain other cases of difficulty the Assembly has ordered Presbyteries to refer them *simpliciter* to the Assembly, notwithstanding existing laws of the church, the Presbytery do act in the spirit of said requirement, and refer the above case *simpliciter* to the Assembly for advice and direction." It was also moved and seconded, " That the Presbytery proceed to allocate a district to the new church at Stewarton, any opposition for the heritors notwithstanding." It was agreed that the state of the vote should be 'refer,' or 'proceed,' and the roll being called, and votes marked, it carried by a majority of 9 to 8, 'refer.' Wherefore the Presbytery did, and hereby do, refer the same to the Assembly accordingly. The moderator having received permission to leave the chair, dissented from the above, appealed to the Synod of Glasgow and Ayr, took instruments and craved extracts."

Now, the reverend gentleman who sat as moderator at this particular meeting of the Presbytery, and who thus took a dissent and appeal to the Synod of Glasgow and Ayr, was the Rev. Mr Clelland,

the individual himself who had been added to the roll of the Presbytery at the original meeting of the 6th August 1839.

Lord GILLIES.—Does it appear that by this time Mr Clelland had taken the oaths to government ?

Mr ROBERTSON.—No.

Lord CUNINGHAME.—Has he taken them yet ?

Mr ROBERTSON.—I do not think it,—he has left the church and gone to England, where, I believe, he has got some church. But there is nothing to show that he had ever taken the oaths to government. He is the gentleman who takes this appeal to the Synod against the reference to the General Assembly.

Under these circumstances, my clients having thus made their appearance at the Presbytery, presented the Note of Suspension and Interdict, by which the case now comes before the Court. The prayer of this suspension and interdict is at page 2 of the record. It prays, in the first place, to interdict and prohibit Mr Clelland " from sitting, acting, and voting, as a member of the Presbytery of Irvine, in all causes, matters, or proceedings, in any way originating in, or connected with, the parish of Stewarton, and specially in any application, references, or appeals made by or from the kirk-session of the parish of Stewarton, and in all parochial and ecclesiastical matters having reference to, or connexion with, the parish of Stewarton." Then, in the second place, it prays the Court to interdict, prohibit, and discharge the members of Presbytery who were present at the meeting of 7th January last, and all other members, or pretended members of the Presbytery of Irvine, and the said Presbytery, by service on the said Rev. John Bryce, minister of Ardrossan, the clerk of the Presbytery, and on the moderator of the Presbytery for the time, at the meeting to be held on the 31st current, or any other meeting of Presbytery,—" from proceeding in any way or manner, by perambulation of the parish of Stewarton, or otherways, from dividing the said parish, and designing and erecting a new parish therein, and placing the same under the pastoral superintendence of the said Rev. James Clelland, or of any other person, and from constituting a new and separate kirk-session, having jurisdiction and discipline over the proposed new parish, and from connecting the said new parish with the church and congregation of the said Rev. James Clelland, and generally from innovating upon the present parochial state of the parish of Stewarton, as regards pastoral superintendence, its kirk-session, and jurisdiction and discipline belonging thereto." It bears further, to prohibit all the members of the Synod of Glasgow and Ayr, assembled at the meeting proposed to be held of the said Synod, at Glasgow, from doing the same things. We do, therefore, pray to have interdict against Mr Clelland acting or voting in this manner; against the Presbytery dividing the parish, creating a new kirk-session, or, generally, innovating on the present parochial condition of the parish. This interdict was granted on the 28th March 1840, by Lord Gillies. You will find it on page 15 of the appendix; " 28th March 1840.—To see and answer within four-

teen days: meantime grants the interdict as craved, and to be intimated." It was intimated on the 31st March. Turn now to page 5 of the appendix, where we have the following extract:—"Irvine, 31st March 1840.—A note of suspension and interdict by the Court of Session, at the instance of William Cunninghame, Esq. of Lainshaw, and others, prohibiting the Presbytery from proceeding to divide the parish of Stewarton, having been served upon the moderator and clerk, was laid upon the table. Messrs Wilson, A. B. Campbell, and the clerk, were appointed a committee to forward a statement of the case, and to employ counsel." This was the state and condition of the proceedings as applicable to this church, when the interdict was presented and granted.

I next proceed to call your Lordships' attention shortly to the subsequent proceedings which took place. The next meeting of the Synod was held upon the 16th April. You will find this on the record, p. 21: "After deliberation, it was moved that the Synod find, that in this case the Presbytery have not proceeded regularly according to the act of Assembly 1798: therefore, sustain the dissent and complaint, dismiss the reference, and remit to the Presbytery of Irvine to proceed in this case according to the rules in said act, and the act of the General Assembly 1839, anent the reunion with Seceders. This motion was seconded and agreed to, and, therefore, the Synod did, and hereby do, find, sustain, dismiss, and remit, in terms of said motion."

Having now ordered that this case should proceed in terms of the act of Assembly 1798, your Lordships will observe that the next meeting of Presbytery took place on the 5th May. Notice was ordered to be given to the heritors, which is required by the act 1798. No notice was given of the original proceedings, as I have already stated; but at this meeting of the 5th of May, the Presbytery came to this resolution (page 22, record): "It was moved and seconded that the heritors of Stewarton, and all interested, be summoned in terms of said acts 1798 and 1839, to appear before the next ordinary meeting of Presbytery, and that the Presbytery proceed to allocate a territorial district to the new church at Stewarton." This was to be done, not only under the act of Assembly 1839, but also under the act 1798. You will see that that act allows nothing of the kind. They proceed, however, to allocate a territorial district to this new church. A separate motion was made, "that the Presbytery take no steps in the matter;" but the former motion was carried, and they resolved "to proceed accordingly."

Then, on the 13th June 1840, no answers having been lodged in this Court, the Lord Ordinary passed the suspension and interdict in respect no answer had been lodged, and granted the interdict as craved. On the 1st September the interdict was served. Then there was a second service of the interdict, and a notarial protest taken on 10th December. The General Assembly, before whom the matter had come as a proceeding under the acts 1798 and 1839,

(p. 22, record) referred the case to the Commission, which, at its meeting in August, pronounced the following judgment:—"The Commission dismiss the complaint, approve of the conduct of the Presbytery, and remit to them to proceed according to the laws of the church, instructing them at the same time to insert express words in the deliverance by which they allocate a territorial district to the church in question, limiting the effect of the same to matters of spiritual jurisdiction and discipline." This, as far as I can gather from these proceedings, is the first time that this limitation of the words "spiritual jurisdiction and discipline" is introduced. Then it goes on to say, 'which alone are implied in, or would be affected by such allocation under the existing laws of the Church, and also to insert the reservation likewise implied, that heritors and their tenants, on the part of the parish which may be set apart for the new church, having legal right to sittings in the original church, to continue, in their option, members of the congregation thereof.'"

In this state of the matter appearance was made in this Court by the Procurator for the Church, as you will find by turning to p. 10 of the appendix. "At Irvine, the 26th day of January 1841, which day the Presbytery of Irvine met and was constituted. *Inter alia*, the clerk read a letter from the agent for the Church, of date 15th December 1840, from which it appears that the Procurator had entered appearance in the Court of Session, in name of the Presbytery, relative to the division of the parish of Stewarton. It was moved, seconded, and carried without a vote, that, as the Presbytery have not given any authority to the Procurator to make appearance for them in this case, and as they are ignorant of the particular form in which the cause is brought into Court,—delay consideration of the case till next ordinary meeting, and in the meantime instruct the clerk to correspond with the Procurator for the purpose of obtaining information. From this motion Mr M'Leod dissented, and protested against being held liable for expenses in the litigation now being carried on by the Procurator, and that a copy of their protest be forwarded to him. This being granted, the following protest was entered on the record:—"We, dissentients in the case of dividing the parish of Stewarton, do hereby protest against being considered liable for any part of the expenses incurred, or which may be incurred in the litigation now carrying on by the Procurator in name of the Presbytery."

Then, on the 4th February of the same year, Mr Clelland having demitted his charge, the elders of the New Church intimated that they were prepared to proceed in the choice of a minister, and they laid the roll on the table, upon which Mr Latta was declared to be elected. The call was sustained, and trials were appointed (see appendix to complainers' case, No. I., p. 90): "The session of the New Church intimated that they were prepared to proceed to the choice of a minister for their church, now vacant, and laid on the table a roll of persons qualified to vote in the election of said minister. Whereupon Mr James Latta, preacher of the gospel,

was proposed and seconded; and no other candidate having been named, he was declared by the Presbytery as duly elected, in terms of the constitution." "The Presbytery having duly considered the call, unanimously agreed to sustain the same, and ordered it to be attested in due form by the moderator." "The Presbytery appointed their next ordinary meeting to take place at Irvine on Tuesday the 2d day of March next, which meeting Mr Latta is required to attend."

Here your Lordships will observe the new aspect the case assumed was this,—that, without any presentation, but on the election of the people, Mr Latta, in room of Mr Clelland, who had demitted, was elected minister. His call was sustained, and his trials were appointed. Then, on the 24th February (p. 11, appendix to the record), a *pro re nata* meeting was called. It was moved and seconded "That the Procurator and Agent for the Church be authorised by the Presbytery to act for them in the action now pending between them and the heritors of Stewarton anent the division of the said parish." It was also moved and seconded "that the Presbytery do not grant authority to the Procurator and Agent of the Church to make any appearance in said matter." It was agreed that the state of the vote should be first or second motion; and the roll being called, and votes marked, it carried first motion; wherefore the Presbytery did, and hereby do, resolve in terms of the first motion accordingly. From which finding Mr John Wilson dissented, for reasons to be given in in due time, and protested against being considered liable to any civil consequences that might result from the proceedings of the Presbytery in this case. To which dissent and protest adhered Messrs Urquhart, Johnston, Colvill, Steven (minister of the parish of Stewarton), S. B. Campbell, J. C. Jamieson, Bryce, and the Moderator. Mr Dickie acquiesced in the above finding, took instruments, and craved extracts, which were allowed. Closed with prayer."

This is an important resolution in regard to one part of my argument (which I do not anticipate at present), that the instructions to the Procurator and Agent of the Church to appear in this process of suspension and interdict, are dissented from by the minister of the parish of Stewarton. Accordingly, you will find in regard to these instructions, that a minute was put in by Mr Moncrieff for the Presbytery of Irvine, which is at p. 12 of the appendix: "Minute for the Presbytery of Irvine, and the individual members thereof, in the process of suspension and interdict brought against them, at the instance of William Cunninghame, Esq. of Lainshaw, and others, heritors of the parish of Stewarton.

"Moncrieff, for the Presbytery of Irvine, stated that he produced herewith an extract minute of a meeting of the said Presbytery, held at Irvine on the 24th February 1841, bearing that the Presbytery resolved, 'That the Procurator and Agent for the Church be authorised by the Presbytery to act for them in the action now pending between them and the heritors of Stewarton, anent the

division of said parish ;' and in terms of the said minute, he humbly begged leave to sist the said Presbytery and the following individuals, being the clerical members thereof." The names of the clergymen are given; and then follow the names of the "elders of Presbytery present at the meeting on the said 24th February 1841." On the opposite side there is a minute for the minority. I shall show you presently how the majority and minority are composed. In this minority is the name of Mr Steven, minister of the parish of Stewarton, and in the minute for the minority these gentlemen state that they appear to disclaim the proceedings of the majority. Be pleased to turn to p. 14, where you will find the following passages:—"That the ministers, being eleven in number, are a majority of the clerical members of the said Presbytery, and the resolution of 24th February was carried only by means of the votes of five persons, who are not legally members of Presbytery; that of these five, two are ministers of what are called parishes *quoad sacra*, within the bounds of Presbytery, and three of them are elders of such parishes." "That the ministers disapprove of the conduct of the apparent majority of the Presbytery at their meeting of 24th February last, and hereby respectfully decline to resist the process of suspension and interdict at the instance of the heritors of Stewarton, and beg to withdraw their names as respondents accordingly." So that if I be right in the argument we maintain, that ministers and elders of *quoad sacra* parishes are not constituent members of this Presbytery, then I would have no opponents to meet in the present case, because the resolution of 24th February 1841, to appear here by the Procurator and Agent, is carried by a majority formed only by including those *quoad sacra* members.

Under these circumstances, we applied to the Lord Ordinary for a special interdict against receiving any minister to the new parish in the meantime; and accordingly, on the 17th March 1841, Lord Cuninghame granted a special interdict (p. 15) in the following words:—"The Lord Ordinary having heard counsel on the motion of the suspenders, for a special interdict relative to certain proceedings said to be contemplated by the respondents, as mentioned in the minutes of Presbytery produced in process as per inventory, finds it reasonable that the interdict already granted in the Bill-chamber should be explained and made special to the effect after specified, pending the proceedings in this cause: Therefore interdicts, prohibits, and discharges the Presbytery of Irvine, during the dependence of this cause, from admitting and receiving any minister or elder as a member of Presbytery, in respect of their alleged election or nomination to their respective offices in the said new parish, and decerns accordingly; and allows this decree to go out and be extracted *ad interim*, reserving to the respondents to apply to have this interdict recalled or explained in the course of this cause; and also reserves to the respondents all pleas competent to them on the merits or jurisdiction, and to the suspender his answers thereto, and counter pleas, as accords."

Your Lordships will please observe, that two of the trustees out of the five infeft in the property of this chapel for behoof of the Associate congregation, dissented from the acts of their co-trustees in proposing to unite themselves with the Established church, and, as you will see at p. 10 of the record, were contemplating to take measures to vindicate their right of property in the chapel. I have now to state to your Lordships, that an action of declarator by those gentlemen who adhered to the principles of the Burgher Associate Synod, to have the right of property vested in them declared to belong to them, was brought; and on the 1st June 1841, a decree was pronounced, declaring that the right of property belonged to those parties (precisely in the words I read from the record), who were in communion with the Associate Burgher Synod. The terms of it are not set forth; but they are in conformity with what I called your Lordships' attention to at the outset. So that the right of property of this chapel has been vindicated, and taken away from that branch of the congregation which declared its willingness to enter into union with the Church of Scotland.

Mr Latta died sometime after this, and the respondents proposed to moderate in a call to another person. The Special Commission of the General Assembly interfered, as you will find at page 92 of the complainers' case. Then, p. 93, you will find certain proceedings, and a letter written by the suspenders' agent, pointing out that this would be a breach of interdict; and there the matter dropped. On this I do not mean to dwell farther. I content myself with directing your Lordships' attention to this proceeding, and the letter of the suspenders' agent in regard to it, as I do not think that much argument arises, at this stage, from the terms of the Minute of Presbytery or the letter; and therefore it is unnecessary to enter into any detail, so far as they are concerned.

Having explained the facts which preceded and followed the present suspension and interdict, I now ask your Lordships' attention to the result of those proceedings as applicable to this case. I submit that the general result is this,—that without the consent of the minister of Stewarton or of the kirk-session, or of the parishioners, or of the heritors of the parish, Mr Clelland, without presentation, without trial, without a parish, without a permanent endowment, without a place of worship, and without taking the oaths to government, is added to the roll of the Presbytery. This is the first general proposition which I take the liberty of putting. Next, the result of this is, that a new parish is to be perambulated within the bounds of the old parish (without consent of the minister and heritors), under the resolution of November 1829. Then, it appears in this particular case, that Mr Clelland, the newly admitted member,—I say the illegally admitted member,—protested and appealed to the Synod of Glasgow and Ayr against a reference of the case to the Assembly,—that Mr Dunlop, one of the elders of the New Church, adhered to that protest; so that here is a judicial step taken by two of the members illegally admitted in the course of those proceedings.

Having got the interdict of this Court, it next appears that, under the orders of the Synod, the Presbytery proceed to allocate the new parish, on the pretence that they were entitled to do so in accordance with the acts of Assembly 1798 and 1839. Next, there follow in December 1840, new resolutions to allocate the parish; and then comes the resolution of 24th February 1841, to appear and plead against the interdict, which is carried by the votes of the majority, including in that majority the *quoad sacra* ministers and elders,—that is to say, carried by an illegal majority against the lawful majority of the Presbytery of Stewarton. I need say nothing more in regard to the attempt to induct Mr Latta.

I pray your Lordships now to observe, that the whole of those proceedings are followed up by a statement in the outset of the case of the other party, that it is not the intention of these gentlemen to obey the judgment of this Court, should it be against them,—that they are so far bound by their oaths to the church, that whatever your Lordships choose to determine, they, in the conscientious discharge of their duty, are not to be bound by that decision. Your Lordships will find this stated at pages 2 and 3 of the revised case for the Presbytery of Irvine. They say "they would greatly mislead your Lordships if they were to allow it to be inferred, from their appearing and pleading in the present process, that they would hold themselves warranted, by any decree of this Court, so far to violate the duty, which, by the constitution of the country and their own vows, they are bound to perform, as to regulate their proceedings in the 'ordering of Ecclesiastical matters and causes within their bounds,' by the directions of a secular court, instead of those tribunals to which alone they are subordinate. They cannot, of course, *as a church judicatory*, established by the constitution of the kingdom, disregard the injunctions of the superior church judicatories, to which, by that constitution, they are subject; and, in opposition thereto, take directions for their conduct, in their capacity of a Church Court, from a tribunal which, by the constitution, has no authority over them. They cannot, *as individuals*, do what, in their conscientious conviction, would constitute a breach of the solemn vows which they have come under, at the requirement and with the sanction of the laws."

"Whatever judgment, therefore, your Lordships may pronounce, the respondents freely, and at once avow, that, in regard to the matters here in question, they will continue to give obedience to the injunctions of the Ecclesiastical judicatories, to which they are subordinate. As, however, they will necessarily be exposed to great personal hardships, or severe patrimonial loss, should your Lordships be led to enjoin them to disobey these judicatories—*an injunction which they will feel themselves compelled to disregard*—they avail themselves of the opportunity now open to them, of endeavouring to satisfy your Lordships, that the granting of the prohibition sought by the suspenders would involve a violation of the constitution of

the country, and a flagrant excess of the powers and jurisdiction with which, by that constitution, this Court is invested."

Then they say that they are confident you will not "rashly interfere;" that you will proceed with "extreme caution" in your determination. I know that the Court will proceed with extreme caution; but I know that if you are satisfied that your judgment, if given on this side, is well founded, you will proceed with perfect contempt of any such menaces. I apprehend that the members of the Established Church are bound to obey the law of the land. The question between us is, what is the law of the land as applicable to this particular matter? The statement, that if the law be found to be against the clients of my learned friends on the other side, they do not mean to pay any regard to your Lordships' decision, can have no effect on your Lordships' minds. I know it can have no prejudice against me, and just as little against them.

I have thus stated the result of this particular case in point of deduction and fact. I shall now say a word or two as to the general result of such proceedings as have occurred here. It is stated, and I take the statement to be correct as to statistics, that, since the Union, there have only been about seventeen parishes erected, and only four within the last century. I beg your Lordships' attention to the following statement on p. 4 of the revised case for the respondents. "Shortly after the Union, indeed, a few additional parishes were erected, chiefly in the Western Isles and remote northern districts; but, from the Union down to the present day, the total number of new parishes, with stipends provided out of the teinds, amount to but seventeen in all—only four of them having been established within a century, and not one having been established since 1769 till the re-erection of Half-Morton, in the Presbytery of Langholm, one or two years ago."

Lord CUNINGHAME.—Erected by the Commissioners of Teinds?

Mr ROBERTSON.—Yes; seventeen by the Commission of Teinds. There have been erected of chapels of ease 63. It does not distinctly appear when these chapels of ease first commenced to be erected. I rather think I am stating it correctly; but I do not pledge myself for accuracy, when I say that the first was for the congregation of Dunfermline. But, however, 63 chapels of ease were erected. Then it is stated in the same paper of the respondents, p. 5, that while there were only 63 chapels of ease, there had been erected 650 dissenting places of worship, of which 500 professed the same doctrines and principles of church government with the establishment. That is the general statement.

Be pleased now to observe what has been the effect of the acts of the General Assembly now in question. In 1833 there were added to the clergy of the church 40 parliamentary ministers, with as many parliamentary districts, under the Assembly's authority. In 1834 there were added the 63 chapels of ease ministers. There have been built 150 additional churches, each having a minister and kirk-session, and these also are added. There have further been admitted

in 1839, under the Union with the Associate Synod, 24; so that we have thus an addition of 40 parliamentary church ministers, 63 chapels of ease ministers, 150 new church ministers, and 24 of the Associate Burgher ministers, making, in addition to the old ministers of the Church of Scotland (if this be lawful), 277. If these be lawful and regular proceedings, I know not why any others of the remaining balance of the 500 who profess the same doctrines and principles of the Church of Scotland, should not also be added. The effect, therefore, of this is, that we are to have 277 ministers, with kirk-sessions and parochial districts allocated to them; and this has been done by the sole authority of the Church Courts; and all this is said to be so purely spiritual, so untouchably spiritual, that this Court has no jurisdiction to interfere in the matter.

Now, whether this be an expedient or inexpedient change for the condition of Scotland is not the question before the Court. Whether Scotland was in such a destitute state in regard to spiritual instruction that a new act of Parliament was required to alter or extend its constitution, is a matter into which I respectfully decline entering. It is enough for me to show that the change here attempted to be made, however expedient, is inconsistent with the law of the land. I think it plainly is so. In the first place, none of these 277 ministers entered the Church of Scotland by virtue of patronage. Patronage may be expedient or inexpedient. We cannot here call it sinful, because it is statute law; but, with the exception of these 277, all the old batch hold their livings by virtue of patronage, and in a church which calls itself a patronage church. Next, they have this peculiarity (not one surely which their brethren regard as sinful), that they have an endowment and a legal claim on the teinds. These new-comers unfortunately have no such endowment and no such claim. Then, with respect to the new churches of all this class, there is no obligation on the heritors to keep up the fabric of the church, or to give manses or glebes. They are bound to keep up the fabric of the Established Churches, and to keep up manses and glebes. The next novelty is, that we are to have a kirk-session separate from the kirk-session of the parish, and a parish within a parish. This may be judicious or expedient, but it is at least novel, and I believe you will hold it to be illegal.

Let us see, then, what is the effect of this novelty? Its effect is to alter the constitution of presbyteries; and this is tolerably well exemplified by the present instance; for, in consequence of the illegal admission of Mr Clelland, the case was appealed to the Synod, which otherwise would not have gone there. And in consequence of the votes of the *quoad sacra* ministers in the resolution of 1841, we are now met with an opposition to an interdict, which, according to the old constitution of the Presbytery of Irvine, would not have been opposed, but obeyed. And, lastly, these new ministers have not taken the oaths to government; and as there was

no patron, of course there could be no protection of that kind from any quarter.

When your Lordships contemplate the result of this state of things, and the general result in the state and condition of the Church of Scotland, you cannot but see the vast importance of the case before the Court—a case of unprecedented importance, and therefore requiring at the hands of your Lordships the most anxious scrutiny.

I now proceed to call your Lordships' attention to the statutes prior to and at 1592. We are all aware that the act 1592, passed soon after the Reformation, is the leading statute of the Church of Scotland. But I think it is most material, with a view to this argument, to show that, from the commencement, the Church of Scotland has been an endowed, territorial, parochial establishment. It is most important to look at the original statutes. You will find her in the early period struggling with difficulties. You will find that the general description I have now given, that she was from the beginning *an endowed, territorial, parochial establishment*, is proved and established by the whole of the statutes. The question may be considered either separately on the statutes, or on the statutes explained by the corresponding ecclesiastical authorities and practice at the time. The first Confession of Faith was ratified in Parliament by the act 1567, when Popery was abolished. Chapter 2d abolished Popery; chapter 3d established the Confession of Faith. The provision for the reformed clergy, for a considerable period of time, was not certainly so fixed as the right to stipend is now. All that they seem to have had was a third of the produce of the benefices, two-thirds being retained by the rejected popish clergy and the sovereign. The history of this your Lordships will find in my learned friend Mr Handyside's able paper, at p. 43 of our case. Parishes existed under the old popish system. Their origin and boundaries are matters of great obscurity; but they did exist. Manses and glebes also existed. In the "Booke of the Universal Kirk," by Mr Peterkin, you will find notices of this so early as the first General Assembly. Many of the early assemblies were attended by all sorts of persons, nobility and barons, commissioners of burghs, and so on; but my present point is to show that parishes existed. I quote from p. 3 of this book: "Finds that the Ministrie of the word and sacraments of God, and assemblie of the people of the haill parochine of Restalrig, be within the Kirk of Leith; and that the Kirk of Restalrig, as monument of Idolatry, be razed and utterly casten downe and destroyed." Then, again, at p. 5, "Ordains every commissioner, alswell of Towns as of paroch Kirks to landward, to bring ane roll with them of the haill tiends, lands, anwalls, profeits and emoluments of the paroch Kirks nixt adjacent to them, and what persons hes tacks thereof, to whom the samen pertains, and their names to be speciallie named, and what dewtie they pay for the samen." Be pleased to turn now to p. 10, where your Lordships will find the minutes of the third General Assembly, held in 1562, in which it is agreed "to make supplica-

tion to the hier powers for the Manss and aikers to Ministers to dwell in, according to the Book of Discipline, and the Kirks to be repaired that are decayed, conforme to the act of the Lords of the Secret Councill, pronounced before the Q. G. homecuming." Then on p. 12, fourth General Assembly, December 30, 1562: "The Kirk presently assembled gives power to everie superintendent within their own bounds, in their Assemblies Synodall, with consent of the maist part of the Elders and Ministers of Kirks, to translate Ministers frae ane Kirk to ane other, as they shall consider the necessitie." Then, p. 13, "Forsameikle as it was heavilie lamentit be the maist part of the Ministers that they can have no Dwelling places at their Kirks, because the Manses are either deteinet be the Parsons or Vicars of the samen, or else sett in Few or utherwayes to Gentlemen, the Clerk Register and Justice Clerk desyres the Superintendants to signifie to the Clerk of the Rentalls where the said Mansis are, and in what countrey, to the effect that the saids Mansis may be assignit to them. * * * Third part; and thereafter that the saids Ministers complienand may be staicked and helped to the samen for their commoditie and remaining with their flocks." Again, in 1563, p. 16, "Ordained, That Supplication be made to the Q. Majestie and Secret Councill for Union of Kirks, that where two or three are within two or three myles distant, the same to unite, and cause the inhabitants to resort to ane of the saids Kirks to hear the word and receave the Sacraments. Because the scarceness of Ministers permits not everie Kirk to have a severall Minister, and also the small number of sick parochines requires not the same." Then, on the same page, "Ordains, That everie Superintendent within his awne jurisdiction cause warne the shires, towns, and paroch kirks, to send their Commissioners to the Assemblie in times cuming, declaring unto them the day and place, and also that everie Superintendent conveen the foresaid day, appointed for the Assemblie, under the paine of fourtie shillings, to be distribute to the poore without remission thereof."

In like manner, reference is made to an act of council, granting the third of benefices, which shows that the church was an endowed church from the beginning. Then there are a variety of other notices of the same kind, in 1564 and 1565. As, for example, "to request her hienes to cause thankful payment to be made of the Ministers' stipends throughout this realme, as also to complain to her Majestie that where, of before, the Kirk of Candwell in L. Carrik was assigned for payment of the Ministers' stipends in Kyle and Carrick, is now given by her hienes to the young Laird of Skeldrume, and in like manner the parochiners of Dalry shew that the lands of the Kirke was assigned to the Minister of the parochine, and now was givan to the Laird Provane, and to understand her hienes well thereanent." There are various other passages to the same effect. When your Lordships see the object I have in view, you will be kind enough to take a note of them, which will serve my purpose, without reading them at length.

A negociation was at this time going on with the state; and in 1565 we have this declaration, p. 39, 3d December: "The haill Assembly, with one voyce, statutes and ordaines, That no Ministers hereafter receave the parochiners of ane uther parochine to be married, without any sufficient testimoniall of the Minister of the parochine, wherefrae they came, that the bands are lawfully proclaimed, and no impediment found, so that the order that has been taken be the Kirk, in sic affaires, be dewlie observed, under the paine of deprivation frae his Ministrie, tinsell of his stipend, and uther paines, as the Generall Kirk shall hereafter think to be imponed."

The kind of stipend which the ministers received was, no doubt, only the third of benefices; but still it was a stipend; and here was an acknowledgment of an acting parochial system so early as this period, viz., that the proclamation of bands should be within the parish kirk, and that testimonials should be given by the minister of the parish from whence the parties came.

We are now still farther advancing,—the negociation is going on at great length, and we come to 1567. You will find in that year, under date 26th June, that there is a resolution that letters missive should be sent to the Earls, Lords, Barons, and Commendators of Abbeys, stating what the church requires; and the church requires that "ane General Assembly of the haill professors, of all estates and degrees, within the Kirk of Scotland, to be holden within the towne of Edinburgh, upon the 20th day of the next month of July, whereby ane perpetual order may be taken for the liberty of the Kirk of God, sustentation of the ministers and falzied members thereof, and that ane sure union and conjunctione may be had for the liberty of God's Kirk, whereby we may be able to withstand the rage of violence of our foresaid enemies." So the demand, your Lordships will observe, which they make, is for sustentation.

Then in the same year, a very busy Assembly is held in December; and on the 28th of that month we have the following order (p. 70): "Ordaines that Superintendants and Commissioners appointed shall plant ministers vaikand in sic rowmes where the parishioners will gladly sustaine them on their owne expenses whill other order be had; and that they remove nane out of their rowme, being found qualified, without the advyce and consent both of the ministrie and kirk-worthie of the place."

In like manner the existence of manses and glebes can admit of no doubt. On the 3d December 1567, 13th article, we have the following: "That the act of Parliament concerning the manses and gleibis may be made so sensibl, that the uniust possessouris find na cauillatiounis to defraud the pure ministeris of thair ryt., and of the peaceable possession of that quhilk justlie appertainis thairto. It is fund that the best mans sall pertene to the minister with the hale gleib, Providing the said gleib exceed not vj aikiris of land; And, gif the samyn be mair, the minister shall be content onlie with

vi aikiris thairof nixt adjacent to the manss; And, gif the samen be within vi aikiris, he sall likewise content him thairwith."

They were here, then, asserting their right to a sustentation or stipend; and they were asserting their right also to the manses and glebes, which were thus the provisions of the church at this early period.

Then comes the act of Parliament, December 20th of that year (1567). Be pleased to look to ch. 6; "Anent the treu and holy kirk, and of thame that are declarit not to be of the samin." They had by this time ratified, as your Lordships know, the Confession of Faith. Then, in the 7th ch., as to the admission of ministers, there is the important passage: "*Item*, It is statute and ordained by our Soveraine Lord with advice of his dearest Regent, and three Estaitis of this present Parliament, that the examination and admission of Ministers within this realme, be only in the power of the Kirk, now openlie and publickly professed within the samin: The presentation of laick patronages alwaies reserved to the Just and auncient patrones. And that the Patroun present ane qualified persoun within sex monethes (after it may cum to his knawledge, of the decease of him quha bruiked the benefice of before) to the superintendent of they partis, quhar the Benefice lyes, or uther havand commission of the Kirk to that effect; utherwaies the Kirk to have power to dispone the samin to ane qualifyed person for that time." Then there is power to appeal to the General Assembly.

Let us see what was the admission of those ministers to the parish churches. The old parish churches occupied by the popish clergy were not superseded. The sustentation was demanded;—the third of the benefices was given;—the manses and glebes were secured; and when they come to make the arrangement that the admission of ministers, and the trial of their qualifications should be in Church Courts, they also settled that the rights of patrons was to be secured. Was there any admission into any thing but into benefices? And what kind of benefices? The history I have glanced at shows that they were parish churches, and that these were the parishes to which the patrons had a right to present.

In the same year (ch. 10) you will find that ministers are secured—not in the same kind of stipend that they have now, but in the thirds of the benefices. "*Item*, Because the ministeris hese bene lang defraudit of their stipendis, swa that thay are becumin in grait pouertie and necessitie and notwithstanding hes continewit in thair vocatioun without payment of thair stipendis, be ane greit space, quhairthrow thay ar and salbe constranit to leif thair vocatioun, without remeid be prouydit; Thairfoir our Souerane Lord with auise of my Lord Regent and thre Estatis of this present parliament, hes statute and ordanit, that the hail thriddis of the hail benefices of the realme, sall now instantlie and in all tymes to cum, first be payit to the ministeris of the euangell of Jesus Christ and thair successouris, and ordainis the Lordis of the Sessioun to

grant and gif letteris, charging all and sundrie intrometteris, or beis addebt in payment of the samin, to answer and obey to the saidis ministeris and their collectouris to be nominat be the saids ministeris, with auise of my Lord Regent, in forme as effeiris, notwithstanding ony discharge geuen be our souerane Lordis mother, to quhatsumeuer person, or personis, of the saidis thriddis, or ony pairt thairof, ay and quhill the Kirk cum to the full possessioun of thair propir patrimonie, quhilk is the teindis; Prouyding alwayis that the collectouris of the saidis ministeris, mak zeirlie compt in the chakker of thair intromissioun, swa that the ministeris may be first answerit of thair stipendis appertaining to euerie ane of thame. And the rest and superplus to be applyit to our souerane Lordis vse."

This is another proof that they were an endowed parochial clergy in 1567. I have thus read from "The Buik of the Universal Kirk" generally, the claims which were made by the clergy at this early period. I have also shown, on the other hand, what the legislature granted. Let us see what further the church do in this same year, 1567. They make up a roll of the clergy and the parishes of Scotland. That roll has been published in a separate work—published, if I am not mistaken, for the Maitland Club, entitled, "The Register of Ministers and Stipends, since the year of God 1567."

Lord MEADOWBANK.—Published for the Maitland Club. Do you mean to send us copies? (A laugh.)

LORD JUSTICE CLERK.—We are not members of the Maitland Club.

Mr ROBERTSON.—To send copies is beyond my power. I find at p. 37 of that publication, the parish of "Stewarton, Alexr. Henderson, Exhortar, xl merkis, Lambas 1572." So that here I see, in pursuance of an endowed parochial system, there was made up in this Assembly of 1765, with a view to enactment of that year, a list of all parishes within Scotland, and of all persons serving in the cures, and drawing the stipends for those parishes.

Now, in the year 1572 (ch. 52), all benefices, under 300 merks, were assigned to the minister. I need not trouble your Lordships with reading a long detail of the statute; but the effect of it is to approve of giving the disposition of all benefices, not exceeding 300 merks of yearly rent, to qualified ministers.

We next come to the act 1579, ch. 69, which gives general jurisdiction to the church, as an established church. Is not this, then, a parochial establishment? The act 1579 is a mere renewal of the act 1567, and is just a general acknowledgment of ecclesiastical jurisdiction, but plainly of ecclesiastical jurisdiction in an endowed parochial church establishment.

I stated to your Lordships that in 1567, there had been made out a list of the whole parishes, and clergy of Scotland. In 1581, there is another proceeding of some importance in the Church Courts. I beg to direct your Lordships' attention to Mr Peterkin's

Book of the Church, p. 207. The General Assembly met on the 24th April 1581, "where there was present the Commissioner for the King, the Laird of Capringtowne." The proceeding I allude to is this:—"The Laird of Capringtoun presentit the King's Majesty's letter unto the Assemblie, concernying also ane commission from his Hienes to concur with the Assemblie, together with certain rowes, containing the planting of the kirks and the number of Presbytries, with the kirks of every Presbyterie, quhilk the kirk ordaynit to be considerit," &c.

They were now approaching, as your Lordships will observe, to the making up of the regular roll of Presbyteries. Then, in the same year, there are these instructions (p. 209) given to the Laird; "To the removing of all occasions of complaint for the furtherance thereof, there is to be commandment and advyce of sic of our councill and the ministrie as conferrit in this purpose, some forme drawne how eldership may be constitute of a certaine number of parochines, laynd together; small parochines to be united, and the greit dividit, for the better sustentation of the ministrie, and the more commodious resort of the common people to their kirks."

Can any thing be more conclusive on the subject that there were then regular parish churches, and that regular Presbyteries were about to be convened, and that arrangements and negociations were going on with the state for fixing all these matters? On pp. 210, 211, 212, your Lordships will see the statements I have made in detail. Then there follows a list of Presbyteries. In 1581, an act of Parliament was passed, which bears materially on this point. You see what had been done in the making up of the rolls. Be good enough to look at this statute, chap. 100: "*Item*, becaus for laik of preaching and teiching in sindrie partis of the realme, monie people are suspectit to be fallen in greit ignorance and danger of godles atheisme. It being found maist difficult, that on the charge of pluracie of kirkes, ony ane minister may instruct moe flocks: thairfoir it is thocht expedient, statute, and ordanit be our Soverane Lord, and his thre estatis of this present Parliament, that everie paroch kirk, and samekle boundis as salbe found to be a sufficient and a competent paroch; thairfoir sall have their owen pastoure, with a sufficient and reasonable stipend, according to the state and habilitie of the place." The next chapter is against the dilapidation of the rights of benefices; then follows chap. 102, as to the presentation to benefices.

We come now to the statutes of 1584. The first I refer to is chap. 129, which is intituled, "An act confirming the Kingis Maiesties royall power over all statis and subiectis within this realme." I merely refer your Lordships to it, without stopping to quote from it. Chap. 129, is "Ane act, discharging all jurisdictionis and judgmentis, not approvit be Parliament, and all Assembleis and conventionis, without our Soverane Lordis speciall licence and commandment." Chap. 132 is headed, "The causes and maner of deprivation of ministers." It bears, "Our Soverane Lord, and

his thrie estatis, assemblit in this present Parliament, willing that the word of God salbe preachit, and sacramentis administrat in puritie and synceritie, and that the rentis quhairon the ministeris aucht to be sustenit, shall not be possest be unworthie personis neglecting to do thair dewties, for whilkis they accept thair benefices, being utherwayis polluted with the fraill and enorme crymes and vices after specefeit. It is thairfoir statute and ordanit be his Hieness, with auice of the saidis three estatis, that all personis," &c., "suspectit culpable of heresie, papistrie, fals and erroneous doctrine," and so on, enumerating the crimes by being guilty of which they "sall be deprivit alsweil fra thair functioun in the ministerie, as fra thair benefices, quhilkis salbe thairby declarit to be vacand."

Then in 1585 we have this statute (chap. 11), that all ecclesiastical persones, sall finde caution to leave the benefice alse gude as they fande it. And in 1587, there is another act (chap. 58), in which parish ministers are distinctly recognised. It relates to licence for eating of flesh in forbidden times; and after ratifying a former act on that subject, it thus provides—"With special provision that no licences shall be granted for eating of flesh on Lord's day (on Wednesdays, Fridays, and Saturdays, during lent), in time cumming, except the desirer thereof report a testimonial subscribed by a doctor of medicine, or be *the minister of the parochine* quhairin he dwellis."

Prior then to the year 1592, there was a parochial system in the Reformed Church,—there was an endowed system. No doubt the endowment was small enough; but there was an endowed system; and in the phraseology of the Rev. Dr Chalmers,—"Our ancestors did not attempt to make new machinery, or break the old, but they took the old machinery as they found it," and put on new workmen to work it in a better form. (These last words are not his, but mine). In this way the reformation proceeded. There was an old parochial endowed system. The new system was only a reform,—it was no doubt the establishment of a new system of religion, and an important and vital religious reformation; but there was no change of the endowed parochial system, which existed in Scotland prior to 1592. I say then that the church struggled from the outset of the reformation, for that which it received peacemeal and tardily enough; but it received from the beginning, an endowed, parochial, territorial system of management, and such was its condition prior to 1592.

The question then comes to be what was done in 1592? Was there a change of that system, or was there not a complete confirmation and strengthening of the system which I have now shown to have existed? I say that the clergy, previous to 1592, had rights, and endowments, and manses, and glebes from the state; and was there any power given to Church Courts in 1592, of receiving within their body unendowed clergy, without presentation, and assigning to them parishes without a permanent endowment? This is the shape which the question now takes. Was there any change

of that system, which from its infancy was, as I trust I have shown, an endowed, parochial, territorial system? Was there any power given to Church Courts of receiving within their body unendowed ministers,—ministers without presentation, and of allocating parishes to them? The history which I have read is very clearly brought out in a very able opinion by Lord Moncrieff, in a question in regard to the Tron Church, as to the right of appointing an assistant and successor. Your Lordships will find it reported in the 10th volume, Shaw, p. 307; affirmed on appeal, 15th August 1832; 6 Wilson and Shaw, vol. vi., p. 24. "The fundamental principle of the Scottish Church" says his Lordship, "is, that every man admitted into Ecclesiastical orders—every man *ordained* as a minister,—must be ordained as actually the minister of some parish, or of a chapel district precisely fixed." I submit, then, that the deduction which I have given, shows that from the reformation downwards, such was the nature and constitution of the Church of Scotland, that it was an endowed parochial system.

Look now at the act 1592. We must read chap. 116, 117, 118, and 123 together. This act is familiar to your Lordships. Chap. 116 is headed, "Ratification of the liberty of the trew Kirk—of General and Synodal Assemblies; of Presbyteries; of Discipline," &c. Chapter 117 is,—"Unqualified persones being deprived, the benefice vaikis, and the patron not presentand, the richt of presentation pertanes to the Presbytery, but prejudice of the tackes, set be the person deprived." Then 118, "annent manses and glebes." Then 123 ratifies the act of February 1587, in favour of ministers, their stipends, and so forth. This is one general settlement; and it asserts the liberty of the true kirk, the rights of Assemblies, Synods, and Presbyteries: it asserts the rights of presentation to benefices, collation, and deprivation: it asserts the right of the church to pastorages, vicarages, manses, and glebes,—the whole proceeding on the theory of an endowed parochial system.

I have thus got down to 1592; and I ask your Lordships, is there in these statutes any trace of a power given to the Assembly or Church Courts to allocate parishes? I say that the system, from its history, proves that the parochial clergy were endowed, not very liberally I admit, but they had the rights of their benefices protected. They were to be presented by the patrons. Additional parishes might, from time to time, have been sanctioned by the legislature as lawful parishes; but no power was given by the legislature to the Church Courts to take into their own hands the power of dividing parishes into such districts as they might think fit. Whether they have it by practice, independently of statutes and acts of Assembly, are questions which I shall speak to hereafter; but at present, having got this length, I submit that, from the origin of the Church of Scotland down to 1592, there was a parochial system, a patronate, and an endowed church; and no power is given expressly, at least,—I say none by implication—to Church Courts to make parishes to themselves by their own authority.

Having detained the Court so long on the first part of the case, I now proceed to the statutes subsequent to 1592. Bishops were restored by the act 1606, chap. 2. In 1617, by chap. 3, stipends were declared to be allocated to the ministers on the teinds of the land. This, your Lordships will recollect, is the first commission of teinds. I think I may state distinctly that, from 1617 downwards, there being now a Commission of Teinds which had power to unite and sever parishes, the power of dividing parishes, and of erecting parishes, was exercised from that date downwards, by the Commission of Teinds, and not exercised by the General Assembly. Even during the time of the Covenant, from 1638 down to 1649, the records of the Church Courts are full of recommendations, to the number of at least about forty instances, for the erection of new parishes—to the Commissioners of Teinds, sometimes to the Privy Council; and thus even in the hey-day of Presbytery, the power of dividing or erecting parishes was not attempted by them. There was a Commission for this purpose; and I may safely state that the other party will not be able to point out, in any way, that it was the practice of the presbyterian church, subsequent to the dates I have mentioned, even to attempt to allocate new districts, and erect new parishes. I am here anticipating a little, but I cannot resist coming out with the observation in the meantime. Prelacy was abolished in 1689, by chap. 3. Then comes the revolution settlement, 1690; and what is the commencement of that settlement? Chap. 2 is the act restoring the presbyterian ministers, who were thrust from their churches; and I pray your Lordships to look at the terms of the act, which ordain and appoint "that all those presbyterian ministers yet alive, who were thrust from their charges since the 1st day of January 1661, or banished for not complying with prelacy, have forthwith free access to their churches, that they may presently exercise the ministry in these parishes, without any new call thereto; and allows them to bruik and enjoy the benefices and stipends thereunto belonging," &c.

Now, what was this? Was it not the renovation of the endowed parochial system, not the creation of a different system? The beginning of it is "to restore those ministers to their parishes, that they may presently exercise the ministry in their parishes without any new call." In the same year, follows chap. 5, ratifying the Confession of Faith, and settling presbyterian church government. Prelacy then is abolished, the Confession of Faith ratified, and church government is declared to be appointed.

Then an act is passed in the same year, transferring the patronage of the church to the heritors and elders, chap. 23. Then in the year 1693, we have an act, chap. 23, "for settling the quiet and peace of the church," and containing an express declaration that no person be admitted or continued hereafter, to be a minister or preacher within this church, unless he first subscribe the oath of allegiance, and subscribe the assurance in the manner appointed by another act, passed in the same session of Parliament. There is thus an express statute

declaring that no minister shall be admitted or continued to be a minister within this church, unless he shall first take the oath of allegiance. It is further declared in this act, which you will be pleased to observe is an act to introduce the representative system into the church, " that the representation of this church in its General Assemblies may be the more equal in all time coming, recommends it to the first Assembly that shall be called, to appoint *ministers* to be sent as commissioners from every Presbytery, not in equal numbers, which is manifestly unequal where Presbyteries are so, but in a due proportion to the churches and parishes within every Presbytery." What ministers? Were they not parochial ministers? The parochial system existed; and it is declared that no minister shall be admitted or continued in the church without taking the oath of allegiance. It fixes the church government; and, for the more effectual settlement of the matter, an humble address is sent to their majesties, " that they would be pleased to call a General Assembly for the ordering the affairs of the church.'

The act, we see, empowers the General Assembly to fix and settle the number of representatives of that body, in proportion to the number of parish ministers. We must here look at the Church of Scotland at the time of the revolution settlement; and what is that settlement? It restores the ousted ministers to their parish churches and manses; it ratifies the Confession of Faith; it fortifies the state by demanding the oath of allegiance to the crown, by the act 1693; it creates the representative system; and it declares that the General Assembly shall proportion the representation to the number of parish ministers. It is quite clear, therefore, that no power was given to the church to allocate or create new parishes. They have nothing whatever given to them to sanction or authorise such a thing.

Let us see what is done by the Assembly of 1694. Under the act 1693, no power is given them to allocate or create parishes, but only to fix the number of their representatives. Accordingly, by the act of Assembly 1694, chap. 5 (Acts of Assembly), they enact and appoint " that, in all time coming the representation of the several presbyteries of this national church, in its General Assemblies, shall hold proportion to the number of *parishes* in which there are, or ought to be, settled ministers within each Presbytery."

Then it gives the number of representatives, proportioning the number from each presbytery, according to the number of the parishes within it; and then they ordain that no persons shall be admitted members of Assembly but such as are ministers or elders, parochial ministers, be it observed,—fixed parochial ministers,—not ministers of parishes to be created at the pleasure of the General Assembly. What would have been said if, in 1694, the General Assembly had added between two and three hundred members to the Establishment at once, allocating to them new parishes? Would it have been listened to for a moment? It is quite plain, on the authority given by parliament, that it was ministers of parishes only, endowed ministers, who were sanctioned and acknowledged

by the state, and these alone could be lawfully made members of Assembly.

Then we have the act of Parliament 1695, chap. 27, allowing ministers to return, which announces to all ministers, "such as shall duly come in and qualify themselves as said is, and shall behave themselves worthily in doctrine, life, and conversation, as becomes ministers of the gospel, shall have and enjoy his Majesty's protection as to their respective kirks, and benefices or stipends, they always containing themselves within the bounds of their pastoral charge within their said parishes," &c. Observe how strong is this chap. 27. Those additional ministers had not yet come in to take the oath of allegiance. They were permitted to come in; and what were they to get? To enjoy his Majesty's protection in their kirks, and benefices in their several parishes.

I therefore submit to your Lordships that there is no power given by statute to Church Courts to create new parishes. I say next, that no civil authority, that no ecclesiastical authority, asserts that they have or ever had such a power. Such a power not only does not follow from, but is plainly excluded by, the statutes; and I say, with deference, that the law of Scotland does not sanction or acknowledge such a distinction as a parish ecclesiastical and a parish civil. I distinctly say that there is no such power given to Church Courts. I know that there are what have been called *quoad sacra* ministers, and that there are new erections; but I desiderate the existence of such a distinction in law as a parish ecclesiastical distinct from a parish civil. A parish is either a parish to all intents and purposes, or not at all. There was no change made in the constitution of the church, or any change of importance, subsequent to the period to which I have spoken, excepting the well-known act of Queen Anne. The effect of that act was merely to restore the rights of the patrons. Patrons being restored, how stood the protection of the state? I say there was a double protection in the oaths to government. I have shown you that oaths were enjoined on the *ministers* by the act 1693; and this is renewed by the act of Queen Anne, chap. 29. The oaths of the *patrons*, on the other hand, were enjoined, first by the act of Queen Anne, and secondly, by the act George I. chap. 29. Patronage, whether it be a good or an evil thing, is the existing law of the Church of Scotland; and a stronger instance of this cannot be found than arises out of the necessity of heritors and liferenters purchasing the patronage at the time the right was bestowed on them in place of the ancient patrons. They took it, then, only by purchase, and as patrons. In the case of Cadder, where the heritors and liferenters had availed themselves of the right of purchase, it was found that it was only through patronage that a minister of a parish could be presented. See the case of Cullen against Sprott, November 1840, 3d vol. of Dunlop, p. 70. The case is well known to Lord Cockburn, who pronounced a long interlocutor in it. I shall just read the rubric of this case:—"During the subsistence of the act 1690, chap. 23, the statutory sum of 600

merks was paid to the patron of the parish of Cadder by the heritors and liferenters, but no renunciation of the patronage had been granted in 1712, when the act 1690 was repealed; in 1725, the patrons, on the narrative of the provisions of the act 1690, and of the payment which had been made to them, executed a renunciation and conveyance of the right of presentation in favour of the heritors and kirk-session—Held that every subsequent vacancy in the parish was to be supplied, not by election under the act 1690, but in exercise of the right of patronage conveyed to the heritors and kirk-session by the deed of 1725." It is thus established that even in that strong case the only mode of being admitted to the Church of Scotland is by the exercise of patronage; and where there is a competition in a popular election, the question is, Who has the support of the lawful majority of the patrons? You must, in short, get in through patronage, else you cannot get in at all.

If, then, I have been successful in showing that up to this period no power has been conferred on Church Courts of erecting parishes, I next make the remark, that such power is conferred by act of Parliament on a different body,—on the Commission of Teinds. I call your Lordships' attention to the statutory commission of 1617, the first commission for the plantation of kirks, which was the first act that gave a right to claim on the teinds of the land. Then there follow the commissions which I now mention: 1633, chap. 19; 1641, chap. 56; 1690, chap. 23 and 30; 1693, chap. 23, and finally as embodied at the Union, 1706, chap. 9. Here, then, were statutory Commissions for the purpose of doing that which, if necessary to be done at all, might then be done legally, but which is here illegally attempted to be done by the Church Courts. Now, during the existence of those commissions, what was going on? Was the General Assembly from 1617 downwards, creating new parishes of its own authority and sanction? No, the General Assembly, as I shall show you, was making no such attempt, setting up no such pretension. And what has taken place under the last named commission since the Union? The first power given is a statutory power to the Court, to divide and unite parishes. You will find the practice fully explained in Sir John Connell's book, where you will see that there were frequent appearances by the Procurator for the Church in the disjunction and union of parishes. I refer to pp. 65, 66, 75, and 88. You will find that in those disjunctions and unions of parishes the Procurator for the church appeared. The next thing done is to erect parishes. There also you will find repeated appearances of the Procurator for the Church, sometimes to forward and sometimes to oppose the erection. I refer your Lordships to pp. 170, 183, and 200. Instead of reading the passage from the last page, I merely refer your Lordships to it, as it is not easy to condense it. This was a process of union; it was disapproved of by the Presbytery and Synod, and referred to the General Assembly. The Assembly disapproved of it also by a judgment in these terms, "That the interests of religion and the church

require the proposed annexation and suppression should be resisted, and that the Procurator for the Church should be directed to oppose the same in the proper court, in the name of the Church of Scotland." Then at page 217, Sir John gives a summary of the practice of the Court after the union in united parishes. "It appears," says he, "First, That the grounds of procedure have been the smallness of the parishes proposed to be united in point of extent and population, the contiguity of their situation, and the inadequacy of the funds to provide for two ministers: 2d, That the proposed union has usually received the approbation of the Presbytery or other Church Courts, before the sanction of the Teind Court has been craved; but that the consent of the Church Courts has not been deemed to be essential to such a measure; and that the measure might even be carried into effect, although opposed by the Church Courts," &c. Here also, and in proceedings of this kind, the Procurator of the Church makes appearance. For example, see p. 218, in a process for disjoining Polmont from Falkirk; a process was brought by the moderator of the Presbytery, and the Procurator of the Church, for disjoining Polmont from Falkirk, and erecting it into a new parish. The Court pronounced an interlocutor disjoining the lands from Falkirk and annexing them to several other parishes, and afterwards (2d December 1724) adhered to that judgment. The effect of annexing, *quoad sacra*, is to render the lands so annexed liable in the expense of upholding the fabric of the church; but as to every thing else, they remain liable to the civil burdens of the old parish. You will find that distinctly laid down in Sir John Connell's book, p. 225, and by Mr Dunlop, p. 11 of the former edition. Then there is another power—and this is a curious illustration—in the Commission of Teinds,—a power of transporting churches. This is entirely in the Commission of Teinds, and not in the Church Courts; and it appears that at one time they had attempted to exercise the power of transporting churches.

Lord GILLIES.—Transporting churches!

Mr ROBERTSON.—That is the phrase. Here is an account of it, given by Mr Dunlop:—"Heritors have no power of their own authority to remove the church from one part of the parish to another. For some time after the Reformation, the power of transporting churches, as it is called, was assumed by the Church Courts; but their right to exercise it was never recognised by the civil power: on the contrary, although the transportation of several churches, which had taken place by authority of the Church Courts, was ratified in Parliament, no allusion is made in the respective acts of Parliament to the authority of the church having been interponed; but the change of situation is sanctioned as if it had been made by the parishioners, without any authority whatever. This sufficiently shows the understanding of the legislature on the subject, and, indeed, if the Church Courts had been held to have possessed the power of transporting churches, it is probable that no applications

for ratification would have been made to Parliament." Edit. 1830, pp. 26, 27.

In unison with this sentiment, I observe, that if the Church Courts had had the power of making new parishes,—of remodelling the parochial system of Scotland, they would have made no appearance in the Commission of Teinds, and they would have had no chapels of ease. Therefore, I submit that this is another illustration of the exclusive right given to this Court, the Commission of Teinds, to attend to such matters. It is not given by the legislature to the church: it is given to the Commission of Teinds from time to time; and ultimately that commission has been vested in your Lordships.

If then, my Lords, I have been successful up to this stage of my argument, I am now to proceed with the consideration of the more recent statutes, on which the main argument of the other party seems to be rested. If they can show that they have statutory power, then I admit that there is an end to my argument. But it must be power directly conferred by statute. If I am successful in proving that they have not got the express power, it will not do to say that by inference or implication, or by a parenthetical part of the narrative of a statute, the legislature had given that power to the church. No, they must show an express statutory provision; and if they do so, I admit that my case is at an end. I think they will find it extremely difficult to do so,—they will find that the recent statutes are in accordance with the old statutory law of the kingdom, and that the legislature have never authorised this stretch of power.

The acts founded on by the other party, are 4 Geo. IV., chap. 79, and 5 Geo. IV., chap. 90. I am mistaken in reading these statutes, if the argument thence derivable is not against the respondents. The first of these gives the power of building places of worship in the Highlands and Islands. Section 6 provides, that notice shall be given to the incumbent of the parish, and to the parishioners. The 7th appoints commissioners to determine and ascertain the situation of the building, which shall be erected or purchased, and fitted up, pursuant to this act, as an additional place of religious worship, to be and become an assistant church in such parish, for the use and convenience of the inhabitants thereof, and of any adjoining parish or parishes, with a churchyard or place of burial, if such shall be deemed necessary, and of the dwelling-house, with such offices and appurtenances as it may be proposed, or as the said commissioners may think it proper, should be afforded to the minister to be appointed, pursuant to this act, to officiate at such assistant church." The phraseology is here strong: "for the use and convenience of the inhabitants." Then there is the amount of the stipend fixed, and so on. Then power is given to the majority to nominate and appoint a fit person to be minister of the church, with right to the stipend thereof. Then, by the 15th section it is provided, "On receiving such presentation, the person therein nominated shall be admitted as a minister to officiate at such church, in the same man-

ner, and according to the form prescribed for the admission of any person, as a minister of a parish in Scotland, and every person so admitted as the minister of such church shall be deemed and taken to be an assistant minister to the minister of the parish in which such church shall be situated, and in respect of such minister shall be and remain in the same situation as an assistant minister, now, as in respect of the minister of any parish in Scotland, of whom he is the assistant, save and except that he must perform the duty of a minister of the gospel at the church to which he is appointed, by virtue of this act."

Now, does the act acknowledge any power in the General Assembly, or confer such power? On the contrary, the minister is to be an assistant minister in the parish. The act, chap. 90, Geo IV., passed to amend the former, is extremely strong. This is the act of 1824. Notice is to be given to the incumbent. Then what are the commissioners to do? Section 6. The commissioners have power conferred on them in the following terms:—" That from and ' after the expiration of a certain time, to be specified in such notice, ' it shall and may be lawful for the said commissioners, after having ' inquired into the circumstances of the case, to settle and determine ' whether an additional place or places of religious worship should ' be provided in such parish or parishes; and if the said commis- ' sioners shall determine that an additional place or places of wor- ' ship ought to be provided for the parish or parishes, from which ' such application shall have been made, then the said commissioners ' are hereby empowered and directed to require the heritor or heri- ' tors making such application, to settle and agree with the Presby- ' tery of the bounds, so as to define and set apart a certain district ' within such parish or parishes, for behoof of which district such ' additional place of worship is to be erected or provided, and to ' which the labours of the minister to be appointed, as hereinafter ' directed, to officiate at such additional place of worship, shall be ' confined." And if the heritors and Presbytery cannot agree, a report is to be made by the sheriff, and the commissioners are directed, before the district is defined, to settle the proper situation, and the " size and description of the building which shall be erected ' or purchased and fitted up, pursuant to this act, as an additional ' place of religious worship, to be and become an additional place of ' religious worship, in full communion with the Established Church ' of Scotland, with a churchyard or place of burial (if such shall be ' deemed necessary), and of the dwelling-house, with such offices ' and appurtenances as it may be proper should be afforded to the ' minister thereafter appointed, pursuant to this act, to officiate at ' such additional place of worship, and the said commissioners are ' hereby further authorised to proceed in the erecting or purchasing, ' and fitting up the said building or buildings, as the case may re- ' quire, before any such district is defined, and set apart as aforesaid." Then, by section 14, the commissioners are certified to state the completion of the additional places of worship, and amount of stipend to

be paid. By the 15th section, the presentation is to be laid before the Presbytery; and where the person so nominated shall be admitted, he shall thereby be entitled and bound to "discharge within 'the district for behoof of which the said place of worship shall have 'been erected or provided, all the duty of a minister of the Church 'of Scotland, save and except the right and duty of church disci-'pline, and shall be in all respects subject to the discipline and 'government of the Church of Scotland, by Presbyteries, provincial 'Synods, and General Assemblies, as by law unalterably established." By section 25, it is declared, that "all questions which may arise in 'courts of law respecting the rights of the ministers appointed to 'officiate at such places of worship, or regarding their civil and pa-'trimonial interests in their respective situations, and all questions 'which may arise respecting the administration of the weekly or 'other collections made at such places of worship, shall be judged of 'and determined respectively, according to the law of Scotland re-'specting the rights and interests of parochial clergy, and respecting 'the administration and distribution of the collections made at parish 'churches, in so far as may be consistent with the provisions of this 'act, and regard being always had to the consideration, that the 'district set apart for the duties of such minister, appointed as afore-'said, is not disjoined from the parish or parishes to which it be-'longs, or erected into a separate parish, and that the elders officiat-'ing at such place of worship do not, along with such ministers, 'form any separate and distinct kirk-session or kirk-sessions, of the 'respective parish or parishes, in which the district has been set 'apart, and have no authority or jurisdiction, except such as by law 'belongs to them as members of such kirk-session or sessions, and 'acting as members of meetings of the same."

Section 26 declares, "that nothing contained in this act shall interfere with or be construed to interfere with the discipline and government of the Church of Scotland, by kirk-sessions, presbyteries, provincial synods, and general assemblies, as by law unalterably established, and the ministers appointed to officiate at the places of worship, erected or set apart under the authority of this act, shall be in all respects subject to the ecclesiastical superintendence and government of the Church of Scotland, according to the laws of that church." I submit that this statute, in place of sanctioning any thing like the attempt of bringing in a new parochial system, makes an express provision that the new arrangements shall not interfere with the old parishes. It therefore, did not sanction in any respect what was done by the General Assembly in 1833, when the forty parliamentary ministers were admitted.

I come now to the act called the Colquhoun Act, which forms an important part of the argument.

The Lord President.—As you will not be able to finish in one day, you had better pause here, and go on to-morrow.

WEDNESDAY, JUNE 22.

Mr P. ROBERTSON.—My Lords,—I was proceeding yesterday to call the attention of the Court to the act 4th and 5th William IV., strongly founded on by the other side, commonly called the Colquhoun Act. I trust I have satisfied your Lordships that, up to this period at least, in so far as civil enactments are concerned, no power was given to the church, by statute, to erect parishes or any power conferred on them by the legislature to that effect. Keeping this in view, I have now to call your attention to the provisions of that statute, and to see whether it does give a power hitherto not acknowledged by the legislature. On the contrary, I submit, from a view of the whole statutes, and from the tenor of the last statutes respecting parliamentary churches, that such power is not acknowledged to exist in the church at all. This act, 4th and 5th William IV., is an act "to regulate the appointment of ministers to churches in Scotland, erected by voluntary contribution." The principal part of it your Lordships will find at p. 77 of the case on our side. "Whereas, in many parishes in Scotland the means of public worship, provided by the Established Church of Scotland, are inadequate to the extent of the population, and it is expedient to encourage the erection of additional places of worship by voluntary contribution." By the 1st section it is enacted, "That where any church, chapel, or any other place of worship in Scotland, built, acquired, or endowed by voluntary contribution, shall, according to the provisions of the existing law, be erected into a parochial church, either as an additional church within a parish already provided with a parochial church, or as the church of a separate parish, to be erected out of a part or parts of any existing parish or parishes, whether the same be established and erected merely *quoad spiritualia*, by the authority of the Church Courts of the Established Church of Scotland, or also *quoad temporalia* by authority of the Lords of Council and Session, as commissioners of teinds; neither the king's majesty, nor any private person, nor any body politic or corporate, having right to the patronage of the parish or parishes within which such additional churches shall be established, or out of which such new parishes shall be erected, shall have any claim, right, or title whatsoever, to the patronage of such newly Established Churches, or newly erected parishes; but the appointment of ministers thereto shall be made according to the manner, and subject to the conditions, which shall be or have been prescribed by the said Church Courts, subject always to such alterations as shall be made by them, according to the laws of the Church, from time to time." Then there follow provisos, that no part "of the stipends of ministers appointed for the service of any such additional churches, nor any charge for repairing the same, &c., shall be imposed on, or become chargeable upon the teinds, or to the heritors of any parish, or magistrates of towns in which any such

church shall be erected or endowed by voluntary contribution, as aforesaid." And "that nothing herein contained shall be construed to limit or affect the powers of the commissioners of teinds, exercised under the provisions of the act of the Scottish parliament."

Now, does this, or does it not, sanction to the church the right of assigning new parochial districts? The words upon which the whole argument rests are not the enactive words of the statute at all. The object of the enactment is to prevent the patron claiming the right of patronage in those churches so built and endowed. It had been decided in the case of Haddington, Nov. 18, 1680, Morrison 9901, that where a second minister was endowed, and "provided in a stipend by voluntary contribution, the patron was found to have right to present both ministers." In a subsequent and similar case, referable to the parish of Whitburn, 26th February 1762, Morrison 9933; where a new church was endowed by a number of the heritors and inhabitants of the parish, and it was declared, by the deed of mortification, the ministers were to be named to the new church so erected within the parish,—it was held the patron's right of patronage continued over the whole parish, and applied to both churches.

It therefore might have been contended, on the part of the patrons of those parishes where churches had been built by voluntary contributions, that they had right to the presentation of the ministers of those churches. The object and meaning of the enactment of this statute was to declare that the patrons should have no such right; but that the right of patronage in those churches should be according to the constitution appointed by the Church Courts, and that "neither the king's majesty, nor any private person, nor any body politic or corporate," should claim right or title to the patronage of those newly established churches; "but that the appointment of ministers thereto shall be made according to the manner, and subject to the conditions which shall be or have been prescribed by Church Courts, subject always to such alterations as shall be made by them, according to the laws of the church." This is not, as you will observe, an enactment that the Church Courts or the General Assembly shall have the power of erecting parishes which I am now assuming to be new. This power is not given to them by express enactment. If I be right in the view I have submitted of the law, that this power in the church did not exist under any prior statutory enactment, I submit that the law cannot be held to have been altered by the last act.

The reference to the erection of parishes *quoad spiritualia* does not occur in the enacting terms of the statute; it occurs only in a parenthetical part of the narrative. What is the purpose of the act? It is, "That where any church, chapel, or any other place of worship in Scotland, built, acquired, or *endowed*, by voluntary contribution, shall, according to the provisions of the existing law, be erected into a parochial church, either as an additional church within a parish al-

ready provided with a parochial church, or as the church of a separate parish, to be erected out of a part or parts of any existing parish or parishes," and so on,—that neither the crown, nor any private persons, shall have any claim to the patronage. If I am right in my argument, no new church can be erected into a parochial church,—according to the existing law,—unless through the instrumentality of the commission of teinds. No doubt, there do occur in the narrative of the act, the words, "an additional church within a parish," and, "whether the same be established and erected merely *quoad spiritualia*," "or also *quoad temporalia*." But still, the whole act will read for its purpose and object just as well and as effectually, whether these words within the parenthesis, "whether the same be established and erected merely *quoad spiritualia*," or "*quoad temporalia*," be in the statute or not. They are not essential to the meaning of the statute, or to the object of the enactment of the statute. This is quite obvious. I do not, indeed, very well understand what sort of right a patron could have in a church which was erected only *quoad spiritualia*. These terms, I repeat, are not essential to the object or purposes of the act. They are not necessary for the introductory part of the act, so as to render it clear what was the object of the legislature in framing the statute, far less are they necessary for the enactment of that object. Then, observe that those churches are to be erected according to the provisions of the existing law. I deny that any such chapel, or any other place to be kept up by voluntary contribution, could be erected into a parochial church, without the authority of the Commission of Teinds. They must be erected according to the provisions of the existing law. If I have shown this to be clear,—although it is said parenthetically in the act, "whether the same be established and erected merely *quoad spiritualia*," or "*temporalia*,"—if the existing law is to govern the provisions, or to govern the erection of such parishes; and if the provisions of the existing law be as I have stated them to be, I submit that the words which follow, namely, as to the erection *quoad spiritualia* or *temporalia*, cannot control the enacting words of the statute, or over-ride the narrative part of the statute which declares that they are to be made according to the existing law.

But next, it is declared at the conclusion of the clause, that nothing therein shall be construed to limit or affect the powers of the Commissioners of Teinds. This nullifies altogether the power here attempted to be made out, as existing in Church Courts or in the General Assembly. If you were to allow Church Courts to have the power to create new parishes, which power was vested in the Commissioners of Teinds, and not in the Church Courts, you would do so against the provisions of the existing law. How these parenthetical words got there, and for what purpose, it is not for me to conjecture. But we must read the enacting part of the statute according to the law as it stood at the period when that statute was passed, and according to the provisions of the existing law; and if the provisions of the existing law; and if the powers of the Commission

of Teinds, which are expressly reserved under the statute, were to give to that commission the right to erect parishes, then, I say, that any declaration in the parenthetical part of the statute never can over-rule the law as it stood before. You are always to presume that the enactments of a statute are consistent with the law as it existed, and you are to construe those provisions with the object and purport of the statute, which was not to give the General Assembly a power which did not exist before, and not to take away from the Commission of Teinds a power recognised and reserved to them, but merely to give the right of patronage in terms of the provisions of the constitutions of those places of worship, and to cut off the right of the patrons of parishes from any such claim. This statute does not sanction or authorise the pretensions rested on it. I do not resume the argument on the former statutes. I assume that I have satisfied your Lordships that they do not authorise, but are against, the pretensions of the church ; and I submit that it was not the purpose of the legislature, or the object of this act,—by a sort of side wind, or parenthetical member of a sentence,—to alter and innovate on the whole parochial establishment of Scotland, and to give that power to Church Courts which the act does not give, and which it is not the purpose of the act to bestow, reserving, as it does, the whole power of the Commission of Teinds.

The only other statute on which my learned friends found, is the act as to schools, 1st and 2d Victoria, chap. 87. The object of that act is to authorise sums to be appropriated for education and the endowment of additional schools. It contains a variety of provisions as to the endowment of these schools ; and there is in the narrative, an allusion to places of worship and division of parishes *quoad sacra*. This act was passed in the year 1838 ; and it is material to observe, that it bears no reference whatever to the Colquhoun act of 1834. The act to which it refers in the paragraph which I am about to read, is the 5th Geo. IV., chap. 90—the one in regard to the parliamentary ministers. Therefore, if I am right in my argument, that the act in regard to parliamentary ministers does not sanction such pretensions—it is pretty clear that this statute in regard to schools cannot have that effect. It narrates the act of 1696, chap. 26, for the settling of schools, and the acts the 43d Geo. III., chap. 54, and the 5th Geo. IV., chap. 90, on the same subject ; and then it says, " whereas, &c., a number of places of worship have been built in the Highlands and Islands aforesaid, and the parishes in which such additional places of worship have been built, have been divided and disunited *quoad sacra ;* and whereas the parish schools and other means of education existing in the Highlands and Islands aforesaid, are wholly inadequate to the education of the people, and some places are altogether destitute of such schools or other means of instruction ; and it is desirable that provision should be made against so great an evil. Be it, therefore, enacted by the Queen's most excellent majesty, and with the advice and consent of the Lords spiritual and temporal and Commons in

this present Parliament assembled, and by the authority of the same, that it shall and may be lawful for the Commissioners of her Majesty's Treasury of Great Britain and Ireland, for the time being, or any three of them from time to time, to set apart and appropriate from any sum which has been or may be voted by Parliament for purposes of education in Scotland, any such part thereof as they shall deem expedient and necessary for the endowment of additional schools in such part of such divided parishes aforesaid as they shall judge proper."

I do not see what aid this can give to the argument on the other side. The act, instead of sanctioning, expressly prohibits this mode of the allocation of parishes; and therefore it is an act which puts the schools under certain regulations, and can have no reference to any other act. The ministers of parliamentary churches have no vote for schoolmasters under this act, which has been expressly decided; see 3d Dunlop, 513.

The only other act is Lady Glenorchy's chapel act, which I pass over. It was merely a private statute, passed with consent of all parties.

If, then, I have satisfied your Lordships that this power of making new parishes is not given by any act of the legislature to the church in 1592, or is not enacted at the revolution,—if I have shown you that there is no statutory power subsequent to that date, bestowing this power on Church Courts; and if, on the contrary, the want of such power is completely established, by showing that the power has been given to the Commission of Teinds only,—I now proceed to call your Lordships' attention to the *Acts of Assembly*, in regard to the manner in which that body passed its own enactments, prior to the recent innovations commenced in 1833. You will recollect that the act of Parliament 1693, chap. 22, gave power to the Assembly to regulate the number of representatives. I again call your attention to the terms of that statute, "respecting the quiet and peace of the church," which contains the provision as to the oaths. Here are the words as to the representation of the church—"To the effect that the representation of this church in its General Assemblies may be more equal in all time coming,—Recommends it to the first General Assembly that shall be called, to appoint ministers to be sent as Commissioners from every Presbytery, not in equal numbers, which is manifestly unequal where Presbyteries are so, but in a due proportion to the churches and *parishes* within every Presbytery, as they shall judge convenient."

This is in 1693. There had existed in 1617 the original commission by which new parishes might be erected, or old parishes disjoined. Presbyteries, therefore, must by law, vary as to the number of ministers in the Assembly. Power is given to the Assembly to regulate the number of representatives in the Assembly in proportion to the number of parish ministers in the Presbyteries. And accordingly you will find in the fifth act of Assembly in 1694, that regulation is made by the General Assembly, in conformity with the act 1693,

apportioning the number to be sent according to the number of parish ministers. But have the General Assembly, at their own hands, either increased or diminished the number of ministers in each particular Presbytery? If they could have done that legally, could they not have remodelled the whole arrangement in any way they pleased? If they could have legally increased the number of ministers to sit in each Presbytery, they might, in the same way, have increased the number of elders,—they might have swamped the original body in the Presbytery, and in that way they would swamp the body which came to be the representative body in the Assembly. The power is given merely to regulate the number of endowed parish ministers; and they proceed to do so in 1694.

I next call your attention to what took place in the Assembly in 1753.

Lord Justice-Clerk.—You do not dispute that parishes may be transferred from one Presbytery to another; but that the Church Courts cannot increase the number of parishes?

Mr Robertson.—That is what I mean. My argument is this; that the Presbyteries cannot be increased by the admission of ministers, by the mere act of the Church Courts,—that nobody but parish ministers can form a part of the constituent body of the Presbytery. They cannot increase the number of parish ministers; no such power is given to them; and if it had, it would shake and alter the whole representative system of the church, according to their pleasure.

In 1753, an attempt was made to introduce ministers, not parish ministers, into the Assembly: see chap. 4, acts of Assembly. They had been in the habit of sending up commissioners from among the missionaries enjoying appointments under the royal bounty. "The General Assembly taking into consideration the case of commissions given sometimes by Presbyteries to missionary ministers employed by the managers of the Royal bounty to represent them in the Assembly, do hereby discharge all Presbyteries to elect such missionary ministers to be their Commissioners to the General Assembly in time coming." This is all right and proper,—quite conformable to law.

Then in 1766 there is a proceeding which is not in the printed acts. I read from the 2d vol. of Morren's Annals of the Assembly, p. 311.

Lord Meadowbank.—I never saw it nor heard of it.

Mr Robertson.—It is quite authentic, my Lord. This is a proceeding of the commission. The question is referred to the commission, and therefore it is not in the printed acts of the Assembly. "A letter from the Presbytery of Abertaph, craving that the General Assembly would order the *missionary ministers* employed among them to attend their meetings and be associated members on account of the smallness of their number in said Presbytery—which letter was read and the desire thereof *refused*." They would not admit those missionary ministers to be members of that particular Presbytery.

Then come chapels of case. It is not very easy to trace the his-

tory and origin of these chapels of ease; but so far as I am able to see, the first one is that of the congregation of Mr Gillespie at Dunfermline. There are a variety of proceedings with regard to this chapel and congregation, with the details of which I need not trouble you; but at last the congregation was admitted in 1782.

Lord MEADOWBANK.—This was a church built after Gillespie's deposition?

Mr ROBERTSON.—Yes. It was however finally admitted in 1782, with a proviso that it was subject to the jurisdiction of the kirk-session of Dunfermline. You will find the words in the 5th clause of the regulations of that body. I direct your Lordships' attention to it to prove, that down to this period—and we are now approaching the act of 1798, anent chapels of ease,—no attempt was made by Church Courts to create new parishes at their own hands. On the contrary, they excluded missionaries both from the General Assembly, and from the particular Presbytery which had made the application. And then, be it observed, when they did admit this congregation of Gillespie's in 1782, it was on the condition that they were to be liable to the jurisdiction of the kirk-session of the parish.

We come now to the act 1798, chap. 5 (introduced first in 1796), as to chapels of ease. I am not disputing the legality of this act,—I have no occasion so to do. On the contrary, assuming it to be legal, I am founding on it as the strongest possible acknowledgment that the power afterwards assumed by the church, beginning in 1833, of creating parishes, and introducing the ministers of such parishes into the General Assembly, is inconsistent with the practice which that act acknowledged and rendered lawful. I do not trouble you with reading the detail or provisions of it. I stated that it was introduced as an overture in 1796; and in that very same year there was a proposal made that ministers of chapels of ease should be allowed to sit in the General Assembly as elders. Your Lordships will find that this is taken up under the proceedings of the General Assembly, 23d May. "The Assembly proceeded to consider the reference of the Synod of *Aberdeen* respecting ministers of chapels of ease being admitted to the kirk judicatories. After reasoning, and the vote being put, the Assembly declared, that it appears to this Assembly that ministers of chapels of ease, being in the habitual exercise of the functions of the ministerial office, are thereby disqualified from sitting as lay elders in the judicatories of this church."

They were thus held to be ministers of the church to such an extent that they were not admitted as lay elders; but then as ministers they were not members of Assembly. They had no parishes,—they were merely *attachées* to the church; because the church had no power to incorporate such persons as an addition to their body, and could not allow them to sit in the Church Courts.

Then followed the act 1798. I need not trouble your Lordships with the details of that act. There are a variety of regulations; for instance, the Presbytery are to decide as to the security of the mi-

nister's stipend, and as to the appointment of a minister; and the sanction of the Assembly must be given before the establishment of the chapel is finally authorised. Now, this is not only not a proof of the practice which is contended for on the other side, or of the power of the Assembly to sanction such a thing; but it is demonstrative proof of a contrary practice. For if they had the power at their own pleasure, to elect those gentlemen members, to give them new parishes, and admit them as members of Presbyteries and the General Assembly, there was no necessity for these chapels of ease being created in this anomalous situation. But no such power was attempted to be exercised.

Thus the matter stood till the act of Assembly 1833, which was the first attempt to introduce ministers not properly parochial, into the Church of Scotland. The act of Parliament 1824 was intended to admit the ministers of the parliamentary churches who had been established by that act to certain privileges, reserving the rights of parish ministers. The act of Assembly 1833 is in appearance to carry the statute into effect, but in reality is in direct violation of it. I might say, although I see it stated that this act of Assembly, 1833, was brought in by persons of high name, and was supported by eminent and distinguished lawyers,—I might say, with the greatest deference,—for I am here to defend neither side of the church,—that an enactment more palpably proceeding in the face of the act of Parliament which it was pretended to give effect to, never was proposed by any party on either side of the church. This is strong language, I may be told, but it requires only to read the act to be satisfied that I am justified in using it. I do not mean any offence, but I am entitled to use such language, strong as it is, because I have the judgment of your Lordships finding the illegality of those proceedings in the case of the Widows' Fund. The act of Parliament 1824 declares that all the rights of parish ministers shall be fully reserved. What does the act 1833 of the Assembly enact? It 'enacts and declares that the whole districts of Scotland now, or to be hereafter provided with places of worship and ministers, in terms of the acts 4th Geo. IV., c. 79, and 5th Geo. IV., c. 90, shall be, and are hereby, from, and after this date, erected into separate parishes, *quoad sacra*, and to that effect are hereby declared to be disjoined and separated from the parishes of which they at present constitute a part. And the General Assembly further enact and declare, that all ministers already inducted or settled as ministers within the said districts, or who shall hereafter be inducted and settled in the same, shall be, and are hereby, authorised to exercise and enjoy, within their respective districts, the whole powers and privileges now competent to parish ministers of this church, and that as fully and freely in every respect, and without molestation or interference, as if their respective districts had been ordinary parishes, and they had been regularly inducted as ministers thereof. Moreover, the General Assembly hereby declares, that the said ministers are, and shall be,

constituent members of all Presbyteries, Synods, Church Courts, and Judicatories whatsoever, and shall enjoy every privilege, as fully and freely, and with equal powers, as parish ministers of this church; hereby enjoining and requiring all Presbyteries, Synods, Church Courts, and Judicatories within whose bounds the said churches are, or shall be situated, to receive and enroll the said ministers as members thereof, and put them in all respects on a footing of Presbyterian equality with the parish ministers of this church; giving, granting, and committing to the said ministers the like powers and authority and privileges, now pertaining by law to parochial ministers of this church within their respeotive bounds."

While the act of Parliament which this is said to carry into effect says there shall be no invasion on the rights of parish ministers, the act of Assembly says, that these Parliamentary ministers shall have just as good a right as the old parish ministers. Therefore, they charge all Presbyteries to put them in all respects on a footing of Presbyterian equality. I say, with great deference, that this act of 1833 is just as illegal as the subsequent acts to which I am to call your Lordships' attention; and, if so, it matters not from what quarter it comes, for what purpose it was passed, or what high names could be brought forward in its support.

These ministers being declared to be parish ministers to all intents and purposes, they claimed the right of being admitted to the Widows' Fund; and if they were parish ministers, they were entitled to be so admitted. What does the Court hold? The Court, at first, gave a decision, pronounced with great difficulty and difference of opinion, admitting those gentlemen as *bona fide* ministers, but ultimately your Lordships in this chamber of the Court, pronounced a different opinion. I am not going to trouble you by entering into detail. I refer to the cases of "Gordon, 18th Feb. 1836, Shaw 14, 598; Irvine 24th May 1838, Shaw 16, 1024. On the consultation of the whole Court your Lordships held that they were not lawful parish ministers. In the same manner, in regard to those places of worship which have been erected within parishes, your Lordships have decided that the money collected for the poor is under the administration of the kirk-session and elders. This was decided in the case of Panmure, 30th May 1839, Dunlop 18,040. This is curious, as illustrative of the argument I submitted at the outset yesterday. It is curious to look at the act 1579, in regard to the poor law, in order to see how strongly it confirms the argument I was submitting as to an actual working parochial system; for that statute contains a variety of provisions applicable to parishes, to the residence of the parties within parishes, to certificates being granted to the poor, and to the right of begging within their own parishes. I take the liberty of throwing out this now, though not directly bearing on this part of my argument.

I come now to the act of Assembly 1834,—if I am to call it an act. I understand that this act, which was the declaratory enactment as to chapels of ease—admitting chapel ministers, never passed

through the ordeal of the barrier act, never was transmitted to Presbyteries, and never was a lawful act of the church itself. Your Lordships will not misunderstand me in supposing that this is necessary for my argument; but I think it is as well to notice the circumstance, as showing the haste and rapidity of the Assembly—having begun in 1833 in regard to the statute 1824, to admit the Parliamentary ministers, they now proceed to the next step, without regard to the barrier act, to admit the chapel ministers, whom, under the old system, they had held not entitled to sit in Church Courts. They proceed, chap. 9 of the act 1834, to enact and declare that "all ministers already inducted and settled, or who shall hereafter be inducted and settled as ministers of chapels of ease, presently erected and established, or which shall hereafter be erected and established in terms of the act anent chapels of ease of 1798, or prior thereto, by authority of the General Assembly, or by the Presbyteries of the bounds, are and shall be constituent members of the Presbyteries and Synods within whose bounds the said chapels are or shall be respectively situated, and eligible to sit in the General Assembly, and shall enjoy every privilege as fully and freely, and with equal power with parish ministers of this church"—and then the act goes on to enjoin all Presbyteries and other Church Courts to receive them as members, and to allocate parochial districts to their chapels. If I am right in my argument, then this is all a proceeding clearly beyond the power of the Assembly.

Then comes the act, or rather the overture, for it never passed into an act, of 1837, chap. 10. It is an overture on new churches—the extension churches, as they are called. What is that overture? "The General Assembly called for the report of the Committee of Overtures on New Churches, which was given in by Mr Cunningham the convener, and read. The General Assembly agree without a vote to transmit the overture as amended to Presbyteries for their consideration, that they may report their opinions to the next General Assembly." This overture never became an act of Assembly.

The first regulation of this new overture is that the 5th act of Assembly 1798 be rescinded. Yet we are told that the proceedings in this case are under the act 1798, together with the act 1839. If the overture 1837 be an act, it commences with rescinding the act 1798 under which it is said these proceedings took place. Then follow the regulations for the admission of all those new ministers,—plainly proceeding on the same principle of usurpation of power which, I submit, characterizes the whole proceedings as illegal.

Then the last act is the act 1839,—that admitting the class of gentlemen, of whom Mr Clelland is one. After a long preamble, it says:—"The General Assembly, with the consent of the Presbyteries of this church, enact and ordain that all the ministers of the Associate Synod and their congregations in Scotland, desirous of being admitted into connexion and full communion with the church of Scotland, be received accordingly."

Then come various regulations in regard to what is to be done with these ministers. You will find no provision as to their taking the oaths to government. The regulations are set forth at page 100 of our case, to which I beg to refer your Lordships. I submit then, in argument, that these acts of Assembly are inconsistent with the statute law of the land.

Well, then, what remains? The practice of the Church Courts. Here I take the liberty of stating, first, that the parties who plead on the practice must prove the practice. The *onus probandi* lies on them, and not on me. Next, I say that the practice must be clear, distinct, and explicit,—it must be general all over the country. It will not do to rake out two or three obscure cases from musty volumes of antiquity, and from that to argue a practice. I say the practice must be clear, explicit, general all over the country, distinct, continuous, and uninterrupted. It must be such a practice as implies the consent of the legislature, who have not given the express power,—for we are now dealing with an established church, the church of the state; and if the power be not given by the statutes, and is rested on the practice, it must be a practice so strong that if it were now embodied in the shape of a law, it would not merely be declaratory, but a practice sanctioned and adopted. On what is it to be rested, in order to make it so? If the power be not given by the statute-law, it must be a practice so strong, so continuous, so general, as, we ought to presume, has been sanctioned, adopted, and approved of by the state. Now, what is the practice?

The first case referred to is that of Greenock, p. 42 of my learned friend, Mr Dunlop's paper; 1589 is the date of the origin of this case. Well, the minister of Greenock sat in the General Assembly. Be it so. Let us see how this comes about. Shaw of Greenock obtained a charter from King James in 1589, its object being to free him from any burdens in relation to the original parish, he being willing to erect the new church; and chap. 21 expressly ratifies the lands of Shaw as constituting a parish. I really do not think it worth while to go into the detail of what happened from this time to 1592; but at that period you will recollect what sort of people were sitting in the Assembly. The Assembly was originally composed of noblemen, commissioners of shires, baronets, and so forth. Could a commissioner of a shire say now, I choose to take my seat in the Assembly on this old practice? On this case I need not detain your Lordships farther.

The next case which my learned friends found on as to the practice, is the case of Cameron, in the same year, which was a new erection out of part of the parish of St Andrews. There is an act of Parliament in regard to this also, same year, chap. 20, to which I merely refer your Lordships.

Then comes the case of Stranraer in 1600. What did the Assembly do in regard to this case? The proposition on the other side is an assertion of the inherent power of the church to erect parishes. I refer your Lordships to Mr Peterkin's Booke of the Univer-

sal Kirk, p. 478: "Sess. 3° Martii 19. Anent the Supplicatione given in by the Synodall of Galloway, making mention that qwher they had ane act for erecting and bigging of ane kirk at the burgh of Stranrawer, within the presbytrie of Wigtoune and annexatione thereto of the 20 pound land of the parochine of Inche, lyand toward the cost of Irleand, pertayning to the Lands of Garthland, Stranrawer, Kenluit and Sorby, with the 29 mark land of the parochine of Salsette, the five mark land of Auchteraire, and five mark land of Stranrawer, as being most commodious for the inhabitants of the said lands to resorte to the said kirk for hearing the word; unto the qwhilk erection and annexation foresaids the heretors and kyndlie tennents of the foresaids lands hes already given their consent, desyrand, therefore, that the General Assemblie will ratifie and approve the same; as at mair lenth is containet in the said supplicatione. The Generall Assemblie ratifies and approves the erecting and annexatione foresaid, made by the Synodall of Galloway in all poynts.

"Because the generall questione was proposit to the haill Assemblie, quhere congregationes are so spaceous, that a great pairt thereof may not commodeously resort to their awne paroche kirk, be reasone of the great distance of habitation therefrae—if it be lawfull to ane member of the said congregatione to big ane new kirk, and intertaine ane pastor at the same tyme upon their awn expenses? The Generall Assemblie, after long reasonying, thinks it both lawfull and expedient, and declares they will assist the same as ane godly work, and will crave the samen to be ratified in Parliament, how so oft it shall occurre."

Why so? Why have it ratified in Parliament if they had the inherent power within themselves to do it as is contended now, without the authority of Parliament, or against the express provisions of the act? Stranraer was anciently a burgh of barony. This erection of a parish took place with consent of the heritors, and was recognised by the Teind Court in 1694; and it is curious enough that there is entered on the register of retours on 11th May 1650, a retour, in favour of William Syme, of various lands lying within the parish of Stranraer, showing that it is an old parish. I submit, then, that the case of Stranraer is favourable to my argument; because the Assembly considered it necessary to go to Parliament to get the erection ratified.

Lord JEFFREY.—Is there any proof that they ever did go?

Mr ROBERTSON.—No.

LORD JUSTICE CLERK.—Is the minister on the Teinds?

Mr ROBERTSON.—Yes; I believe so. Then there are certain cases in 1606——

LORD JUSTICE CLERK.—The statement here is that there are certain lands annexed to this locality which constitute the parish of Stranraer.—Was there a process for the augmentation of teinds?

Mr ROBERTSON.—I do not like to make a positive statement as to this; I do not like to commit myself off-hand.

Lord President.—I recollect we had a discussion in regard to the manse of Stranraer in the Teind Court. This can be easily called up.*

Mr Robertson.—In 1606 there are three cases ratified by statute, North Leith, Prestonpans, and Ferry-Port-on-Craig. I take the cases of Prestonpans and Ferry-Port-on-Craig. They appear in the acts of the General Assembly in 1602, on p. 528 of the "Booke of the Universal Kirk." It is important to observe that North Leith, and, I believe, also Ferry-Port-on-Craig, are both in the Old List of 1567. The former is not entered as North Leith, but as Leith; the other parish was Restalrig, or connected with the monastery of Holyrood House.

Lord Meadowbank.—It is not the parish of Holyrood House.

Mr Robertson.—It is material to observe that in the Assembly of 1603, the King was personally present, and, of course, gave his consent to what was done.

Then, in regard to the case of Prestonpans, it appears, by an entry in the register of privy seal, that there was a presentation to Mr John Davidson to the vicarage of the lands of the parish of Preston, so that he had obtained the presentation at that date. It would rather appear that the old kirk at Prestonpans had been destroyed and rebuilt. Mr Davidson seems to have contributed to the rebuilding; and, indeed, every body about seems to have had something to do with it: one man gives the ground, another builds, another puts on the roof, and so forth. After all, what does it come to? Every body consented,—Davidson was a great man, and of great influence, but no great favourite with the king, having taken the liberty of reprimanding him and his courtiers for unbecoming language; and it appears to me to be no argument in favour of the right of the church to erect parishes, that his title to sit in the Assembly did not attract the notice of the king. All this practice, therefore, prior to the act 1617, which first gave the power of the

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* The ecclesiastical arrangements narrated in the Booke of the Kirk, as having taken place in 1600, though not ratified in Parliament, were fully sanctioned by an act of the King and Privy Council a few years after. By a precept of sasine, dated 24th July 1617, King James VI., with advice and consent of the Privy Council, erected the ancient burgh of barony of Stranraer into a royal burgh, and authorised the corporation "to build, have, and hold within the said burgh, in all time coming, ane kirk, for the honour and service of God, *with the paroch allready allocate to the said burgh, by the church and bishops of this our kingdom.*" The teinds of the lands out of which the stipend to the minister was paid, according to the original agreement, were only within these few years, evicted by the ministers of the parishes within which the lands are situate, and the present incumbent placed upon the government bounty for small livings. Stranraer, besides the civil recognition of it as a parish in 1617, was recognised as such by the Teind Court in the years 1649, 1686, and 1696, when localities were decreed; and finally, it was held by that Court to be a civilly erected parish, when its minister was admitted to the benefit of the small stipend fund. Stranraer was recognised by the first General Assembly of the Restoration, 1690, as a "burgh and parish."—See Index to Acts of Assembly.

new erection of parishes to the Commissioners of Teinds, is not in any view such a practice as is at all similar to the attempt now made on the part of the church.

The next case is the case of Carmyle. There is an act of Parliament in regard to this case which ratifies the proceedings,—the act 1609, ch. 26. There is also the case of Denny in 1641, ch. 173, for which there is an act of Parliament. But it is said that the minister of Denny sat in the Presbytery for several years prior to the act of Parliament. It may be so. On the other hand, I find in the register of retours that, on the 22d of May 1622, the Earl of Linlithgow is retoured as "heir to his father," showing that it was an old parish. I should have mentioned in regard to Ferry-Port-on-Craig, that it seems to have been attached to the priory of St Andrews; and in July 1625, there is a retour showing that it was an old endowment.

The next is Bo'ness. For this also there is an act of Parliament, 1649, chap. 145.

There is some obscurity attaching to the only other one of those alleged erections of parishes, the case of Foot Dee, near Aberdeen. It seems to have been some sort of endowment. It is said that the minister sat in the Church Courts till 1755, when, as my learned friend has said, new notions began to prevail. The minister of this place of worship had been sent as a member of Assembly, where he sat without objections till 1755. Since that date, till 1834, he was not returned; so that really the case is just as strong for me as it is for the other side. That the minister sat for some time without objections may be true; but that will not establish the practice which is now sought for.

My remarks on these cases,—some of which I have not been able fully to explain,—have occupied more of your Lordships' time than they are worth, as affording any proof of a practice similar to that for which my learned friends are contending. The cases referred to are few and far between. There are only eight or ten of them in all, and most of them have been ratified by act of Parliament,—all of them but one in fact; and they will not, taking them all, make out that the practice of the church was to erect parishes *quoad spiritualia*, which were then recognised by the legislature.

The next class of cases is that of the collegiate ministers. I make this remark in regard to them that they are entirely in royal burghs; and many of them are named in acts of Parliament. In none of them has the district or parish been assigned by the Presbytery, but by the Town-Council,—and each of them has been laid out by the Town-Council. I beg to say that I am correct in making this statement. They have each and all of them been erected by consent of all parties concerned. This is admitted by the other side of the bar. Not one of them was erected after opposition. In the next place, the stipends, although not burthens on the teinds, are secured by public bodies, and very different from that species of security, which is offered here under those voluntary contributions. In these

collegiate charges there is perfect security. Next, they are only the constitution, in general, of additional ministers within the same parishes. They are not the laying out of new parishes by the authority of Church Courts; and I submit to your Lordships that any custom of this kind, with the consent of all having interest, never can sanction a practice which is now sought to be introduced of a totally different kind, and without consent. I submit, then, that this case of collegiate ministers does not sanction the proceedings of the Assembly from 1833 downwards.

Only one other branch of the case remains, and which I shall dispose of very briefly, I mean the question of jurisdiction.

Lord Justice-Clerk.—Can you give any information respecting the discussion in the Presbytery of Edinburgh, as to the erection of a new parish on the Calton Hill? Dr Inglis contended most strongly at that time for the power of the church to erect parishes *quoad sacra*. He was opposed by Sir Henry Moncrieff; and a long discussion as to the power of the Church Court took place on that subject between those great persons.

Mr Robertson.—I have no information about it; I am much obliged to you for noticing it.

Lord Cockburn.—It is very clear that they had no power to erect a church on the Calton Hill.

Mr Robertson.—I shall not detain your Lordships on the jurisdiction, having largely gone into that question last session in the Culsamond case. We have a printed note of the authorities which we then referred to, which we can hand to their Lordships of the other Division who have it not; and also the opinion of your Lordships of the First Division in the Culsamond case. I do not mean to argue the question of jurisdiction now. If what be done, and is complained of in this case, be contrary to the law, and a civil injury arises from it, I apprehend there can be no doubt that the proper jurisdiction is here. It is necessary that every thing done by the Established Church should be done according to the law of the land. The jurisdiction of this Court is to determine whether every thing complained of, be or be not consistent with the law of the land. Church Courts have jurisdiction in matters purely ecclesiastical, but in matters civil they have no jurisdiction. I beg generally to refer to what was done by your Lordships' predecessors in setting aside the sentence of deposition in the Killbucho case. I refer also to the case of the schoolmaster of Kilberry, where the proceedings were set aside; and to the want of a regular complaint which vitiated the proceedings in the case of Ross and Findlater. These cases are in the printed note to which I have referred. I refer also to the Auchterarder case generally; to the Lethendy case; to the Daviot case, where interdict was granted in the other division; to the Strathbogie case, setting aside the sentences of suspension and deposition; to the Marnoch case, ordaining the Presbytery to receive and admit Mr Edward; and, lastly, to the case of Culsamond, where the whole matter of jurisdiction underwent so copious a discussion.

The LORD PRESIDENT.—I recollect that towards the close of last session we were particularly pressed to give out our opinions in the Culsamond case, correctly revised, which we did. The reason why that pressing demand was made, was that the case was taken to appeal, and we saw that it had been entered. I should like to know why that case has not been decided; because here would have been an opportunity to have this case decided.

The PROCURATOR.—The case was put out *ex parte;* the other paper is not in.

Lord GILLIES.—We were pressed very much for our opinions. I agreed with great hesitation, and with very great inconvenience.

Mr ROBERTSON.—The point there having been very fully argued, and having, I fear, already occupied more of your Lordships' time than I have been justified in doing, I do not mean to detain you by entering upon this separate ground. I submit therefore that my clients are entitled to your Lordships' decision in their favour.

Lord MONCRIEFF.—If there be a question of jurisdiction in this case, the Judges of the Second Division ought also to hear it discussed. We have never heard a word on that subject. It is not sufficient that we should be referred to what took place in the other division of the Court. I must judge for myself.

LORD JUSTICE CLERK.—Mr Robertson may refer to previous decisions, and say "that is my case."

Mr ROBERTSON.—In hopes that your Lordships will read the opinions in the Culsamond case, I am willing to waive the privilege of being heard on the point of jurisdiction, as I have already occupied the Court for two several days.

Lord IVORY.—We have not even the written pleadings in the case referred to; and we have not heard a sentence of *viva voce* argument on the subject.

Lord MEADOWBANK.—You had better take a night to consider it.

LORD JUSTICE CLERK.—I do not see that there is any thing irregular in the course which Mr Robertson proposes to adopt. It may not be sufficient to satisfy your Lordships; but he says, here is a note on which I rely; and he runs his chance whether he satisfies us by this or not. Nothing is more common than for a counsel to say, "this point has been discussed in such and in such a case, and I refrain from entering on it again."

Lord MEADOWBANK.—It is much better to allow Mr Robertson to consult in regard to this, and let us know to-morrow.

Lord CUNINGHAME.—You do not mean to say that the case of Culsamond is binding as an entire precedent upon us, but refer us to the cases quoted there?

Mr ROBERTSON.—Yes. All the cases are referred to there in a printed note. I refer you also to the argument contained in the opinions of the Judges, to which I can add nothing, and which appear to me to be conclusive. If that be not sufficient, I do not think that any argument from me will be sufficient.

Mr RUTHERFURD.—The case of Culsamond is one in which, so

far as the question of jurisdiction has been before your Lordships, very much disentangled of specialties that arise here. A question here arises, whether this case may follow a similar course? There will, I presume, be an appeal taken, involving this important question of jurisdiction. It is in your Lordships' power to require the counsel to argue the jurisdiction.

Lord President.—I ask you again, Mr Robertson, you were the leading counsel in the Culsamond case,—you got the judgment of this Division,—your agent pressed us for our opinions,—why has that appeal not been followed up?

Lord Jeffrey.—Whether is it likely that it will be taken up in the present session of Parliament?

Mr Rutherfurd.—I feel satisfied that they will not take it into consideration this session. It is the more important that you should require the point to be argued, if you are of opinion that it should be argued. I am quite sure that the House of Lords will wait for the decision of your Lordships in this case.

Mr Robertson.—I understand the state of the matter to be this; that application had been made to have the appeal case set down for an early hearing, and that the paper on the other side could not be got ready by my learned friend, Mr Moncrieff; and therefore the parties would not concur in a joint application. Mr Moncrieff was called to London. The paper on the other side has been before Mr Inglis, who has not yet been able to overtake it; and we are not in a condition, till the paper is printed, to join in an application now, for that hearing which the other party were not in a condition to join in at the beginning.

Lord Murray.—There is a passage in Sir John Connell's book in regard to the case of *Cathcart*. It appears that at first there was a consent of the heritors. It appears that the case was fairly and fully considered *quoad sacra*. I have marked the passages which I want you to consider.

Mr Robertson.—I presume that I must repeat the argument which I formerly stated in regard to jurisdiction in the Culsamond case, as it was not heard by the whole Court.

Lord Gillies.—This and the Culsamond case are not identical.

Mr Robertson.—I should not wish it to appear that the argument was stinted; therefore, with your Lordships' consent, I shall take up the question of jurisdiction to-morrow.

Thursday, June 23.

Mr Robertson.—My Lords, before proceeding to the argument on the jurisdiction, I beg to offer some explanation in regard to two questions brought under my notice, one by the Lord Justice-Clerk, and another by Lord Murray.

I directed an inquiry to be made into the records of the Presbytery of Edinburgh, touching the church proposed to be erected in

the parish of South Leith, in 1821; and I refer your Lordships to the memorial, in August of that year, by the Governors of George Heriot's Hospital. It goes on thus: "A memorial and petition from the Governors of George Heriot's Hospital was given in and read, stating the particulars of a plan on which it was proposed, under the authority of the Presbytery, to erect the grounds belonging to George Heriot's Hospital, lying in the parish of South Leith, into a separate parish *quoad sacra*.

It is quite true that Dr Inglis took the management of that matter, and was opposed by Sir Henry Moncrieff. The Presbytery gave orders for a general sisting of all parties interested. The memorials had been laid before the procurator for the church, and my learned friend, Mr Forsyth, was also consulted in the matter. A great deal of discussion took place; and at last, on the 21st November of that year, "Parties being called on the business relative to the memorial from the Governors of George Heriot's Hospital, compeared for the said Governors the ministers of Edinburgh, whose names are mentioned in the sederunt; and for the heritors, &c. of South Leith, Messrs Thorburn and Veitch, along with Drs Dickson and Robertson, ministers of said parish." Then answers were given in. The memorial goes on to say: "Parties were then heard at great length, and being removed, after deliberation by the Presbytery, Sir H. Moncrieff moved that the Presbytery should find it inexpedient and incompetent for them, as a Presbytery, to grant the prayer of the petition of the Governors of Heriot's Hospital, and recommend it to them, if they shall judge it proper, to apply to the Lords of the Commission for the Plantation of Kirks. The motion having been seconded, another motion was made by Mr Simpson, That the Presbytery should resolve to proceed towards the proposed erection, and in the meantime require the Governors of the Hospital to produce a bond by which they shall be obliged to fulfil all the conditions proposed in their memorial and petition, which also being seconded, it was agreed that the state of the vote should be first or second motion; and the roll being called and the votes marked, it carried by a majority of one, second motion. Therefore the Presbytery did, and hereby do, resolve accordingly. On which Dr Inglis took instruments in name of the Governors of Heriot's Hospital. Against this resolution Mr Grant entered his dissent, and protested for leave to complain to the Synod of Lothian and Tweeddale for reasons to be given in in due time."

Thus the matter terminated on the 21st November. Then on the 28th, Sir H. Moncrieff gave in his reasons of protest. [See Appendix subjoined to this report.] Mr Grant also gave in a paper, "craving liberty to complain to the Synod of Lothian and Tweeddale, at their next ordinary meeting, for the following reason among others, which might be stated to the Synod, viz., "That he thinks the jurisdiction, as claimed by the Presbytery in this case, belongs to the Teind Court, and not to the Presbytery." Then on February 27, a committee is appointed to answer the reasons of

dissent and complaint from the resolution of the Presbytery on the 21st November last, relative to the memorial and petition; and on the 27th March 1822, this proceeding took place:—"Bailie Smith and Treasurer Denholm gave into the Presbytery a memorial of the Governors of George Heriot's Hospital, withdrawing the application formerly given in relative to the erection of a separate parish, *quoad sacra*, over the lands belonging to the Hospital in the parish of South Leith. Mr Grant, on the 24th of April following, stated that as the application was withdrawn, there was no occasion for going farther in the matter."

In regard to the other subject to which Lord Murray directed my attention, it stands thus:—At p. 220 of Sir John Connell's work, your Lordships will find that a process was brought in 1725, in the name of the Presbytery of Glasgow, of the Procurator for the Church, and of the heritor of the lands of Drip, in the parish of Cathcart, setting forth that these lands lay at a great distance from the church of Cathcart, and were situated near to the lands of Carmunnock, and craving that they should be disjoined from the former parish and annexed to the latter, *quoad sacra*. When the case came before the Court, it was alleged that the disjunction could not take place without the consent of three-fourths of the valuation of Carmunnock. An argument arose on that subject, and a short delay took place. Ultimately the Court pronounced the interlocutor, which is quite correctly printed, that the consent of the "heritors of three-fourths of the valued rent of the paroch of Cathcart was necessary before the disjunction was decerned." The decision was not that they required the consent both of three-fourths of the heritors of the parish from whom you did disjoin, and also three-fourths of the heritors of the parish to whom you annexed; but having got the consent of the three-fourths of the heritors from whom the disjunction took place, this was quite sufficient.

Having made this explanation, I now proceed to the question of jurisdiction. And in arguing this question, I must assume, first, that the addition of Mr Clelland, as a member of the Presbytery of Irvine, was illegal, and that he had no right to sit and vote in that Presbytery. I must also assume that it was illegal to erect a new parish within the boundaries of the old parish of Stewarton, or even to institute there a new parish, *quoad sacra*, with a new kirk-session, against the consent of the minister and heritors of the parish. If I am wrong in both of these propositions, I have no case on the merits. If the proceedings of the Presbytery were lawful, and within the proper jurisdiction of the Church Courts, I have no case on the merits; and it necessarily follows, that the civil courts have no right to interfere with what has lawfully been done ecclesiastically. But I must assume that I have made out the propositions which I set forth, to the satisfaction of the Court; and I must hold the acts complained of to be illegal, because they are beyond the power of the Church Courts. I must hold that it was beyond the power of the Presbytery or the General Assembly to sanction the

addition of a party situated as Mr Clelland was, to the roll of the Presbytery, or to sanction the erection of a new parish in the manner done here. If, then, the Presbytery and the General Assembly have no power to do these acts, because they are not acts of a purely ecclesiastical description, the reason that they have no such power is, that it has never been conferred on them by any of the statutes, or by the law of the land.

Holding and assuming, then, the illegality of the proceedings, the next question is, Is there any civil wrong in these illegal proceedings? If these proceedings are purely ecclesiastical, and perfectly correct and invulnerable on the merits, it is idle to ask whether you have any jurisdiction; but if they are illegal and contrary to the law of the land, it necessarily follows that there is a civil wrong committed. First, the Presbytery, though an ecclesiastical court, is also a court having civil jurisdiction. Be good enough to look at the paragraph in Erskine, in which he treats of Church Courts, which is in the same section in which he uses these emphatic words, "that all the acts of Church Courts must be consistent with the law of the land;" book 1st, tit. v., sec. 24. He here sets forth that "the jurisdiction vested in churchmen is either spiritual or civil. By the present establishment, our General Assemblies or convocations of the clergy, may define or explain articles of faith, condemn heretical opinions, and make canons for the better establishment of the government and discipline of the church, provided their resolutions be consistent with the laws of the realm, from which our national church derives its whole authority." Then in the same section he says, "To have a just notion of the church's *civil* jurisdiction, as it presently stands, a distinction must be made between *Ecclesiastical Courts* and *proper Church Courts*. By the last we understand those that are composed partly of clergymen and partly of a number of laymen, who bear office in the church, under the name of *elders, ex. gr.*, Presbyteries, Synods, &c. Ecclesiastical Courts consist of laymen only, as Commissariots, the Commission Court, &c."

Observe also the paragraph, book 1st, tit. 2, sec. 2. Here he refers to the act 1572, ch. 48, as to the designation of manses and glebes. He says, "If the possessor of the ground marked out refuse to give up the possession to the minister, the execution is committed to the Supreme Civil Court, by whose authority letters issue from the signet for that purpose."

Then in book 2, tit. 10, sec. 56, 57, and 58, he describes at length the power of the Presbytery, and the jurisdiction in regard to manses.

The constitution of the Church of Scotland, in like manner, is so described in Sir Henry Moncrieff's work, p. 2. He says,—"Under this constitution, as previously established by the laws of Scotland, civil and ecclesiastical, *every parish* has a kirk-session, consisting of the *parish minister* or ministers, and of elders selected from the most respectable inhabitants of the parish, who are solemnly ordained to their office in presence of the congregation." He then

describes the duties of the kirk-session; and at p. 4 he says,—"The presbytery is the court immediately above the kirk-session. A presbytery consists of the ministers of several contiguous parishes who are *ex-officio* members, and of an elder from each kirk-session within the district, who, by the present usage, is elected at the end of every six months. The Presbytery, besides being a court of review, to affirm, reverse, or alter the sentences of kirk-sessions, when regularly brought before it, or to direct or advise them with regard to any part of their proceedings, *has a radical or original jurisdiction* of its own, both ecclesiastical and civil. It has the immediate superintendence of the private conduct, as well as of the professional labours, of the clergy of the district, who are not amenable to the kirk-sessions. It has the power to admonish, to censure, and even to deprive them, according to the established laws, *and upon evidence regularly taken.* The induction of presentees to benefices *belongs exclusively to presbyteries.* All presentations to benefices must be directed to the presbyteries, in whom the original right is vested to take trial of the qualifications of presentees, to give them induction if they are found qualified; and, if they want the necessary qualifications, to reject them." Then at p. 6 he says,—"The presbytery has, besides, a limited *civil jurisdiction*, in questions which relate to ecclesiastical benefices, to the designation or exchange of parochial glebes, to the building or repairing of churches or manses (parsonage houses), and in a few other cases. But in all such civil questions an appeal is competent from their decisions, in the form of a suspension or advocation, not to the Superior Ecclesiastical Courts, but to the Court of Session, the supreme civil court in Scotland. The forms of proceeding in the presbytery are prescribed by statute, or are ascertained by use and precedent."

Such being the nature of the Established Church of Scotland, I say, that with its parochial divisions, and kirk-sessions, and presbyteries fixed by law, all parties having an interest in these divisions, and in that ecclesiastical superintendence, have a civil right to have them preserved,—have a right to the meetings of the kirk-sessions within their respective parishes, and see that the ministrations of the ministers within their parishes are not interfered with by any other persons. This is not only a valuable interest, so far as the people are ecclesiastically concerned, but it is a civil right of a valuable nature to all persons having lands in the parishes. It will not do to say that there is any right in the church to divide one part of a parish from another. If that be done illegally, I say that the right to check that illegality, to prevent it by interdict, and set it aside by reduction, is not an ecclesiastical, but a civil right. It is impossible in law, under any pretence of ecclesiastical jurisdiction in ecclesiastical matters, to alter the statutory arrangements, and the constitution of the Church Courts, and the division of parishes. I say that any subversion of that statutory arrangement, any encroachment on the statutory constitution, any subversion of, or illegal interference with, the

constitution either of the kirk-session, Presbytery, Synod, or Assembly, although done under the pretence of being *quoad spiritualia*, is a civil wrong unless done according to law; and if done according to law there would be no wrong. If illegally done, which I assume of course,—if the division of the parish be illegal,—if the addition of a minister, not a parish minister, in the statutory sense of the term, to the rolls of presbytery be illegally done,—I say, that that addition, and the erection of a new parish, is contrary to law, and that nothing contrary to the law of the land can, in any established church, be consistent with the ecclesiastical law, and the constitution of the church itself. I cannot understand any thing to be lawful in an established church ecclesiastically, which is unlawful in itself civilly.

I know there is a distinction between civil and ecclesiastical—I am not blind to that; but I say that any ecclesiastical arrangement of the parishes in the church into new divisions is illegal, and inconsistent with the statutes. Although that distinction was very evident in some of the other church questions before your Lordships, we have here a still stronger point on jurisdiction than in any preceding case. For although I do not admit that the erections of new parishes *quoad spiritualia*, and *quoad spiritualia* only, is legal, if that were to be assumed, still the Presbytery, in the present case, have gone farther, because they have added Clelland to the roll of the Presbytery. They have not admitted him as a member *quoad sacra* only: he is added to the roll *quoad omnia*. He would indeed have been an anomalous judge if they had made him a member to judge in one class of cases, and not in another. This would have been unlawful. But there is not even a pretence of such a qualified admission. If they had admitted him to judge of ecclesiastical, and not of civil matters, and if he were to determine on the primary question whether any case coming before the Court was civil or ecclesiastical, is it not likely he would call that ecclesiastical which was civil? He is admitted to the roll of the Presbytery, however, *quoad omnia;* he has an elder added to the roll in the same way, making two additional votes. If the Presbytery can put in two, they can put in ten, I suppose. In some of the Presbyteries they stand thus: for example,—In the Presbytery of Edinburgh there are twenty-eight parish, and twenty *quoad sacra* ministers; in the Presbytery of Glasgow, twenty-two parish, and thirty-nine *quoad sacra* ministers. Suppose that these thirty-nine had been admitted to judge in ecclesiastical matters only, and a question came before the Presbytery whether the case before them was civil or ecclesiastical, I am afraid the thirty-nine would be inclined to vote in favour of their own jurisdiction. Having done this, and got jurisdiction, I say that the proper parish ministers, whom I am now assuming to be the only lawful members of Presbytery, are swamped and outvoted by the *quoad sacra* members; and yet our friends on the other side tell us that we are to hold that this Court has no jurisdiction to interfere in that matter. No jurisdiction! Suppose certain justices of the peace should think fit to add

to the number of the quarter-sessions. A part of Dumbartonshire, for example, runs into Stirlingshire—and suppose there were not a sufficient number in Stirlingshire, and the Dumbartonshire justices say we will help you, and they add themselves to the roll of the Commission of the Peace in Stirlingshire, and decern in an action of L.10, would this Court not have jurisdiction to interdict these proceedings?

The illustrations which might be brought to bear on this point are endless. It is thought proper that, in a royal burgh, an incorporation should be got up; and it is thought expedient that the gentlemen forming this incorporation should have a vote in the Council; and they are sent to the Council, who take them in and add them to their number—would this act of *illegality* not come before this Court? Where is the distinction? The civil right in a justice of peace court, composed as I have assumed, to judge in a question of L.10, is not a bit stronger than the civil obligation to build manses or repair churches. Clelland has been added to the roll of the Presbytery, and he is permitted illegally to judge—has not this Court jurisdiction? They may take in persons off the street, and add seven scavengers (as we have heard the phrase go) to the roll—Would these seven be entitled to vote in the lawful Presbytery? And would this Court not be entitled to say,—"You are not members of this Presbytery, and we interdict and set aside your proceedings." Once admit that the Presbytery is a court having civil jurisdiction, I say that the superintending jurisdiction of the Court of Session is applicable to such a case. My remedy lies here. Suppose a decree pronounced for a new manse by a Presbytery not lawfully constituted, would this Court not suspend and quash the decree? Does it not necessarily follow, if this gentleman be not a member of Presbytery, that the Presbytery with him as a member cannot pronounce a decree; and if this member taint the whole of their proceedings, am I to be told that the Court has no jurisdiction to suspend these illegal proceedings? Is the civil jurisdiction of this Court of so anomalous a nature that you are to wait for the civil wrong before you can remedy it? There would then be an end of all interdicts. If I once make out that there is a civil wrong done, I am entitled to civil remedy; and if I be entitled to the remedy of reduction, I cannot see how I am not entitled to the civil remedy of interdict.

I put this strongly on the admission of Clelland to the Presbytery as a member thereof; but do not let me be understood to say that I think it follows, that the other branch of the evil, namely, the erection of the new parish, is not a civil wrong too. I say that if they had stopped there,—I can demonstrate to you from recent decisions,—if they had stopped in the admission of Clelland *quoad sacra*, they committed an illegality which was a civil wrong? What is a civil wrong? It arises from the thing done, not from the words used. The ministers in the Strathbogie case were only suspended in the first instance from the exercise of their offices *quoad spiritualia*, and were not prevented from drawing their stipends. In the

Auchterarder case, all that was done was not to give the ordination. In the Lethendy case, all that was done was to ordain another man; and is all this spiritual? Spiritual in words it may be. It was only spiritual in words, when Mr Middleton of Culsamond was directed not to preach the word within the parish. It was only spiritual in words, when the minority of the Presbytery of Garioch were directed to discharge the duties of the majority in all spiritual matters. But was there no civil injury done? It was on the assumption of a civil injury having been done, that the Court interfered.

It is said, indeed that we might have gone to the Commission of Teinds in regard to the division of the parish, and got a reduction of it there. The only case of reduction of this description is the case of Garril, an old case, which you will find in Sir John Connell's book on Parishes, p. 45. There is neither suspension nor interdict that I ever heard of in the Commission of Teinds. The Commission of Teinds also could not meet the whole evil of which I complain; for I complain not only of the division of the parish, but I complain also of Mr Clelland acting as a member of Presbytery, and I am seeking an interdict against that. I say again that the Commission of Teinds cannot meet the whole evil, and my remedy is not to be found there. Lord Fullerton, in his judgment in the Culsamond case, says, "We will not interfere in the jurisdiction of the Church Courts, until they interfere with us;—if they let us alone we shall let them alone;" and his Lordship refers to two cases, which were decided the same day, the 15th May 1810, Johnston *v.* Guthrie, and Guthrie *v.* Finlay. These cases are extremely well selected, for the purpose of bringing out the distinction. The first was an advocation from the sentence of a Sheriff, on the statute of usury, in an action at the instance of the Procurator-Fiscal for the triple penalties, *ad vindictam publicam.* There the Court sustained its jurisdiction. The second was an advocation of a sentence of fine and imprisonment, pronounced by the Sheriff without a jury, in a complaint against the same party for subornation of perjury; and this advocation was dismissed as incompetent. In this case, the Court of Session did not sustain their jurisdiction, because the Justiciary Court was the proper court for such a question. The Court of Justiciary was the proper court. I am not admitting the general proposition taken up by the learned judge to be correct in point of law; but I say, assuming it to be correct, that we have civil wrong here,—does the remedy lie in any other court than the Court of Session? Certainly none of these proceedings can fall within the jurisdiction of the Court of Justiciary; and if I cannot get my interdict here, I can get it no where else. Can I get it from the Commission of Teinds? I cannot. I can get no interdict from the Commission of Teinds in regard to Clelland acting as a member of Presbytery. Assuming that the learned judge was correct, that the matter being spiritual, the Court of Session could not interfere, and that the only remedy lay in the General Assembly, it necessarily follows that there being no power to pronounce this sentence, and no remedy in

the General Assembly, there being no Justiciary Court or Bill Chamber-to which I could go, the very analogy of the two cases, Johnston *v.* Guthrie, and Guthrie *v.* Finlay, strongly supports my argument. Had there been no Court of Justiciary, would the wrong in the latter of these cases have stood unredressed? It is impossible. You redressed the wrong *quoad* the penalties under the statute of Queen Anne, because it was a civil wrong. You could not red ress the wrong, in the other case, where a fine was imposed, *ad vindi ctam publicam*, because the Justiciary Court was the proper tribunal to give redress. Here I cannot go to the Assembly, and where am I to go? I come to the supreme civil court. I say that in this Court lies the redress for civil injuries of every description, which have not been taken from this Court by express statute.

I have stated already to your Lordships the authority of Erskine upon the subject of the necessity of the proceedings of Church Courts being within the law of the land. What does he say as to the subject of the jurisdiction of this Court, book 1, tit. 3, sect. 23? Talking of the ministerial powers of the Scotch Privy Council, he says (it is not necessary to read the whole paragraph), "If they were not now transferred to the Court of Session, there would be a defect in that part of our constitution, and many wrongs would be without a remedy. For which reason, the author of Historical Law Tracts reasonably conjectures that it will be soon considered as part of the province of the Court of Session, to redress all wrongs for which a peculiar remedy is not otherwise provided." The Court of Session is bound to redress all wrongs for which there is no other remedy provined. Here is a wrong, a civil wrong; here is an intrusion of an improper person, unsanctioned in point of qualification, into a court having civil jurisdiction. Is the Presbytery an inferior or superior court to the Court of Session? I say it is an inferior civil court on civil matters, just as much as the sheriff or justice of peace court; and if that civil court go beyond its jurisdiction, and elect an illegal member into its body; and if I be an heritor within that parish, whose civil rights may be affected by the judgment of that court, has the supreme civil court any right, on the one hand, to set aside their proceedings, or, on the other, to interdict them? I submit it plainly has.

This is more clear than all the church cases that have come before this Court in modern times. If even the decisions in all the other cases had been the other way, I should have been ready to contend that, in this case, the Presbytery is wrong, and the jurisdiction clear. What is the kind of cases that occurred prior to the discussion in the Auchterarder case? You know the case of Newlands, where a sentence of deposition, not regularly signed, was held as void. In the case of Corstorphine, I see the first dawning of this pretension of the powers of the church being beyond that of the state, set forth in the argument that the Church of Scotland did not resemble the Church of England, but had a power by its great Head above all other churches. I do not go into the argument which was discussed in that case; but merely direct your Lordships' attention to Lord

President Hope's judgment. Then there is the case of Brown of Kilberry, which was affirmed in the House of Lords. In the case of Findlater, permit me to read a few passages from Lord Pitmilly's opinion, 4 Shaw, 514. "There must be a control to correct such proceedings. Where, then, does it lie? Is it to lie in the Ecclesiastical Courts? They are expressly excluded by that statute, and cannot interfere; and they have not that *nobile officium* which must exist some where to remedy wrong. The power required to redress wrongs of this nature is not a power to review, but to quash irregular proceedings contrary to statute. Now, Ecclesiastical Courts can have no such power. If, then, they have not this power, and as it must exist somewhere, it is clear that it must be possessed by this Court."

I say that this is an irregular proceeding, contrary to statute. The Church Courts have no power under the statutes to make a new parish, or to make a new constituent member of a Church Court. Ecclesiastical Courts have no such power; and seeing that they have not, this power must exist somewhere: therefore, continues Lord Pitmilly, "accordingly it has exercised the power of review in many cases where it has been excluded. The principle is obvious—Presbyteries have no jurisdiction beyond what the statute gives. If they go beyond it, they act without jurisdiction; and in all such cases, although this court has no original jurisdiction in the matter, they must have power to interfere,—not to review, but to set aside irregular and illegal proceedings."

Although they do not come within your Lordships' original territory, yet if they step beyond their own limits, and I am aggrieved by it, here is the place to which I am entitled to come for redress. I deny that it is a question of territorial boundary or limits of any description. There is but one supreme power in the state, and the matter is here subject to the review of the House of Lords, whose judgment can only be remedied if wrong by the interposition of the legislature. If the proceedings complained of be illegally done—if they be contrary to law, however expedient they may be said to be—if they be contrary to law, the ultimate appeal is here. I deny the supremacy of Clerical Courts, while I admit the finality within their own bounds, in matters purely ecclesiastical. I say the ascertainment in the first instance, of the legality or illegality of their proceedings is here; and if they are ascertained to be illegal, and wrong is committed, the remedy lies here. The moment the ecclesiastical courts go beyond their own jurisdiction, I say they are within yours, not because they have wandered into a portion of the jurisdiction which you had originally, but they have come within your jurisdiction, because they have gone beyond their own, and are therefore wrong doers. It is not a collision between two courts of co-ordinate jurisdiction; it is a question whether the wrong doer is amenable to the law:—it comes to this, refine it as you please. If the matter be ecclesiastical,—within their ecclesiastical power,—I admit you cannot touch it, because there is no wrong done. You can interdict me from trespassing on another man's ground; but you cannot interdict me from walking across

my own, because the one is illegal, the other is legal. You cannot interdict the Presbytery from meeting with proper constituent members, because they are entitled so to meet; but you can interdict a Presbytery, when met, from wandering beyond their jurisdiction, and encroaching on my civil rights. You have no limit to your jurisdiction excepting what the law imposes upon you; and your jurisdiction being universal to redress all wrongs, unless the remedy is elsewhere, it lies here.

What then, finally, have the recent decisions done? What has the Auchterarder case settled? If it has not settled this, it has settled nothing,—it settled the illegality of the veto act, and settled the jurisdiction of this Court to interfere and prevent the exercise of an illegal act. You have a right then to inquire whether the Presbytery have violated their duty. I assume that they have violated their duty, and in what respect? Not merely by the illegal division of the parish, erecting a new parish, *quoad spiritualia*, but by having admitted the minister of that new erection a member of Presbytery *quoad omnia*. The Auchterarder case will then carry me through. But I say that without it, and upon the case before your Lordships as it stands, the Presbytery violated their duty, by electing within their body a person not presented according to the law of Scotland, who had no right to sit there, a person who had not taken the oaths to government, and who was not an endowed parish minister. An illegal addition was thus made to that Court; and yet it is maintained that your Lordships have no right to give any redress, when a civil wrong is committed, unless the Ecclesiastical Court wanders within the boundaries of your own peculiar jurisdiction. I cannot think that this is the law of Scotland. In the Auchterarder case they delayed to take the presentee on trial, on pretence of the veto act. That was settled, *causa cognita*, to be a wrong which this Court could redress. What was settled in the Lethendy case? Interdict was granted, and judgment given on the merits in favour of Mr Clark, the presentee. The Court held that there was a title to apply for interdict, and that you had jurisdiction to grant it; and the parties were held liable for a breach of interdict. This was also done *causa cognita*. I do not go into the subsequent case of Daviot. Interdicts were granted in the Strathbogie case; and here I beg particularly to refer to the opinion of Lord Gillies, pp. 591, 592, 2d vol. Dunlop, 20th December 1839; and the final report, in 3d vol., p. 292. I should have stated that in Edwards' declarator your jurisdiction was also sustained. Then ultimately there is the case of Culsamond, in which this Court granted the interdict against the interference of the Presbytery to prevent Mr Middleton being settled minister of that parish. Now, I hold that it necessarily follows, that the mere circumstance of the parish in this case being declared to be erected *quoad sacra*, does not protect the Presbytery from your jurisdiction, in their illegal acts of dividing the old parish, and enrolling Mr Clelland as a member of Presbytery.

TUESDAY, JUNE 28.

Mr RUTHERFURD.—My Lord President, My learned friend who addressed your Lordships on the other side of the Bar, stated at the outset the great magnitude and importance of this case, not only to the parties here, but in regard to other great interests. Although I feel as much as any one can, that in a case of this kind the argument ought not to be abridged, yet I shall endeavour to keep in mind the other demands upon your Lordships' time, and occupy it with no introduction, or any thing that does not essentially bear on the main features of the case. I shall consider also, that in this case where a supplementary argument by one counsel on each side has been ordered, it is strictly an argument in addition to the papers written in it; and although I must necessarily go over the same grounds, and refer to the same principles and authorities as stated in the very able paper of my learned friend, Mr Dunlop, I shall endeavour to comprise the remarks I have to make in such a compass as will enable me to finish to-day.

Keeping then these remarks in view, it is not my intention to go into detail as to the circumstances in which this case came before your Lordships; nevertheless, it is undoubtedly necessary that you should have in view, what is the particular question which you are called upon to decide under this note of suspension. It is a note of suspension which takes its origin in the proceedings adopted by the Presbytery of Irvine, for the purpose of receiving the minister of an Associate Congregation in Stewarton, and that congregation, into their body, in consequence of their having joined the Church of Scotland under a relative act of Assembly. The heritors of the parish of Stewarton, in which this has taken place, came forward and presented a note of suspension, praying your Lordships, *inter alia*, to interdict the Rev. James Clelland from sitting as a member of the Presbytery of Irvine. This part of the prayer is not of importance now, because Mr Clelland has removed to England, and the specialties as to his case are consequently out of the way; at the same time, it is necessary to attend to this part of the prayer also, because, in regard to any other incumbent the case would be so far the same. The prayer is, "to interdict, prohibit, and discharge the said Rev. James Clelland from sitting, acting, and voting as a member of the Presbytery of Irvine, on all matters and proceedings in any way originating in, or connected with, the parish of Stewarton." And then an injunction is also asked against the Presbytery, from "proceeding in any way or manner, by perambulation of the parish of Stewarton, or otherwise dividing the said parish, and designing and erecting a new parish therein, and placing the same under the pastoral superintendence of the said Rev. James Clelland, or of any other person, and from constituting a new and separate kirk-session, having jurisdiction and discipline over the proposed new parish, with the church and congregation of the said Rev. James Clelland, and generally from innovating upon the present parochial state of the parish of Stewarton as regards pastoral superintendence, its kirk-session, and jurisdiction, and dis-

cipline belonging thereto." Then there is an interdict also asked against the Synod, from proceeding to divide the parish of Stewarton, in similar terms.

Your Lordships will now see the procedure which has taken place in the Bill Chamber. When the case came before the Lord Ordinary on the Bills, on the 28th March 1840, he appointed the note to be seen and answered within fourteen days, and granted *interim* interdict, with order for intimation. But afterwards, on the 15th of June 1840, "The Lord Ordinary, in respect that the note has been duly intimated, and no answer lodged, passes the note, and grants the interdict as craved." Then, on the 17th March 1841, and this is the last point in the procedure to which I shall point your Lordships' attention, "The Lord Ordinary having heard counsel on the motion of the suspenders for a special interdict relative to certain proceedings said to be contemplated by the respondents, as mentioned in the minutes of Presbytery, produced in process as per inventory; finds it reasonable that the interdict already granted in the Bill Chamber should be explained and made special, to the effect after specified, pending the proceedings in this cause: Therefore interdicts, prohibits, and discharges the Presbytery of Irvine, during the dependence of this cause, from admitting and receiving any minister to the new parish proposed to be erected, as complained of in this process; also from admitting and receiving any minister or elder, as a member of Presbytery, in respect of an alleged election or nomination to their respective offices in the said new parish, and decerns accordingly." First, then, your Lordships see generally what is here done is, that the Lord Ordinary in the Bill Chamber has passed an interdict against the incumbent of this new church from sitting in the Presbytery, and adjudicating in any matters connected with the parish of Stewarton, and also against the Presbytery and Synod from taking any step in terms of the act of Assembly 1839, and particularly against erecting a new parish, *quoad sacra*, or taking any steps whatever for the purpose of altering the existing state of pastoral superintendence in that parish, by erecting a new parish, *quoad sacra*, or a kirk-session, for any purpose, even ecclesiastical.

My learned friend accordingly, although he went into some particulars and specialties in this case in regard to the appointment of Mr Clelland,—such as not taking the oaths to government; yet when he came to his argument, and addressed your Lordships on the merits, he did not pretend to say that there was any particular specialty in this case, and he therefore threw himself into the broad line of argument, and denied the legality of all that was done, not only with respect to the parish of Stewarton, but with regard to the whole 277 parishes erected since 1833. My learned friend must have been brought to this point. He said, with his usual candour, that this case stands precisely on the same footing with the Parliamentary Highland chapels or churches, also with the churches under the Colquhoun act, and all those churches erected under the act of Assembly relative to church extension.

Now, in addressing myself to the argument maintained by my learned friend on this question, I do not think I can better fulfil the promise which I made to you, than by calling your Lordships' attention in the outset (because we have to argue the question of jurisdiction afterwards), to what is the law and constitution in regard to the government of the Church of Scotland and its relation to the state, and the power which it has derived from the state; and I here say, as I have said in more instances than one, that in this case I look to the statute-book alone. I read the statutes, and take what I find there; and I mean to ask your Lordships to acknowledge no other power or jurisdiction for the government of the church than what is given in the statutes, for I know that were I to ask your Lordships to look to any other authority, I should ask in vain. There can be no other legal power in the church than what is given by statute, either directly, or by clear unequivocal implication.

The first of the acts, then, which I think it necessary to refer to, is an act 1567, which is found in the larger collection, for which we are indebted to Mr Thomson, the folio edition of the Statutes, 3d vol., p. 27. It is afterwards repeated in nearly similar terms in the small collection, 1579, chap. 69. "Our sovereign Lord the King, with the advice of his three estates of this present Parliament, has declared and granted jurisdiction to the Kirk, whilk consists and stands in the preaching of the true word of Jesus Christ, correction of manners, and administration of the hailie sacraments, and declares that there is no uther face of Kirk, nor uther face of religion than is presentlie, by the favour of God established within this realme, and that there be na uther jurisdiction ecclesiastical, acknowledged within this realme, uther than quhilk is and sall be within the samen Kirk, or that quhilk flows therefra, concerning the premises." Your Lordships will observe that this is a statute which was originally passed in 1567, and was repeated in 1579; and it is difficult to imagine words more express or emphatic than these, declaring "that there is no uther face of Kirk, nor uther face of religion than is presentlie, by the favour of God, established within this realme," and declaring that there is no ecclesiastical jurisdiction, other than that which is within the Kirk.

Now, these statutes are confirmed by the act 1581, chap. 99, which expressly repeats all the previous acts anent the jurisdiction of the Kirk. Then you have the act 1592, which is so constantly referred to, as being the grand charter of the Church of Scotland, in which again these acts are confirmed, and in which the Parliament goes farther: "also ratifies and approves the Synodal and provincial assemblies to be halden be the said Kirk and ministrie twice ilk year, as they haif been and ar presentlie in use to do, within every province in this realme, and ratifies and appreves the Presbiteries and particular sessions appointit be the said Kirk, with the hail jurisdiction and discipline of the same Kirk, agreit upon by his Majesty, in conference had by his highness with certain of the ministrie convenit to that effect." I shall not take up your time by reading the rest of this statute. The important thing to be noticed is, that it ratifies and

approves of the " Presbyteries and particular sessions appointed by the said Kirk." Then it specially declares that an act of Parliament passed previously, the act 129, of the Parliament 1584, by which certain rights were asserted to belong to the crown, shall be of no effect, and above all, " that that act shall no ways be prejudicial, nor derogate any thing to the spiritual office-bearers in the Kirk, concerning heads of religion, matters of heresy, excommunication, collation or deprivation of ministers, or any such like essential censures, specially grounded, and having warrant of the word of God."

Now, I shall not detain your Lordships with what is familiar to you,—the history of the Church of Scotland subsequently to the statute 1592 ; but it is necessary to call your recollection to the language and provisions of the Rescissory act, 1662, chap. 1, being the act of the second session of the first Parliament of Charles the Second. This act recalls the previous statutes by which all these powers are given, and that jurisdiction conferred on the church ; and it is of importance, as showing what, in the contemplation of the legislature, was absolutely conferred on the church by the statutes which it recalled. It recalls those statutes by which the liberty of the church was established, by which its exclusive ecclesiastical jurisdiction and powers were conferred ; but in rescinding them, observe that what the legislature conceived to have been enacted by them, is mentioned in these terms ; it annuls " all acts of Parliament, by which the sole and only power and jurisdiction within this church doth stand in the church, and in the general, provincial, and Presbyterial assemblies and kirk-sessions." Therefore, the statute in establishing prelacy again, and recalling all those acts in favour of the Presbyterian church, tells, in terms the most emphatic, that the object of those Rescissory acts was to endeavour to destroy every thing " by which the sole and only power and jurisdiction within this church doth stand in the church, and in the general, provincial, and Presbyterial assemblies and kirk-sessions."

Then your Lordships are aware that, in 1669, chap. 1, an act was passed for the purpose of asserting the supremacy of the crown as being the head of the church. I refer to it only to show that, in 1690, that act of Parliament, chap. 1, after having been voted one of the articles of grievance, and after a recognition by Parliament of the church having no earthly head, was specially rescinded. Therefore you have the statute-book first saying that the crown is not only the head of the state, but that it is also the head of the Church of Scotland ; and afterwards, that there may be no pretence for saying, that, according to the law of Scotland, the crown occupies the same position as head of the church, as in England, you have this voted, as I said, an article of grievance by the Estates of Parliament, and specially recalled by the first act of the Parliament 1690. Then in the same year in which this important act was passed as to the constitution of the church, you have the statute which not only repeals adverse statutes, but which specially establishes, ratifies, and confirms the jurisdiction of the Church of Scotland.

These, generally, are the statutes on which the authority of the

Church of Scotland, and her claim to exercise her inherent right to ecclesiastical power, are based—statutes which, no doubt, like every other statute in Scotland, must be construed with reference to the practice of the country, under these statutes ; but, looking to them alone, it is impossible to imagine language which more clearly and more expressively vests in the Church of Scotland, to the exclusion of every other body, the sole power of ecclesiastical jurisdiction.

You are told in the Rescissory act, that the only ecclesiastical power and jurisdiction is that which is in the church, and stands within the church : and then you find the statutes 1567, and 1579, and 1592, ratifying that ecclesiastical jurisdiction, and declaring it to be the only ecclesiastical jurisdiction within the church ; that there is no other ecclesiastical jurisdiction ;—all which is confirmed by the revolution settlement, particularly by the act 1690, chap. 5, and again by the Act of Security and Articles of Union. Now, it is perfectly clear, in the very commencement of this argument, and I do not imagine it will be seriously disputed, although it is necessary for me to bring this under your Lordships' notice formally,—not only that the church has ecclesiastical jurisdiction, but that it has that jurisdiction exclusively and supremely, subject to no review whatever. Can my learned friend deny this ? Your Lordships have no ecclesiastical jurisdiction, and you are not entitled, directly or indirectly, to exercise ecclesiastical jurisdiction, whatever may be the consequence in regard to the argument in this case. I am perfectly sure that, in so far as I have gone, I occupy a position from which it is impossible to drive me. Your Lordships are aware that the act 1592 is a very important law of the church. Its effect is not sufficiently considered, although referred to in the papers. It says that the government of the church shall be in presbyteries and particular sessions, appointed by the Kirk. That is the language of the statute 1592 ; and if I understand aright the argument of my learned friend, it comes to this, that the Court should recognise, on any case that comes before it, no Presbytery or Church Court, except that which is in Presbyteries and Synods acknowledged and recognised by that act, and existing at the time it was passed. I hold that it is impossible to maintain this position, without shaking to pieces the whole establishment of the Church of Scotland,—without trampling under foot the whole practice of this country from 1592 downwards, and all that has been done under the superintendence of the church, and in the knowledge of this Court, as well as of the whole population of Scotland. It is impossible, I say, to maintain, under the law of any country, an argument so extravagant as that of my learned friend ; more especially to maintain it in a country which has given so much force to custom, as the law of Scotland unquestionably does. But my learned friend puts his argument in this way—he says, that Presbyteries have a certain civil jurisdiction, and so also have kirk-sessions ; and because of this civil jurisdiction, given incidentally, he draws his conclusion, that its existence must necessarily give your Lordships the cognisance of all their proceedings.

My learned friend then goes on to say, that the law and constitution of the church acknowledge no minister as a member of Church Courts except a minister endowed with a cure,—and this was not the limit of his argument,—not only endowed, but a minister in a parish proper; and thus he reasons further,—and this is the nature of his argument,—that the church having no power in itself to erect a parish proper, no minister appointed by the church to a parish,—because the church cannot make a parish,—can be acknowledged by the law and the constitution as a member of Church Courts. But I should like my learned friend to come with me to one element in this question, and say, whether it is meant to be maintained that the act 1592, acknowledging government by Presbyteries and particular Sessions, means, and includes, and authorises those Presbyteries and kirk-sessions only, which were in existence in 1592, or whether it does not imply a much larger power in the church, and places the government in the hands of those Presbyteries and kirk-sessions which the church might, in the exercise of its proper jurisdiction, think fit to appoint? It is in Presbyteries and particular sessions appointed by the Kirk, in which its jurisdiction and power is vested by act of Parliament; and I want to know this, whether we are to be stopped by the statute 1592, and to take the state of things as at that period? or whether we are not to look farther, and hold that this statute did imply the power of appointing new Presbyteries when it acknowledged and recognised the jurisdiction of the church?

Let us try the question on the matter of presbyteries, and see what has been the history of Scotland on that subject, and also the practice of the church. At page 26 of our paper, you will find this general statement:—"The scheme of Presbyteries in existence at the date of the act 1592, was that settled by the General Assembly in 1586, with two erected in the interval. Their number in 1586 was *fifty-one*, so that at the date of the act in 1592, there were fifty-three," &c.

"The total number of Presbyteries at this present day is *eighty-two*, being twenty-nine more than existed at the date of the act 1592, and all erected by the authority of the church alone."

Having received these successive augmentations during the existence of Presbytery downwards, there are now eighty-two Presbyteries in the church, and these, from the time of their respective establishment, have been in the constant use of sending members to the General Assembly, and of deciding all questions which arose within their bounds; and these eighty-two are twenty-nine, as your Lordships have been told, more than the Presbyteries recognised directly by the act 1592. And this is not all; because you will observe that the church, in exercising its power in establishing these Presbyteries, has exercised its power not merely in transferring, as it has done in many cases, a parish from one Presbytery to another,—from an old to a new Presbytery, but it has often transferred parishes from different Synods. In 1701, for instance, Inverkeithnie was transferred to Turiff, changing both its Presbytery and its Synod; in 1705, Dunsyre, was transferred

from Lanark to Biggar; in 1731, Oathlaw, from Brechin to Forfar; in 1758, Moneydie, from Dunkeld to Perth; and there are various other cases mentioned in our paper. Then you have also, in addition to all this, the act of Parliament 1693, ch. 22, being an act for settling the quiet and peace of the church, and that act, after making various provisions, goes on to say:—"And to the effect that the representation of the church and its General Assembly may be more equal in all time coming," &c. Now, your Lordships will be pleased to observe what it does set forth; it does not proceed to make any enactment; "It recommends to the first General Assembly that shall be called to appoint ministers to be sent as commissioners from every Presbytery, not in equal numbers, which is manifestly unequal when Presbyteries are so, but in a due proportion to the churches and parishes within every Presbytery, as they shall judge convenient." This is a recommendation by the legislature of Scotland to the General Assembly. The legislature does not proceed to direct with respect to the constitution of the church, as if it had the power to remedy the grievance; but an act is passed for settling the quiet and peace of the church, and which, adverting to the inequality of representation in the church, recommends to the General Assembly to take measures to remedy this by introducing a more equal representation. When you place all these things together,—when you find not only this general acknowledgment of the whole ecclesiastical jurisdiction and power being vested in the kirk, and above all, with no other ecclesiastical authority in the country; and when following the practice from 1592 downwards, you find the church, by its own authority, establishing Presbytery after Presbytery, cutting down and dividing old Presbyteries, and removing parishes from one Presbytery and Synod to a different Presbytery and Synod; and when you find the legislature of Scotland addressing itself to remove grievances, and settle the quiet and peace of the church, and as one means of accomplishing that desirable object, wishing a more equal representation to be introduced in the General Assembly, it does not proceed by direct enactment,—it does not claim or assert any authority to make that alteration in the government and constitution of the church of itself,—but what it does is simply this; it recommends to the General Assembly to take the matter into their consideration, and to introduce that more equal representation in the church, which the Assembly did accordingly in the act 1695; if your Lordships look to these facts, and connect them with the act 1592, I beg to say that it is impossible to read those statutory words in which the legislature ratifies and approves of the government of the church by Presbyteries, as recognising merely those Presbyteries that existed in 1592; and I say farther, that it is impossible it could be maintained any where in Scotland, where the law and constitution as established by practice are known to exist, or in the courts of any country, where law is established by custom and statute, that those Presbyteries, aided by the authority of the church, are to be thrown overboard as illegal Church Courts, and that the Presbyteries are to be confined only to those existing in 1592.

If I am right in what I have stated, I have got one important step in my argument on the jurisdiction of the church. My learned friend's argument is this,—that there is such a civil interest in the existence of a Presbytery as it now stands, in regard to the civil jurisdiction which is only incidentally attached to it, that your Lordships are entitled to quash all proceedings, which go to alter the constitution of any Presbytery of the church. Can this be maintained with regard to the increase of their numbers? Is it possible to say, that all those changes, introduced from 1592 downwards, are not well introduced by statutory legislation, under the avowed authority of the church? Would you question the designation of a manse by one of those Presbyteries that did not exist in 1592? It would, I think, be impossible to maintain such a proposition; and yet I know no authority for the existence of any one of those Presbyteries except this, that it is to be found in that general power of government, amounting in a great measure to legislative power, which those statutes have vested in the church, and which is recognised by the act 1592.

Let us now go to parishes; for my learned friend turns upon me, and says,—admitted that I cannot find fault with any distribution of Presbyteries,—you may take a thousand ministers, and you may put them in what order you please,—you may augment the number of Presbyteries from 49 to 82, or multiply them to 100; to this I can have no objection; but, says my learned friend, you shall not establish a new parish to any effect; nay, more—for this is the question—I deny that you have the power to introduce into one of those Presbyteries any minister who has not a proper parish erected by the Court of Teinds, or by act of Parliament. Let us see how the matter stands in regard to the history of the church. In the first place, my learned friend, at the outset, must qualify his proposition about the composition of those Church Courts; for he cannot maintain absolutely that no minister can be in a Church Court except a minister having a parochial cure. Your Lordships are aware that professors of theology, under the character of doctors, are always eligible, and sit in church judicatories as proper ministers, not as lay members or elders. Therefore, in the outset, there are exceptions to this rule laid down by my learned friend, that no minister can be a member of Presbytery who is not a parish minister. Though the exceptions are not numerous, there are cases in which ministers do sit in the Church Courts as ministers without a parish church, and without a cure,—I mean the case of doctors or professors of theology.

Then my learned friend read I know not how many pages of the Book of the Universal Kirk, one after the other, to establish the fact that the Church of Scotland was a parochial church, and to establish this other fact, that the church did make great claims to the endowments and property of the Catholic Church. Then you had the whole history about the thirds of benefices, and the provisions made for ministers of the Church of Scotland. I am sure I would have given him an admission of this in the most ample terms for the purpose of his argument. Undoubtedly, the Church of Scotland and the Church of England were parochial churches, and the Catholic Church, in its

leading features, was a parochial church. Moreover, the leaders of the Reformation, including John Knox himself, maintained that the property of the Catholic Church belonged, and ought to go, to the Reformed Church for the maintenance of its ministers. Nothing was more strongly maintained by the reformers than this; but they were unable to struggle with the cupidity of the crown and the rapacity of the nobles; and between the two, they could hardly obtain a miserable existence out of the large ecclesiastical reserves of the country, though these had been accumulated to a greater degree in this than in any other country, excepting, perhaps, the papal dominions. But, nevertheless, the Reformed clergy were unable to obtain any thing except a miserable pittance—a sort of stipendiary allowance out of those ample resources. Did my learned friend not make one or two lapses when he endeavoured to explain how it came at last to be only a stipendiary church subsisting by the burden of stipends, those revenues having in a great measure, by violent appropriation or forfeiture, become the property of the state, leaving many ministers totally unprovided with any endowment?

But was my learned friend quite serious, when he was talking about the early period of the church from 1567 down to 1592, in asserting that all ministers in the church, in reference to their particular cures or charges, were parish ministers? Was my learned friend at the pains to inquire into this? I suspect if inquiry were made, you would find that there were a great many ministers in those church judicatories who had nothing to do with parishes, and naturally so, because there were a great many benefices in the Catholic Church with no districts assigned; having nothing of the nature of a parochial church, and having no provision for supplying the particular means of worship to the people of a district. That church had its prebendaries, it had its chapels and altarages, but those appointed to minister in them were not set apart to a particular parish. There were many of these in the early judicatories of the church; and when I find this existing in 1566 downwards to 1592, what becomes of my learned friend's argument about parish ministers; that no minister can be a member of the judicatories of the Church of Scotland who is not a proper parish minister? I could give you instances of members who could not be parish ministers, who were appointed to preach where there were no proper parishes, and for whom no provision was made. I find in the list of Presbyteries which was given in to the General Assembly in 1586 (see Mr Peterkin's Book of the Universal Kirk, p. 304), one person particularly mentioned as being the chaplain of the castle of Edinburgh. That was not a parish, neither was it a cure; yet the chaplain of the castle of Edinburgh sat in all the Presbyteries and General Assemblies down to 1764, when, in consequence of a change in the tenure of his situation, by which he only held his office during pleasure, it was held impossible that he could retain his seat. Then, the parish of Restalrig and the parish of North Leith, which was disjoined from the parish of Holyrood, appear in this situation. There were actually only two proper parishes, Restalrig and North Leith;

yet there are three persons sitting in this Presbytery who are designed as the ministers of Restalrig, North Leith, and Holyrood, and that minister of Holyrood is not minister of the king's household, because there is another person who sat in various assemblies as minister of the king's household.

Lord MEDWYN.—The minister of Canongate.

Mr RUTHERFURD.—Yes. I mention this merely to show that there were three ministers sitting for these churches, although there were only two parishes, for the parish of Canongate or Holyrood comprehended the parish of North Leith. Then there is St Catherine's Hope, which is a chapel in the parish of Glencorse, and in the Presbytery of Pennycuick. I believe, Glencorse was not erected into a parish till it was taken out of the parish of Pennycuick in 1606. Then you have St Mark's Chapel at Haddington, in the Presbytery as well as in the parish of Haddington.

Then what does my learned friend say as to the minister of the Bass, in the parish of North Berwick. Some chaplainry is attached to the Bass; but whether that functionary has a particular care of the solan geese except to turn them to account, I do not know; but, nevertheless, that was one of the benefices which gave a seat in the Presbytery of the bounds; and it is not mentioned here. In Stirling, also, we have the chapel of Cambuskenneth, within the parish of St Ninians, but which is not the parish church of St Ninians. There is the kirk in St Ninians; and there is a kirk which would have been a most delightful endowment, the kirk of Shotts, in the parish of Bothwell; and the minister of that kirk also sits in the Presbytery. There are cases also in Orkney; and many more are mentioned which, as far as we can trace, were not separate parishes, and the ministers of those churches sat in the church judicatories at the time, and were not parish ministers.

Now, what becomes of my learned friend's argument about parish churches and Presbyteries? Will he say now, that according to the constitution of the church, as recognised by the act 1592, nobody could sit in the General Assembly excepting ministers of proper parishes, when you find, on the first blush of information—and without a more deliberate inquiry—that those benefices were not parish kirks at all, not having districts allotted to them, but comprehended in some one parish or another; and yet gave the ministers a title to sit in Church Courts. My learned friend even spoke about patronage. He spoke of the impossibility of there being any proper parish church without patronage. This is another of his great positions. Your Lordships will remember the position which he laid down—and, I dare say, he considered well the necessity of employing that argument, and I suppose he had communed with himself as to the lowest point which it was necessary for him to maintain; and, no doubt, it was with some small unwillingness he was led to say, that a minister to be a member of a Church Court, must have a proper parish church, and also a primary recognition in the act 1592. Now, in 1592 and 1596, there were many of those churches and

benefices that were not patronage churches, and not patronage benefices. Stair speaks of this as existing even in his time. In book 2d, tit. 8, sect. 27 and 28, he seems to speak of a different system from that laid down by my learned friend. He says, " The entry of ministers was according to the nature of the benefices whereunto they were to have right, or out of which their stipends were to be modified ; for all kirks were either patrimonial or patronate, and by clearing patronage, it will easily appear what kirks are free or patrimonial : for this distinction is taken from that of persons in the civil law, into those who are *ingenui* or fully free, and *libertini* or become free, but with some acknowledgments and services to the authors of their freedom, who were, therefore, called the patrons : so there stood the like relation between patrons and kirks patronate, as betwixt patrons and libertines, the ground whereof was an eminent good deed done by the patron or his predecessor to that kirk, especially these acknowledged in law, *patronum faciunt dos, aedefactio, fundus ;* signifying the building of the church, or giving of the stipend, or of the ground necessary for the church, church-yard, manse or glebe, were the grounds for constituting the patronage, which were sufficiently instructed by the custom of the kirks acknowledging such a patron ; yet it was a voluntary agreement between the patron and congregation at first, till parishes were settled, and all churches behoved to have a patron (except mensal or common kirks) ; then the interest of the parties pretending to be patrons, gave ground to determine the patronage, without the consent of parties.

" It was lately contraverted, who should be patron of a second minister, whose stipend was constitute, not out of teinds, but by contribution and engagement of a town for the greatest part, and the heritors of the landward parish for the rest, whether the patronage and power to present that second minister should belong to the patron of the kirk, having the unquestionable power of presenting the first minister, or to the contributors ; in which competition, the patron of the kirk was preferred, because the contributors had never been in possession of presenting, nor had reserved the patronage nor power of presenting in the erection of the said minister ; which was only by an act of the bishop and Presbytery, bearing the shares contributed for a second minister, but neither reservation nor protestation by them concerning the patronage or power of presenting the second ministers ; nor was there any thing of custom or possession to show the meaning of the parties."

Stair, in speaking here of a very important case in regard to the right of patronage, the case of Haddington, takes no exception whatever on the ground of the popular appointment of the minister—a very important matter. He does not hint in the slightest degree, in so far as he gives an opinion, that the popular appointment of a minister may not be reserved in the constitution of the church ; on the contrary, he says : —" This case (Town of Haddington, Nov. 18, 1680), will not prejudge erections of second ministers in most of other towns in the kingdom, where the erection doth bear a ' reservation of the patronage.' For clearing of the derived right from the first patron, espe-

cially to singular successors, the patronage was ordinarily conveyed by infeftments, carrying expressly 'advocation, donation, and right of patronage of such kirks.' Such kirks, then, as acknowledged no patron, are fully free; and these are provided, not by presentation, but the ordinary conveyeth *pleno jure*, whereby the incumbent hath right to the benefice and full fruits; but in mensal kirks, the incumbent hath but a stipend, and these belong to the proper patrimony of prelates, who have right to the fruits thereof, as a part of their own benefice; and therefore are called 'patrimonial or mensal.' Patronage is also either laic or ecclesiastic; laic is that which belongs to secular persons; ecclesiastic that which belongs to churchmen; as when a bishop hath a right of presentation to a kirk not in his own diocese; there he presents, but another must confer as ordinary,—so he is but ecclesiastical patron.

"Kirks patronate required for the entry of ministers a presentation of the patron, presenting a person to the church and benefice, to be tried by churchmen having that power, and giving him the right of the benefice or stipend, being found qualified, and collation of the office and institution therein by churchmen upon trial, without which the incumbent could have no right; yet, where the bishop had the power of collation and institution, &c. to confer *pleno jure*, a gift from the bishop presenting and admitting was found sufficient, without a distinct institution or collation, July 4, 1627, minister of Sklate. But in kirks not patronate, institution and collation was sufficient. And of late, the act of ordination, or admission of ministers, by Presbyteries, served for all; but in benefices without cure, as prebendaries or chaplanries, presentation is sufficient, without collation and institution."

You may also look into M'Kenzie's Observations on the Statute 1592, ch. 116 (123, small book). He complains that the patronage of patrimonial kirks had been assumed by the Lords of Erection, to the great discouragement of religion; and with this inconvenience, that it enabled these Lords of Erection to force in their presentees, as against the crown and the other heritors, by indirect and fraudulent means. All this is complete proof that my learned friend is wrong in supposing that nobody could get admission into the kirk in 1592 or 1690, except by presentation by a patron; and that the law is, that no one can be a minister and hold a place in the church judicatories unless presented by a patron, and deriving a living from the teinds of the parish. Why, the fact is directly against my learned friend, as well as what I said before about the benefices. But then it is most important to keep in view that Stair, in speaking about this second charge in Haddington, says that it was established by the act of the church alone. He takes no exception to that, and none to the proposal of making the appointment of that minister popular, because that was only reserved. He says this was not to prejudice the question in another case where the patronage was reserved. That point came afterwards to be decided in the case of Whitburn; where it was held that the right of the patron does extend over the whole parish, and that you cannot establish a church within the parish, and reserve the appointment of the

minister to the contributors, because it was held inconsistent with the civil right of the patron, whose patronage, therefore, is, *ipso jure*, reserved. But in the case of Haddington the opinion of Lord Stair was, that there was nothing inconsistent with the constitution of the church in a minister sitting in the church judicatories, although he was not put in by the patron. The decision in the case of Whitburn went on a different principle, viz., that you cannot oust the civil right of the patron by reserving the patronage; and it was this consideration which led to the Colquhoun act in 1834. But the question that arose there was, whether the patron was ousted by the appointment being made by the contributors; and with this opinion of Stair, and this practice in the church in allowing ministers to sit in its judicatories who had taken their cures by popular appointment, the question comes to be, whether that point as to the reservation of the patronage to the contributors could affect the cure itself, and the right it gave to sit in the Church Courts?

Let us return to patronage, and look to the practice of the church. We have the collegiate ministers, and the numerous collegiate churches, and second charges established in parishes, and sometimes third charges. The ministers of those charges have no right to any allowance from the teinds. They may have, or may not have, a regular provision, but they are established by the sole act and authority of the church. I do not apprehend that any question is raised about this. My learned friend does not impeach the right of the church to establish those charges; and I refer to it merely as the ground of future argument. There are numerous instances of this; and in the whole history of the church downwards, the power of the church to establish second charges, and to induct another minister within the parish for the purpose of discipline and pastoral superintendence, has never been disputed. But let us go to the towns. There are many towns in Scotland in which you find numerous parishes as well as additional charges established. I need only refer to the towns of Stirling, Glasgow, Edinburgh, Aberdeen, Dundee, Dysart, Haddington, the last being the case to which Stair refers,—and a great many others. My learned friend says, with regard to Edinburgh, where this practice has been carried to a great extent, that this was done by the act and assistance of the Town-Council. Will that better the case? The Town-Council were parties who might have given some trouble; but they happened to consent, and the arrangement was made by their consent; but still it was bottomed on the authority and jurisdiction of the church. The consent of the magistrates made it no better or worse. It was an ecclesiastical arrangement within the great town of Edinburgh, and the same in Glasgow. All the different erections in Glasgow, with the exception of the two last, were made on the authority of the Church Courts alone; and I believe all the parishes in Edinburgh were also made on the consent of the Church Courts alone. Therefore, not only the collegiate charges, but those numerous separate parishes, with districts allotted and assigned to them, were introduced on the sole authority

of the church. Look now to the case of Stirling, because it is a strong case. It was a case in which there was a second charge, established by the sanction of the Presbytery. The ministers of the first and second charges officiated in the same church. Then a third charge is added. The magistrates resolved to resist the claim of the widows' fund to the stipend of this third charge during a vacancy. The Magistrates of Stirling *v.* Gordon, Feb. 24, 1827. Here it was held that the vacant stipend was due to the fund, as it was a benefice in the sense of that act. This is a strong instance of a third charge established by the authority of the church, with no intervention of the Court of Teinds or of Parliament, receiving first and last, the authority of the church alone. Yet this was held to be a good and valid appointment; it received the civil sanction in the question that was tried, and unquestionably the incumbents sat all along in the Church Courts.

Look, in the next place, to those numerous cases, which you will find in the paper by my learned friend, Mr Dunlop, beginning at page 42, cases not of towns and burghs, but of every description. He mentions the case of Greenock in the first instance, where a kirk and parish were erected in 1589.

Then there is the case of Stranraer in 1600, into which I have looked particularly. There is no provision out of the teinds in the case of Stranraer. It is not the case of a burgh, or a second or third charge established in the parish; it is the case of a parish, *quoad sacra*, in the strictest sense of the word, and erected by the authority of the Church Courts alone. A minister is established there, exercising in all respects a separate parochial jurisdiction; and it was established on the obligation of the Magistrates of Stranraer to pay a certain sum; yet that parish has been acknowledged to the effect of enabling the minister to draw upon the fund for providing for the small livings. He draws L.150; and when the case came before your Lordships, your decision was only to the effect of refusing him a manse, because he had a claim on that endowment. There are other cases. I do not mean to go into them; but I beg your Lordships' particular attention to them, —they are North Leith, Ferry-Port-on-Craig, and Prestonpans. The circumstances connected with all these cases are fully detailed by my learned friend Mr Dunlop, in his paper, and I would waste your time if I entered into full details in regard to them in an argument of this nature.

Your Lordships now see that in a great variety of ways the church has exercised this jurisdiction, with which I apprehend it was endowed by the statutes, and particularly by the act 1592, in the erection of parishes and churches, as well as in the erection of Presbyteries; and I think the power to erect those parishes *quoad sacra*, is implied in that statute 1695, cap. 22, in which Parliament recommends to the church a still more equable apportionment of representatives to the General Assembly, using the words, not parishes merely, but "churches and parishes." Then, when you come to couple all this practice, the establishment of so many separate kirk-sessions in landward parishes,

and also in burghs in the way of collegiate charges by the assigning of districts,—I say, when you come to couple this with, and apply it to, the construction of the act of Parliament 1592, which establishes the jurisdiction and authority of the church, in presbyteries and kirk-sessions appointed by the kirk, it is too narrow a construction of that statute, and one which it will not bear, to hold that it applied only to kirk-sessions and Presbyteries existing at the time, which had been appointed by the kirk, and did not apply to parishes which might be thereafter appointed by the kirk in the exercise of its jurisdiction. And while looking to this construction of the statute, which all the practice bears out, it is impossible to conceal or deny what has been done in Scotland, and under the eye of the legislature and in the face of your Lordships. You have the opinion of Lord President Blair, in these papers, in regard to parishes in Edinburgh, an opinion which I venture to put in opposition to the protest which has been referred to on the other side, and taken in the middle of a discussion. This opinion, which you will find in page 58 of the respondents' case, is very conclusive, and delivered after great deliberation. It is a reasoned opinion. The *dictum* even of that great lawyer would not have been declared without strong reasons to support it; but when you have not only his *dictum*, but his deliberate opinion, and the grounds stated on which his opinion is rested, it undoubtedly carries a much higher authority. He says, "In order to sanction an establishment of this kind, which is totally unconnected with teinds, and by which the rights of heritors neither are nor can be affected, it does not appear to me that any thing more is necessary than the authority of the Presbytery, which is by law vested with the superintendence of all ecclesiastical matters within its bounds." That authority of the Presbytery, which is by law vested with the superintendence of every thing ecclesiastical within its bounds, was, in the opinion of that great lawyer, sufficiently justified. He says, "Upon the whole, I am of opinion that the proposed establishment of an additional minister in the parish of St Andrews may lawfully proceed, if sanctioned by the Presbytery, without resorting to a process before the Commission of Teinds, which I do not consider to be necessary in a case of this nature."

Then you have another authority as to the general power of the church, and it is to be found in the case of Gordon against the Widows' Fund, February 18, 1836. I allude to the authority of a very venerable judge, who lately presided in this Court. It is true his opinion is pronounced in circumstances in which it may be called an *obiter dictum;* but still it is a strong opinion in reference to the power of the Assembly, and the power of the church, in regulating its own jurisdiction. He says, "In 1833 the General Assembly passed an act whereby these parliamentary ministers were empowered to exercise all the duties of parish ministers as fully and freely as if these districts had been made separate parishes, making them constituent members of the Presbytery, and giving to them the like powers, authorities and privileges, now pertaining by law to parochial ministers of the

church." It is said that this act was *ultra vires*, and in direct contradiction to the act of Parliament, 5 George IV.; but this, I think, is not the case. Parliament did that which properly fell under its powers. It gave money to build a church and manse, gave a stipend to the ministers, reserved the rights of the parish minister and the district parishes, gave patronage to the crown, and left the matter of church discipline and the jurisdiction of the new ministers, as well as their functions and status in the church, to be regulated by the Court of Teinds, if necessary, and by the General Assembly. Accordingly, the Assembly did not, as they could not, disjoin the district from the parish, and erect it into a separate parish; they only authorised the ministers to have the same authority within their districts as the old ministers had in the other portions of the parishes, and they admitted them to be members of Presbytery, which they alone could do, and which they had often done as to second ministers, and the numerous additional ministers in Edinburgh, Glasgow, and other large towns. Now, that act of Assembly 1833 was passed with great care, and in the presence of great lawyers, of whom it is impossible for me to speak, as they will be spoken of hereafter; but that is the act which my learned friend declared to be the most monstrous act ever passed, the most monstrous piece of parchment that ever was penned, an unconstitutional attempt of the church to encroach on the civil law, displaying monstrous ignorance of the constitution of the church, and astonishing ignorance of its civil and ecclesiastical constitution on the part of those under whose auspices it came into existence. Hear how the late Lord President speaks of this act. "Things were on this footing when the Act of Assembly 1833 was passed, which enacted and declared, that these ministers 'shall exercise and enjoy, within their respective districts, the whole powers and privileges now competent to parish ministers of this church.' This was a matter within the proper province of the Assembly. They had the power to pass such an act, and they exercised that power. And I see no conflict between the provisions of this act and those of the statute. The Parliament on the one hand, and the Assembly on the other, each being supreme in its own province, passed their respective enactments, both leading towards the same end, and the last being in supplement of the first. The Assembly made no disjunction of the parishes *quoad civilia;* but it declared the ministers to be members of all Church Courts; and it also declared them to possess all the privileges of the parish ministers of Scotland,—and that the Assembly alone could do. I don't think the Assembly exercised a new power in declaring a minister to be possessed of such privileges. I conceive the same power to have been exercised in analogous cases, such as when second ministers were appointed, or in any of the numerous instances where new ministers were appointed in Scotland."

Will my learned friend deny the supremacy of the church now? Here is the opinion in very marked and conclusive language of the late Lord President, on the very matter,—here is an opinion in strict accordance with that of Lord President Blair, and which is found to be most dis-

tinctly and consistently borne out by the whole practice of the country, from the first establishment of Presbytery down to the present day, and which is also founded on the broad recognition of the authority in those statutes conferring the ecclesiastical jurisdiction of the church, and founded on the construction of the statute 1592, which it is impossible to deny in regard to the appointment of Presbyteries, and which we cannot, without altering the words of the statute, deny to be true in the same way with regard to parishes.

Am I to be told, then, that my argument is defective, because in many cases a different course was followed after the Commission of Teinds was appointed, with a power of erecting parishes with reference to civil effects? I know that in many cases—not after 1617, because then the Court had no such power, they had none until 1621—application was made to the Court of Teinds for the purpose of sanctioning those arrangements, just as before application was made to Parliament for the purpose of ratifying them, and giving them more effect than any arrangements by the church. The church could do nothing touching the pastoral superintendence, but appoint a minister and kirk-session, and put a district under the minister's pastoral care. The church could do no more. It could not affect, and never attempted to affect, any civil right or interest whatever; but if you wanted to make those new parishioners liable to repair the church, you must go to the Commission of Teinds or to Parliament. If you wanted to extend the erection *quoad spiritualia* to civil effects, to the maintenance of a parish proper, to the maintenance of a manse and glebe, why then you must go to Parliament and the Court of Teinds, to have a complete annexation *quoad omnia*. But because this was very desirable after 1621, when the Commission of Teinds came to have this power, is there any thing in the establishment of this Commission of Teinds which touches the power of the church as a church, or which limits that power? Unquestionably not. I do not mean to go over the cases, but I ask your Lordships to look at them in the paper of my learned friend. Many of those cases begin with a *quoad sacra* erection on the authority of the church, and when that has subsisted for some time, an application is made to the Court of Teinds or to Parliament to carry the erection farther, by an annexation *quoad sacra*, giving civil effects, in a limited degree, or *quoad civilia* and *quoad omnia*. But most unquestionably the subsistence of the Court of Teinds is like the subsistence of Parliament itself, for you must consider the Court of Teinds but a delegated power from Parliament. No alteration was made in the laws of the church by the establishment of the Court of Teinds. Great facility was thereby given to the establishment of parishes, and to the provision of ministers; but the powers of the church and the jurisdiction conferred by the statutes, even by this act 1592, were not in the least degree struck at by the establishment of the Court of Teinds. What the Court of Teinds did, and what Parliament did before, was to carry the annexation to much higher than merely to ecclesiastical consequences; but they did not even interfere with the church in its pastoral superintendence and discipline.

Then we have the Highland churches. This is the case in dispute; for when we come to the Highland churches, we get on debateable ground; but leaving these churches alone, and founding the argument on the broad ground of jurisdiction given by the statutes, and especially on the act 1592,—founding on the jurisdiction that those statutes have received, recognizing the ecclesiastical power and government that reside in Presbyteries and kirk-sessions, looking to the variety of circumstances and situations in which new Presbyteries have been established, and new parishes erected,—there is one clear undoubted stream of practice which completely authorises the church in all that they have done here, and in all that they have done with regard to the government churches, and those other new churches. All this exercise of its power is eloquently set forth in the speech of the late Lord President, in his opinion formerly quoted from Sir John Connell's book (Appendix) in the case of Preston Kirk against the Heritors of Kirkden. When, in talking of the justice of a second augmentation or not, his Lordship indignantly exclaims: "During all this time, were all the heritors in Scotland asleep? Was this Court asleep? Was the respectable bar of those days asleep? Did none of the great and illustrious men at the bar perceive, that the case of Kirkden was a mere circumstantiate case, no way deciding or even touching upon the great and important law question we are now agitating.

Might I not apply the same language here? Has every body connected with the administration of parochial law, and every body interested in raising questions of what is lawful and unlawful in parochial assemblies, been asleep? Have the Court, and the bar, and the legislature been asleep, when you find that from 1592 downwards, there has been scarcely a single form or feature in which that power has not been recognized? It is true that in the case of those Highland churches, and in the case of Chapels of Ease, and in the case of those churches under the Colquhoun act, there has been in one sense a large stretch of power on the part of the church, that is to say, that it has exercised this power in a much greater variety of cases than it had previously had occasion to do, although the number was not a few before.

But you will not overlook, when you come to this, consideration of the state of the country and its population, as compared with former times. We are not to forget that the necessities of the country for such exertions, and such arrangements as these for religious instruction, are greater in our times, and in this country, than they were the last century. Need I tell you, for I expressly looked into the matter this morning, that in 1801 the population in Scotland was one million and a half; in 1821 it was above two millions; and last census it was two millions six hundred thousand, being one million and one hundred thousand more of a population requiring religious instruction than in 1801. Is it then wonderful, that the legislature, in its wisdom, should think it right to provide religious instruction for the destitute Highland parishes? And if private individuals come forward, and out of their abundance, contribute in carrying forward

and extending that laudable object,—and if Parliament in its wisdom, and to encourage the scheme, shall say, " we, against the common law, reserve to you, the contributors, your right of patronage," thereby excluding the right of the old patrons ; and if you find the church establishing, with the sanction of the legislature, 277 additional churches, and a large proportion of these in no great space of time ; and if you find Parliament following out the views of private benefactors and the ecclesiastical policy of the church,—a policy not involving any new exercise of power, not without precedent, not without statutory authority, but following the course and directions of the church from its earliest days ; and if you find the church has done that at once with regard to these new churches, which it had done a hundred times before with regard to individual churches, and had adopted them all at one and the same time,—on all these considerations, I say, it is impossible to deny that the church must have had the authority to make kirk-sessions *quoad sacra*. The exigencies of the people were pressing, and at once the church adopted this course, for the purpose of discipline only—it is so limited here—for the purpose of religious care and superintendence only,—disclaiming and disavowing that any thing they did could carry any civil right.

I pray your Lordships' attention to the act 4 Geo. IV., as to the Highland churches. I shall not detain you by going over the enactments of that statute ; but in regard to the argument of my learned friend, who founded so much on the want of patronage, and the want of endowment, and the want of a parish proper, and who held that the decision in a case which involved only a construction of the Widows' Fund act, was quite conclusive against the rights of the Parliamentary ministers to sit in Church Courts, what is the situation of these Parliamentary ministers ? First, you have the crown as patron of every one of them,—then you have a minister secured in an endowment, because it is given by the state ; you have next a place of worship, and also a manse and glebe secured to them ; and, lastly, you have a district allotted to them, bearing the designation of a parish. Now, what does my learned friend say to this case ? I understand his argument to be—and now your Lordships will see more strongly the necessity which forced him to maintain it—that none but parish ministers were qualified to sit in the church judicatories ; he, therefore, must make out that the Parliamentary ministers are not parish ministers. The moment it is maintained that proper, exclusive parish ministers, are the only persons entitled to sit in the church judicatories, then the question arises, How do we stand in regard to the Highland churches, whose ministers were all admitted by the act of the church alone ? Here we have got the crown for a patron,—we have at least got that requirement, a patronage ; here we have got an endowment, a place of worship, a residence, a glebe,—and a district allotted to them by the Presbytery. Are these ministers not to be members of Church Courts, for the purpose of religious care and correction of morals, and ecclesiastical discipline in every sense ? Why should they not ? This

is a ten times stronger case than many of those referred to in regard to the power of the church in times past; and yet my learned friend has admitted—and he is not in the habit of granting propositions so easily,—that his case must stand or fall with the case of the Highland churches. He could not say he had another case to maintain before you. If he cannot say that the act of Assembly 1833, passed under the circumstances mentioned, was utterly and notoriously illegal, as he described it, he can have no case at all. Suppose we have one case of a Highland church where we have all the requisites of crown patronage, endowment, manse, glebe, designation, and every thing, except an act of the Court of Teinds—shall that minister not sit in the judicatories of the church? My learned friend says, "No." What is the reason? He says that none shall sit there but proper parish ministers, under the authority of Parliament. I deny his major proposition altogether. He is unable to make out that nobody can sit in Church Courts but parish ministers, except on the assumption that none but parish ministers can sit in the Church Courts; and if I drive him from that position, I drive him out of Court, because I have a clear case in regard to the Highland churches; and he admits that if I succeed in establishing my argument in regard to the Highland churches, he has no case. If I satisfy your Lordships that the ministers of the Highland churches have the right to sit in the church judicatories, his case falls to the ground. If they have not the right, then a great deal of language has been thrown away by the legislature, and with no meaning. He must assume *that*, and also that the proceedings of those eminent men who passed the act of Assembly 1833, were conducted with deplorable ignorance or inattention.

Now, what becomes of the case in regard to the Colquhoun act? Here we have an important specialty. It is the act 4 and 5 William IV., cap. 41, "An act to regulate the appointment of ministers in Scotland to churches erected by voluntary contribution." It encourages voluntary contributions by vesting the right of patronage in the contributors, or those giving an endowment. Now, I am not here under a patron. I have not got a patron, as my learned friend frequently stated. I have neither a male nor female patron, nor a pupil, nor a grown up person, whether a Presbyterian, Episcopalian, or Roman Catholic for a patron. I have not got that particular mode of appointment. I have not got that qualification from which a presentation must flow; but I might have had it,—I would have had it, if I chose, in regard to every one of those churches, and may have it in regard to every one of the chapels of ease, as decided in the case of Whitburn, to the effect, that the right of a patron might be extended to all the churches within the bounds of the parish. I have not, however, that qualification here, and why? Because Parliament, by the act William IV., has expressly reserved this right for the contributors: and in Parliament reserving it, has it done anything inconsistent with the right of the Church of Scotland? I put my hand on a passage in Stair, in which he says, he saw no objections to the nomination to the church by the people. I say that every one of those churches would have

fallen into the hands of the patron, but for that act of Parliament, which says that the nomination and appointment shall belong to the contributors. What does this act say,—not in its preamble, but in its enacting clause? though my learned friend would give no effect to it, and said it was ridiculous to found upon it when talking of statute law ratifying the power of the church. By this act it was enacted, "that where any church, chapel, or other place of worship in that part of Great Britain called Scotland, built, or acquired, or endowed by voluntary contribution, shall, according to the provisions of the existing law, be erected into a parochial church;"—(Mark that!)—"either as an additional church within a parish already provided with a parochial church, or as the church of a separate parish, to be erected out of the part or parts of any existing parish or parishes, whether the same be established and erected, merely, *quoad spiritualia*, by authority of the Church Courts of the established Church of Scotland, or also, *quoad temporalia*, by the authority of the Commission of Teinds, neither the king's majesty, nor any private person, nor any body politic or corporate, having right to the patronage of the parish or parishes within which such additional church shall be established, or out of which such new parishes shall be erected, shall have any claim, right, or title whatsoever, to the patronage of such newly established churches, or newly erected parishes; but the right of presenting ministers thereto shall be exercised according to the manner, and subject to the conditions, which shall be provided or sanctioned by the Church Courts establishing the said churches." All this has evidently been very carefully considered.

The first question I would here ask is this, Is this a parliamentary recognition of the power of the Church Courts to erect such a parish for the purpose of this act? One hundred and fifty churches have been built under this act, by the authority of the Church Courts alone, all of them erected *quoad spiritualia*. I ask whether this recognition, not in the preamble, but in the enacting words in which the condition of the enactment is expressed, is not good authority for the purpose of this act? Does my learned friend say that these words are perfectly idle, useless, and not to be given effect to, if a question arises about the position of any of the ministers of these churches? Do the words of this act not amount to the most express recognition that parliament could make, to assign such parishes for the purpose of this act? And the question arises here, whether there has not been a parish given to one of these ministers? Is there not here a good statutory recognition of the power to assign a parish, for these purposes, to the effect of following out the provisions of the statute? But does it not go farther? When you consider that parliament must have legislated on this matter with reference to the practice of the Church of Scotland, and with reference to all the previous statutes giving power to the church,—when all this must be held to be, and certainly was before parliament at the time they passed this act, is it to be said that this is not to be admitted? My learned friend does not even admit that this power is acknowledged by the statute. He

says that the words which I have read are idle, useless, and absurd, and that parliament was quite ignorant of their meaning; and this can be no great censure on parliament, even were my learned friend right, particularly when he says that they knew as little about the matter as the General Assembly, including the late Lord President, several of your Lordships, and other eminent men, when that Assembly was passing the act 1833. Is this act to be read as a mere recognition by parliament of the churches erected by voluntary contribution? Does it not go deeper than the purpose of the act, and connect itself with those great statutes on which the Church of Scotland is built, on which its claim to jurisdiction rests, independently and separately from which I could never argue that the church had any jurisdiction at all? I say it has the power to establish parishes *quoad spiritualia*, but not to civil effect. Chapels of ease present no difficulty at all, because a case may arise as to the nomination of chapels of ease, as in the case of Whitburn, and then you would have patronage there as well as any where else. But I say that patronage is not a necessary part of the argument. It is no indispensable condition to such a thing existing. Chapels of ease fall under the statute, as do the Burgher churches which have become connected with the church, excepting the Highland churches, which were already specially provided for.

Looking, therefore, to the whole merits of the case, I submit that there is no ground here for saying that, in establishing this parish in Stewarton, for the purpose of religious discipline, and in associating the minister with the Presbytery, and the other Church Courts, for the same purpose, the Presbytery are doing any thing which was not done of old, or exercising any power which is not clearly given to them by the statute.

These are generally the views which I would submit on the broad merits of the question, viz. the right of the church; and, without trenching on another point, I mean your jurisdiction, I beg your Lordships to consider what is done here, especially in the circumstances in which the case has occurred, and in regard to the remedy which is asked. But this leads to another branch of the subject, very intimately connected with all I have said before.

We now come, then, to the very important question of jurisdiction. The legislature of the country having given a church establishment, and conferred on it certain powers—(we shall take the case of a Presbytery again)—has directed, not as a proper part of ecclesiastical duty, but merely incidentally, that Presbyteries shall discharge certain civil duties; that they shall, for instance, assign manses and glebes; that they shall give orders about the repairing and building of the churches, and there may be other duties besides; and in these cases the jurisdiction has been accounted entirely civil;—one chief reason being that there is no review in any of the superior church judicatories. The only power of review lies here; and you have held that review competent, not merely by suspension and reduction, but also by advocation. Now, the point is this: to what extent does the circumstance

of this jurisdiction, in regard to these civil duties which come under your review, and which are thus imposed on the Presbytery, open jurisdiction to your Lordships as to the constitution of the church? You have no ecclesiastical jurisdiction. I do not hesitate to say, in the strongest terms, that you have not the vestige of it. It does not reside with you. It resides no where but in the church, in which alone, and exclusively, the statute law has put it. Well, then, I say that if it belong to the church to decide what shall be the constitution of the Presbytery; if that be, in truth, part of its ecclesiastical functions, this Court must take the constitution of the Presbytery from the church, and it is the Presbytery so constituted by the church, to whom statute law has given this incidental jurisdiction. That is my first proposition, and there is a great deal beyond it. Could your Lordships, for example, deny effect to the designation of a manse and glebe, or to any order for the repair of a church, on the ground that the Presbytery was not one of those recognized by the act 1592, but a Presbytery whose sole existence was derived from the church under the authority of that statute. I apprehend that you could not; and I therefore apprehend that the law is this, that it is for those judicatories with whom the constitution of a Presbytery rests to decide on the constitution of the Presbyteries; and when they have pronounced their judgment, you must take the Presbytery from them, and that is the Presbytery so constituted which can alone exercise the civil functions, subject only to your Lordships' review. There is nothing peculiar in this. You may have jurisdiction incidentally, in a great number of cases; but I do not know any rule of law, in regard to jurisdiction, more deeply rooted, and of wider application than this, that if a particular question does belong, in its proper and immediate character, to a particular court, and that court has adjudicated the question, every other court must take the adjudication as it has proceeded from that court. You could judge of any question raised incidentally in any process that comes before you. Take the case of marriage, which formerly belonged to the Commissary Court. You could certainly take up the case of a marriage, and try it incidentally. Take a question of peerage. When settled by the court which has the exclusive jurisdiction, you, as a court of judicature, cannot decide upon it; but if you have incidentally a case of peerage before you, you can take it up, and adjudicate upon it. But when a question of peerage is settled by the highest and proper court, then you must take their decision. Or, take the question of a prize, which belongs to the Court of Admiralty. If the question should happen to be raised incidentally before your Lordships, you may adjudicate upon it; but if the Court of Admiralty has decided it, you cannot try the same question over again with a view to come to the same or another result. You must take the decision of the Court of Admiralty, and act upon it. If the jurisdiction, in like manner, be vested exclusively in the church, to the effect of settling the constitution of a Church Court, must not that be final also? How can you go beyond it? If it be a matter ecclesiastical to say what shall be a proper Presbytery, if

the legislature and the constitution of the country have trusted it to the Church Courts and to them alone, to say distinctly what shall be the constitution of a Presbytery, the circumstance of your Lordships having incidental jurisdiction, because of the civil functions incidental in the presbytery, will not enable you to judge as to the constitution of that body. The matter is solely within the ecclesiastical province. But what is proposed to be done here? You are here with no civil question before you, to enable you to decide who shall sit in the Presbytery. You are trying the question of the jurisdiction of the Church Courts in their ecclesiastical character, and not as to their jurisdiction of a civil nature. There can be no doubt that this is a case of ecclesiastical jurisdiction, because you have the Presbytery acting under the express warrant and directions of the General Assembly on the matter in question. Are you then, with no civil question to determine, to take the decision as to the constitution of the court from that body on whom parliament has conferred the right to decide, and assume it to yourselves?

My learned friend put a number of absurd cases, as to a person being a good member *quoad sacra*, and a bad or illegal member *quoad civilia*. All these cases, I think, make against him. The matter resolves into this, that a Presbytery, to all purposes and effects, must be constituted according to the law of the land; but if you have not jurisdiction to ascertain the constitution of the Presbytery to all purposes and effects, then you cannot get out of the difficulty. The only way to establish the uniformity of the system is this,—providing always you are satisfied that it lies within the church to judge of its own constitution,—you must take from the church alone the decision of the question as to what are the constituent parts of its Presbyteries. Now, I ask, was it a proper case that my learned friend put in illustration, or one at all worthy of being applied in association with a constitutional ecclesiastical legislation, when he supposed a Presbytery bringing in a set of scavengers as members of its body? If I were to say, suppose that the Lords of Justiciary were to bring in a set of scavengers as part of their tribunal, would it not be an utter absurdity? Really it is not decent to bring in such suppositions,—they are not constitutional. But take the case of the Court of Justiciary having decided upon the claim of one to be admitted among their number, and having entertained that claim, and received that person into their body, I do not think it would be in the power of the Court of Session to question that decision, any more than it is in the power of the Court of Session to question the power and right of the church to decide on the constitution of its Presbyteries. All these cases are quite out of the question. It is not constitutional to suppose that they exist; since the legislature has seen it meet to vest the church judicatories with full powers to regulate its laws and constitution, and to vest these powers in them exclusively.

My learned friend says you are the supreme interpreters of statute law. With great deference I say you are not. Your interpretation of statute law cannot be available against the Court of Justiciary. The

Court of Justiciary is equally supreme. You may advocate a case from the Justice of Peace Court; but the Court of Justiciary may take a different view of the matter, and so claim it as coming within their exclusive jurisdiction; and statute law does not say that the interpretation of the Court of Session is better than that of the Court of Justiciary. In the same way the Court of Exchequer may take a different view of a case from the Court of Session, and yet that view is not declared by statute to be less independent than that of the Court of Session. There never was a country whose constitution has limited the rights and powers of its courts more strictly than the constitution of this country. It has done so with great jealousy, and much more so than in England, with its Courts of Equity, and Courts of Common Law. Your Lordships know the discussion that took place between the Courts of Equity and the Courts of Common Law. You are aware that Sir Edward Coke, in attempting to vindicate the jurisdiction of the Court of Common Law against the alleged encroachment of the Courts of Equity, resolved to imprison a master in Chancery. The matter came before his Majesty in Council, and Sir Edward was obliged to confess that he was wrong, and that the Courts of Equity which he had thus challenged, were beyond his jurisdiction. But here in Scotland we have different branches and provinces of jurisdiction allotted to different individuals or tribunals; and the question therefore comes to be,—if one of the courts in one of these provinces be vested with the civil jurisdiction belonging to another, has the one any power to control the other? I doubt this extremely; and I submit, with great deference, that you must take the constitution of that tribunal from the court to whom it belongs. You cannot interfere with its constitution,—you cannot say, in regard to the question before you, that it shall not be a good Presbytery, that it shall not be a good kirk-session, for the purposes of ecclesiastical jurisdiction and discipline, or that this division of the parish shall have no effect in regard to ecclesiastical purposes, because there are certain civil rights, which may be contingently affected, and as to which therefore your jurisdiction may be competently exercised. What would be the effect of this? Would it not come to this, that it must be in the power of this Court to arrogate to itself the decision of every question regarding the constitution of all other judicatories? I do not know one question which might not then be raised and brought under your jurisdiction. Certainly, the Exchequer Court would not be safe, nor would the Justiciary Court be safe, if my learned friend be right in saying that every thing that affects a man's interest will open up a jurisdiction in the Court of Session. But is it so? Because a matter ecclesiastical may have certain civil consequences, is it, or is it not, a matter ecclesiastical for the General Assembly to arrange and settle what is a Presbytery? Is it not committed to them to do that in any way they may think fit, or to settle what is a parish for purposes of ecclesiastical discipline? Are you to interfere there; and because of that civil jurisdiction which is incidental to the Presbytery, to say, you, the Presbytery shall not establish such a church,—you shall not

establish such a kirk-session,—we shall not recognise it at all, even ecclesiastically? Are you to say you shall put it down absolutely, because if a civil question arise, you must decide upon it? Is it within your province, or is it not going beyond your province, to take it upon yourselves to exercise the jurisdiction which is given to the Church Courts alone by the statutes? Would not this be to go beyond your proper sphere, and control the church in a province where it is declared to be supreme, as was so well expressed by the late Lord President?

My learned friend said that nothing that is ecclesiastically wrong can be civilly right. This is a good declamatory expression. Why, a great many things may be ecclesiastically wrong that are civilly right, to the effect that you cannot interfere with them. If their decrees are not examinable by you—though a great wrong may be committed—there is no wrong in one sense, because there is no power to correct. I do not admit that things that are ecclesiastically wrong are necessarily civilly wrong; because there may be ecclesiastical wrongs. The General Assembly dealing in matters ecclesiastical, may have forgotten or neglected their own law, or the statute law, and forgotten all the guides that Parliament set before them; but still, if the wrong done by them is within their own province and sphere of action, there is no redress beyond it; if they have gone wrong, that cannot give you the right to enter upon their province. How can you redress an ecclesiastical wrong, if you have no ecclesiastical jurisdiction? If the fact be, that it is in the power of the church to decide all questions in regard to the proper constitution of the Presbytery, though the law of this country has attached certain civil consequences to certain presbyterial actings, the primary question as to the constitution of the Presbytery belongs to the General Assembly and the church, and your Lordships ought to act upon this decision. Can any jurisdiction arise to your Lordships in any view of the case until you have before you a question involving a purely civil right? We are not here in a question as to the designation of a manse or a glebe.

Lord President.—That question has arisen in the case of Greenock, which has been reported by the Lord Ordinary.

Mr Rutherfurd.—I am aware of that, my Lord; but suppose a civil question is raised as to what is its effect—can you do any thing more than see, whether, according to your own opinion of what is a proper constitution of a Presbytery, the civil right has been legally or illegally affected? Can you go farther, and interdict the Presbytery from exercising its functions? Suppose all that I have ventured to suggest as to this question being beyond the jurisdiction of this Court, were to be completely overruled, and satisfactorily answered, and that holding me not to have taken a right view of the law, that you sustained your jurisdiction,—does that open to you a larger sphere than the actual exigency requires? If the question be as to the power of the Presbytery in repairing a church, you may inquire whether the decree of the church be pronounced by a body entitled to do so; but are you to say that this body shall have no power of pastoral su-

perintendence, that it shall have no ecclesiastical functions at all? That is going beyond the necessity of the case; because you are only called upon to put all civil rights in order. You are here to protect all civil rights undoubtedly. You will not allow any civil right to be touched by that which is an illegal act: but will you do anything more than stop the wrong,—will you not acknowledge the validity of any other act? Would it not be to go beyond your province, and usurp functions that do not belong to you, if, not content with giving redress, you choose to say to the Church Court, "you shall not exercise ecclesiastical functions, and nothing done by you in respect of ecclesiastical jurisdiction shall be valid?" I say there is no principle for this. A question as to the exercise of jurisdiction must be looked at in two points of view, first, the case is to be adjudged;—second, the remedy is to be given. You may have no jurisdiction in respect to the case; but you may have it in your power to give a particular remedy. One remedy may be in your power, and another not. A good illustration of this arises in the Auchterarder Case. I perfectly understand how you can have jurisdiction to entertain an action of damages, although you cannot force the induction. It has been decreed that the right of the presentee to get into the parish, is only a civil right; and I can understand if effect is not given to that civil right, how you can make that tribunal, with whom it lies to give effect to the same, responsible, not by forcing them to do an ecclesiastical act,—but by giving a civil remedy. You cannot quash a sentence in a criminal case; it must stand, in despite of this Court, until the Court of Justiciary take it up and decide upon it. A man may be put in the pillory in the most unjust manner; but your Lordships cannot interfere, because the matter is not within your jurisdiction, but within the jurisdiction of another court. When any court is asked to exercise its jurisdiction, it must look to the redress asked, as well as the power to give it; and what is the redress asked here? It is to find that this minister and kirk-session should have no pastoral care and superintendence; to find that the Presbytery shall be illegal; and that this minister and they shall not be entitled to exercise any ecclesiastical functions. Is not that giving ecclesiastical redress for what is supposed to be an ecclesiastical wrong? I deny that you can judge of the wrong; I deny that you can give the particular redress which is asked. When questions come before you in reference to civil right, you may have the power of looking into the constitution of the body, and see that they are that body on which the state has conferred the particular civil jurisdiction. Supposing you to get over that first difficulty, and hold yourselves entitled to look into the constitution of the Presbytery, you may suspend and interdict—you may paralyze its civil functions—you may stop it from acting civilly—you may dissever every thing it does in that character; but shall you touch it in its ecclesiastical character? Shall you stop it from acting ecclesiastically? And yet you are here asked to do all that. My learned friend seems to say that it is competent to this Court to obtain a declarator or suspension and interdict, to the effect set forth, holding that the whole Pres-

bytery was illegal—that a Presbytery calling itself a Presbytery, was not a Presbytery. I deny that such a question can be entertained here—I deny that you can have any such jurisdiction. Those questions of jurisdiction have been raised between the Court of Session and the General Assembly of former days. My learned friend quoted many out of the Book of the Universal Kirk. I shall mention one instance which occurred in the year 1591; it was, whether a Lord of Session, of some distinction, should be called to the bar of the General Assembly, to answer for an expression used by him in a discussion which took place in the Court of Session in a case then depending before the Court. Here came the question of your jurisdiction. See Book of the Universal Kirk, Mr Peterkin's edition, p. 354, under date July 9, 1591: "Anent the foresaid matter, the Assemblie, after grave reasonyng had, if it was expedient to proceed in this cause before the Lords of Session had given their decisione, thocht meet that my Lord Justice Clark sould be demandit if he acknowledged the judgement and jurisdiction of the kirke or not? Quha being callit and inquyrit as said is, answered, that he acknowledgit with reverence the judgement of the Assemblie in all causes appertayning to them. But in this cause quhilk is civille, quherento the Lords are *primario judices*, before quhom also it presently depends, they cannot be judges *primario*.

"After the quhilk answers, being removit, and the kirk farther advysit calling his Lordship in againe, they pronuncit, that they fand themselves judges *primario* in this cause, and instantly to proceed therein,—requyring him what farther he wald alleadge or propone for his defence in the said cause: who took instruments of their interloqutor, protesting for remead of law; quhilk protestatione, because it was made *verbo*, and contaynit many heads, he was desyrit to givein to the clark in write."

I think that, on both sides, the discussion was well sustained; and it raised the question, who should be judges *primario?* I, therefore, put it to your Lordships, if the primary and proper jurisdiction be in the church to declare the constitution of the Presbytery? The single circumstance of civil functions being attached to the Presbytery, and they being called upon to execute them under review of your Lordships, will not take that from the church which belongs to its jurisdiction, *primario*.

The second position I maintain is this, that even if you could review the constitution of the Presbytery incidentally, still the question of constitution belongs *primario* to the church. You cannot review the constitution of the Presbytery to any ecclesiastical purpose or effect, or say what it shall be. Your review and your remedy must be with reference to your own jurisdiction, which is civil. You must give the civil remedy; but should the church go wrong in its own province, that opens up no jurisdiction to you. There is nothing against the wisdom of the constitution in saying that there may be a wrong without a remedy, because all courts are fallible; and the constitution, in restricting each to its own province, contem-

plated the possibility of error, but still guarded against the greater evil of one court encroaching on the territory of the other.

I entered, my Lords, on this discussion, with the benefit of a very able written argument on this side of the bar, as well as on the other, but particularly upon my side of the bar, by a gentleman (Mr Dunlop) thoroughly acquainted with the subject. He has treated the question with great ability, and left little for any other to advance ; but still I have thought it necessary to detain you so long in reply to my learned friend, Mr Robertson. As I have gone over what I think the larger and more important parts of this case, and as your Lordships will feel it to be your duty to go over the long and important written arguments before you, I shall relieve you from any farther attention on my part.

The Lord President.—After the conclusion of the very able and succinct argument we have now heard from the senior counsel for the respondents, before we come to the decision of the question, which has so fully and ably been discussed on both sides, I must call your Lordships' attention to a circumstance which, in the discharge of the sacred duty that belongs to the situation in which I now address you, I feel it indispensably necessary to notice.

As your Lordships will in this, and in every case that comes before you, afford to litigants the unqualified privilege to discuss their causes with the utmost freedom, and never will, in any way, restrain counsel from stating what they hold to be essentially necessary for the interest of their clients, it is on this account that I have hitherto purposely abstained from adverting to the circumstance, to which I am now to direct your Lordships' attention. In the printed case, at pages 2d and 3d for the Reverend Presbytery of Irvine (and I am extremely sorry to be obliged to notice any expressions coming from that body with whom I had been so long and so intimately connected), there are statements which do most unequivocally appear to me to be of such a nature, that we would betray the duty of the offices we hold, if we did not take the wholesome step which our predecessors have frequently done, viz. to ordain these exceptionable expressions to be expunged from the pleadings. (Here his Lordship read the passages in question, as quoted by Mr Robertson in his speech.)

I have read the whole of these two passages for the purpose of bringing the matter fully before you, not that I am of opinion that every thing therein stated is of the description I have referred to ; but because there is expressed a determined resolution that whatever judgment you may pronounce, the respondents will not feel it incumbent on them to give obedience to it. When litigants come into this Court, whether civil or clerical, I apprehend it is indispensably necessary that they should address your Lordships with the language of respect ; and there is no instance with which I am acquainted, in which parties who were bringing a matter in litigation under your consideration, have set out with telling you that whatever judgment you may pronounce, they are determined not to give it obedience.

I think it my duty to bring this matter before your Lordships; and I leave it to be disposed of in any way you think proper.

THE LORD JUSTICE CLERK.—My Lord, the tenor of the very able, well considered, and admirable argument we have just now heard from the bar, in which so very different a tone and line of argument have been adopted from that in the passages in question, certainly leads me to endeavour to construe the two passages consistently with that argument, and with the principle now stated by the learned gentleman, viz. that the jurisdiction claimed for the church rests wholly on the construction of statutes. Whether it is possible to construe these passages in this way, after reading them carefully—and I own that my attention was strongly arrested by them when the cases came before us, and before the pleading took place—really as yet I am hardly prepared to say. I do not know that it is necessary that we should now at once come to the resolution to which your Lordship has referred, and which, acting according to a very wholesome course, frequently has been adopted by the Court in previous cases. It may be necessary for us to adopt this course. But in the mean time, I would observe, that there are expressions in these two passages which seem to imply nothing more than a declinature of jurisdiction, on the ground, that the question in dispute is not civil but ecclesiastical; and if the expressions can be construed in this way, one is desirous to put on them that construction. But there are other expressions at the commencement of the 7th paragraph, p. 2, which, without explanation, and without qualification, do seem—I do not hesitate to say—to bear one construction only, viz. that whatever may be the judgment which we pronounce, the parties will refuse to obey it.

I do not wish, without farther consideration, to give a decided opinion as to whether this is the construction of the passage or not. It is possible that some of the expressions may yet be qualified or explained; and, I presume, it would be infinitely more expedient that the matter should be so qualified than that the parties should adhere to the sense referred to, plainly against the advice of the eminent counsel whose argument we have just now heard. But if it turns out that they bear this construction, and shall not be retracted, I do not look upon them as merely involving a failure of respect to the Court, because they would be an *avowal* of an intention to disobey not only the judgment of the Court, but the law of the land, which goes greatly beyond want of respect to the Court; and if avowed by parties at the bar, would lead to instant imprisonment. We do not visit on parties accidental expressions in the pleading of their counsel; but if a party avows a resolution of the nature alluded to, and if such is the only construction which can be put on these passages, I must say that the offence might amount to sedition. The question is so serious when viewed in this light, that I am unwilling to persuade myself that such is the construction which was meant to be put on the passages. Therefore, viewing the question in this way, and as a matter far beyond a want of respect to the Court, I think the parties should be allowed an opportunity of explanation. But whether it should or

should not be, that the parties really mean to say that they will disobey the law, I propose that your Lordship would allow us time to reflect upon the point; and I do so the more anxiously because I would wish the import of the passages to be well deliberated upon, and weighed by the leading counsel in this case for the respondents (Mr Rutherfurd).

Lord GILLIES.—I entirely concur in the opinion expressed by the Lord Justice Clerk.

Lord CUNINGHAME.—I concur, certainly, in desiring to have some time to consider this most important question; because, if it is competent for the party now before the Court, representing a great body in the state, to say they will argue a case before us, but that whatever judgment we pronounce they will not obey, the same right should be competent to the meanest party in the kingdom. I remember, that early in my practice at the bar, a commander-in-chief came to the Court of Justiciary when a soldier was about to be put on his trial for an offence which the commander conceived a military offence; and he protested against the Court taking cognizance of it, on the ground that it was a case for the military authorities solely. He was informed that the Court was of a different opinion. Now the time may come again when a plea such as we have in the paper before us, may be put forward on the part of an individual, who may say that he will go through the ceremony of arguing his case before the Court, to save trouble to himself, but that he will not obey our judgment, should it be against him. The same plea that the respondents have taken here, was competent to the noble commander-in-chief, who appeared in the Court of Justiciary; but he instantly declared his acquiescence, and saved the necessity of entering into so delicate a question. I do not know that we are bound to hear a party who says he will not give effect to whatever judgment we pronounce; but I am glad the passage did attract your Lordships' attention, while I agree that the matter should be the subject of consideration at some future period.

Lord MONCRIEFF.—I certainly require time to consider, before I can enter into any measure on this subject; for I have not yet read the papers, having intentionally abstained from reading them until I should have heard the argument from the bar. I do not know that the passages are well expressed towards the object of them; but as I understand their substance, from hearing them read by your Lordship, it would seem to be, that these parties come before you denying the jurisdiction of your Lordships in this case, and specially denying, according to the argument of my learned friend, Mr Rutherford, the jurisdiction of the Court imperatively to determine the question of jurisdiction. I look upon it as of the nature of a protestation against the jurisdiction of the Court. I require time to consider the true import of the expressions in these passages, of which I say nothing just now; but I do not understand that the meaning is any thing more than that their appearing here to argue the question shall not be considered as importing an acquiescence in the jurisdiction of the Court. I am not

sure, but if I am not mistaken, there was a similar protest in the case of Auchterarder, without any notice being taken of it.

Mr Rutherfurd.—Allow me to express my regret that my attention was not drawn to these paragraphs sooner. In the circumstances in which we stand, you will not expect me to offer any explanation at present. If I had been fortunate enough to have had my attention called to them previously, I might have been able to make an explanation satisfactory to your Lordships. I beg, therefore, that you will be kind enough to continue the case ; and to assure you, that what has fallen from the Court will receive the most attentive and respectful consideration, and by no one more than by my learned friend, Mr Dunlop.

Lord Jeffrey.—I think it would be very desirable to hear what the bar has to say, before we give a final decision.

Lord President.—And nothing will give the Court greater pleasure than to receive any satisfactory explanation that can be given of the matter.

Lord Justice Clerk.—I propose that we should take it up on Friday.

Lord Cuninghame.—I apprehend that no counsel at this bar would wish to preface any argument on these passages here, that he would not make the introduction to a paper to go before the House of Lords. Nothing should be stated in this Court that may not be stated in the House of Lords. If these passages are defended here, they must be defended before the Court of Appeal.

The case was then adjourned till Friday, the 1st of July.

Friday, July 1.

Mr Rutherfurd. — My Lord President, I have the honour to attend your Lordships for the respondents, the Presbytery of Irvine. My learned friends and I, counsel in this case, have discharged the duty we owe to our clients, by giving our attention to the passages which your Lordship put from the chair in the discharge of a very important duty. Undoubtedly, some of your Lordships seem to think that expressions in these passages bear, or might bear, a construction which argues disrespect towards the Court ; and one of your Lordships seemed to think, that this might, according to certain views, bear a construction of a still stronger nature, leading to far more serious and painful consequences.

Before adverting to the expressions in the paper, allow me to say, that the Presbytery of Irvine do not yield to any body in feeling, and at all times openly expressing the greatest respect, for your Lordships, and the law of the country. In all matters civil, and which truly belong to your Lordshps' jurisdiction, they feel it their duty to give that obedience which all dutiful subjects are bound to give to your judgments ; but your Lordships will be pleased to recollect their situation as forming an inferior judicatory of the church. They are bound, not merely by their ordination vows, but by the statute laws of the land

to yield obedience to their ecclesiastical superiors; and these ecclesiastrial superiors claim, and, in the humble opinion of the respondents, rightly claim, the sole, exclusive, and supreme jurisdiction in all matters of the church. They know, and are perfectly aware of the consequences which shall justly visit them, and all subjects of this country, who show disrespect to your Lordships' judgments; but they wish you to be aware, as I doubt not you are, of the consequences which may affect them as members of the church, if, in matters ecclesiastical, they shall refuse obedience to the lawful orders of the superior ecclesiastical judicatories of the church. Be the consequences as ruinous as any that can come from disobedience of a civil nature, disobedience to their ecclesiastical superiors in ecclesiastical matters would be no less ruinous, it would end in their being deprived of their ecclesiastical character and functions.

When this case presented itself to the Presbytery of Irvine, they were satisfied, from the consideration they had given to it, and this consideration was formed by what was understood to be the opinion of their ecclesiastical superiors, that the matter here in question was not civil at all, but purely ecclesiastical. They were perfectly aware that some questions of this sort which had come before this Court, as in the Auchterarder case, presented a mixed character of a civil and ecclesiastical nature. They thought *that* mixed character did not in any degree belong to the question here raised; and, therefore, they came forward for the purpose of endeavouring to satisfy your Lordships, by a deferential argument, that the matter was ecclesiastical, and not in your Lordships' jurisdiction.

But, my Lords, while they come forward to decline your Lordships' jurisdiction, and hope to bring you to be of their opinion (so as to avoid what would be to them a great calamity personally, and perhaps to the church at large), that in questions of this kind there should be a different opinion between the supreme ecclesiastical and civil courts, though each court considered the matter as confined to its own sphere, they feel, and your Lordships must feel with them, that they have been charged with higher and more important interests than any that touched themselves personally; and in making appearance respectfully to decline your Lordships' jurisdiction, they felt it to be their duty, to make such protestation as a party may be allowed to make at your Lordships' bar, that no decision pronounced in any civil case or matter depending before your Lordships, whatever may be its consequences as to civil effects, should have any consequences ecclesiastically, or should limit Church Courts in the exercise of that jurisdiction which has been put into their hands by the statute law, and which it has declared to be theirs, and theirs exclusively. Therefore, the object of the parties in putting these passages into the paper, and which, undoubtedly, I am free to say, do contain unguarded expressions,—the object of it was to enter, respectfully, a declinature of your Lordships' jurisdiction, and, to go a step farther, to state to your Lordships, that in appearing at this bar as a Presbytery of the church, they did not, and could not, enter any plea which should, in the least degree, prejudice or compromise that

exclusive jurisdiction which, in matters ecclesiastical, belong to the church alone.

Now, my Lord, I know it is not a very usual thing for Supreme Courts to be addressed by parties, who say that the judgment to be pronounced should not be held as binding to all intents and purposes. But other cases have happened, in which I have never heard it alleged that the appearances made had been considered either disrespectful to the Court or in contempt of the law of the land. I may mention that in the case of Stockdale *v.* Hansard, appearance was made in the Court of King's Bench by the Attorney-General by order of the House of Commons, and he stated at the very outset of the speech, "I come here by the order of the House of Commons,"—I do not quote his precise words, but merely give the substance—"to satisfy your Lordships, by argument at your bar, that what is here complained of was done by order of the House of Commons, and what is so done by order of that House, cannot be founded on as matter of complaint, or justify action against the party who proceeds in obedience to the order of the House, before any court of this country. But while I make this appearance at your bar, I tell your Lordships, by order of the House, that they will not submit any one of their privileges to your Lordships' judgment; and be your decision what it may, it shall not affect their privilege, because they hold that they are exclusive judges of their own privileges, and will not submit them to the Court of King's Bench, or any other tribunal." Here there was not only a declinature of jurisdiction, but there was added, by the party appearing to plead and decline the jurisdiction of the Court, an express statement that they would not allow any decision that might be pronounced to be binding on them, in so far as regarded the privileges of the House. Your Lordships know that one celebrated judicial person, who presided in the Court of King's Bench on one occasion, bid the speaker begone, and told him, if he were to come with the mace, and the whole House of Commons in his belly, he would commit him. The present noble lord, that presides in the Court of Queen's Bench, and his colleagues, are persons of not less spirit and not less judgment, to assert their rights and privileges, than Sir John Holt, who is reported to have so spoken; yet that noble and learned lord, and the other judges, did not consider that the court or the law of the land was treated with disrespect, because a party appeared, declining not only the jurisdiction of the Court, but stating that the decision to be pronounced would have no effect, and would not in any degree be binding on them.

I do not presume to say that the Church of Scotland stands in all respects in the same situation as the House of Commons. They have not a mace, nor temporal power to give force to their decrees; but this I will venture to say, and say it with the assent of any one who has given deep attention to this subject, that the rights of the House of Commons, as depending on the customary law of Parliament, are far less clear in regard to their jurisdiction and extent of privileges than the rights of the Church of Scotland, as possessed of sole ex-

clusive ecclesiastical jurisdiction, are founded on the clear and express words of the statute book, made only the more stringent, if you look into the history of those enactments, from the deep anxiety of the legislature, to exclude in matters ecclesiastic, all cognisance of the civil courts.

Now, my Lord, my learned friend who wrote this paper, and my other learned friend, the Procurator, who revised it, had no other object than to express what I have thus stated, and I trust I have stated nothing beyond the limits of the rights of parties, and nothing beyond what is due by the bar in the discharge of its duties. They had some reason, although the expressions are in some particulars unguarded—to think that they had not been understood as having overstepped their proper limits, because they observed that the Lord Ordinary to whom these cases were addressed, and who, after a perusal of them, sent them forward to your Lordships; and your Lordships of the First Division, after studying them, had them transmitted to the whole Court for decision———

The Lord President.—I beg to say that the Court had not considered the cases at all. As soon as we saw the nature and importance of the question, we directed the cases to be sent to the whole judges, and gave orders that it should be argued by one counsel on each side before the whole Court. It was not till the vacation that the First Division received the cases.

Mr Rutherfurd.—I do not suppose your Lordships delayed from calling attention to the passages, because you had at first overlooked their tendency. I only mean to say, that the particular character of the expressions not having been adverted to by any of the judges under whose notice they came, did lead the parties to suppose that there was nothing, or at least did not awaken in their minds the suspicion that there should be any thing, in these passages that might justly excite your displeasure. What I would humbly propose, because undoubtedly there is no person at this bar who feels more entirely than my learned friend, Mr Dunlop, who may address something to your Lordships after I have done, and my other learned friend the Procurator, the respect which is due to your Lordships individually and collectively, and still more the respect due to the law of the land,—what I would humbly propose to do, because it is difficult to correct the expressions, is to state in explanation of the objectionable passages what are the points which the Presbytery of Irvine respectfully intended to state. The statement will contain the substance of what I have said, extending even to a declarator of your Lordships' jurisdiction, and a statement that your decision in any matter civil cannot be binding on them in matters ecclesiastical. I shall read to your Lordships what they have to propose in explanation of the passages in question, and I humbly suggest that you will allow it to be minuted, which may be a better course for removing the difficulty than expunging the paragraphs, which would be attended with the inconvenience of removing the substantial protestation under which parties came to plead, and also be preferable to going through the difficulty of correcting the paragraphs, by expunging particular expressions and inserting others.

The Lord President.—Before you read the statement, I think it my duty to state distinctly, that the reason why I did not call the attention of my brethren to these passages before the argument—for they attracted my attention at the first—was, lest it should be supposed, that, by noticing them in any way, the Court was interfering with the undoubted right of the respondents to state their case with perfect freedom, and without it being supposed that they were checked or restrained by the Court in any way. This was my sole motive, and on this view I allowed the argument to be concluded *ex proposito.*

Mr Rutherfurd.—I am sure that must have been the sole view of your Lordships, and that your Lordships are incapable of doing any thing that would discourage a party in stating his case fully, and with all freedom of speech. The minute I propose is this :—

"Rutherfurd for the respondents stated, that the respondents would greatly mislead your Lordships, if they were to allow it to be inferred, from their appearing and pleading in the present process, that they would hold themselves warranted, by any decree of this Court, so far to violate the duty which, by the constitution of the country and their own vows, they are bound to perform, as to regulate their proceedings in *the 'ordering of ecclesiastical matters and causes within their bounds' by the directions of a secular court,* instead of those tribunals to which alone they are subordinate. They cannot, of course, *as a church judicatory* established by the constitution of the kingdom, disregard the injunctions of the superior church judicatories to which, by that constitution, they are subject, and, in opposition thereto, take directions for their conduct, in their capacity of a Church Court, from a tribunal which, by the constitution, has no authority over them. They cannot, *as individuals,* do what, in their conscientious conviction, would constitute a breach of the solemn vows which they have come under, at the requirement and with the sanction of the laws.

"Whatever judgment, therefore, your Lordships may pronounce, the respondents freely and at once avow, that, in regard to the matters here in question, they will continue to give obedience to the injunctions of the ecclesiastical judicatories to which they are subordinate. As, however, they will necessarily be exposed to great personal hardships, or severe patrimonial loss, should your Lordships be led to enjoin them to disobey these judicatories,—an injunction which they will feel themselves compelled to disregard,—they avail themselves of the opportunity now open to them, of endeavouring to satisfy your Lordships, that the granting of the prohibition sought by the suspenders would involve a violation of the constitution of the country, and a flagrant excess of the powers and jurisdiction with which, by that constitution, this Court is invested."

Lord Justice Clerk.—I sent for my report in the case of Hansard. Every thing depends on the expressions used. In the report which I have, and it is a long and full one, no such expressions are used.

Mr Rutherfurd.—The case is reported in Adolphus ; but the more full report will be found in the papers of the House of Commons, as furnished by the short-hand writer.

Mr Dunlop.—My Lord,—As the counsel who prepared the paper containing the passages to which the attention of the Court has been called, I desire, with the permission of your Lordships, to say a few words in addition to what has been stated by my learned friend, Mr Rutherfurd. My Lords, I trust, with some confidence, that to judges who have had occasion to observe my professional conduct in pleading before them, it is not necessary that I should disclaim, although I do so most cordially, any intentional disrespect to the Court which I have the honour to address. Charged, however, with the cause of parties composing a constituted tribunal in this country, ratified by statute, and subject alike by the law and constitution of the land, as by solemn vows come under by them on requirement of statute, to the supreme ecclesiastical court of the land, also ratified by statute, I felt it a duty incumbent on me, so to plead their cause as in no respect to compromise or impair the jurisdiction of the superior ecclesiastical Court,—a jurisdiction which is secured by law,—which they had no power to waive,—which they are bound to acknowledge,—and to which they are resolved to submit. If, in endeavouring to accomplish that object, I have gone beyond what was necessary for the purpose, and used expressions which have given offence to the Court, it must be to me a matter of deep regret; but I have to plead as my excuse, my anxiety,—perhaps, an over anxiety,—but still a natural and warrantable anxiety,—to avoid misconstruction in regard to the conduct of my clients, and to protect them from the grave and serious charge to which another Presbytery, who, when appearing to plead before your Lordships, contented themselves with doubtless a strong, but still only a general protestation, were subjected, not merely beyond these walls, but from the judicial bench itself. I feel assured, however, that objectionable as some of the expressions may appear to be, the substance of what I have stated, as now explained, is not beyond what would be necessarily involved and implied in any protestation under which a Presbytery, or other judicatory of the church, could consent to appear and plead before your Lordships in a cause of this description.

The Lord President.—I presume it will be the pleasure of your Lordships that the minute should be printed for your Lordships' consideration. If Mr Dunlop thinks fit to add any thing to it he may; he may not judge that necessary, but he is entitled to do so.

At the meeting of the Court, July 15, Mr Rutherfurd stated that, with their Lordships' permission, he begged to read an additional minute for his clients,—that he considered it in substance as contained in his former minute; but that, in order to show the anxiety of his clients to avoid any language which might be objectionable to the Court, he thought it right to give in this additional statement,—that

probably their Lordships might think it ought to have been before—but that any delay was not to be attributed to his clients, or to the other counsel in the case, but to himself.

The additional minute was in the following terms :—

" Rutherfurd for the respondents begged leave to refer to the minute lodged on their behalf, on the 2d instant; and, in the view of preventing any possible misconstruction of their sentiments, and of obviating what he was now apprehensive might have seemed unsatisfactory in the explanation there given, he trusted he might be allowed to repeat their sincere regret that, in two paragraphs, upon pages 2d and 3d of their case, expressions had been inadvertently and most unintentionally used, which might be thought inconsistent with the respect for their Lordships which they truly felt, and should ever be anxious to avow; and were such, therefore, as they acknowledged should not have been addressed to the Court. He humbly requested their Lordships' permission to withdraw these paragraphs from the record, and prayed their Lordships to hold the minute of the 2d instant as containing the statement which alone it had been their intention to submit to the Court.

" AND. RUTHERFURD."

The Lord PRESIDENT stated that the Court were satisfied with the explanation given in the minutes; and the additional minute was directed to be recorded, and to form part of the record.

His Lordship also added, that as the consulted Judges could not, at this period of the session, form their opinions on the merits of so important a case, with the deliberation which it required, the Court were under the painful necessity of delaying to give judgment till next session.

APPENDIX.

REASONS OF DISSENT BY SIR H. MONCRIEFF WELLWOOD FROM A DELIVERANCE OF THE PRESBYTERY OF CUPAR, REFERRED TO IN THE DEAN OF FACULTY'S SPEECH.

"I dissent—1st, Because there is no example which can be regarded as a precedent of the erection of a new landward parish by the exclusive authority of a Presbytery, or of any of the ecclesiastical courts of Scotland. Though three examples from the parishes of North Leith, Ferry-Port-on-Craig, and Strichen, have been founded on as if they were precedents in point; these examples are quite inapplicable to the case before the Presbytery,—the two first having been erected by act of Parliament, without the least reference to the decree of a Presbytery; and the parish of Strichen, though it was nominally erected by a Synod, having afterwards received the ratification of Parliament, because, without this ratification, it was held to be both ineffectual and illegal, and was therefore expressly and *in terminis* erected *anew*, while having been besides an erection upon *teinds*, if a Synod could have had the power which the Synod of Aberdeen assumed, it would have been an example of a proceeding which, as far as the church was concerned, going beyond the case for which it was quoted, proved too much, and therefore can prove nothing as a precedent. 2d, Because the new erection created by the Presbytery is declared in their decree to be an erection *quoad sacra* only, though it is an unquestionable fact, that down to the present time there is not one example upon record of the erection of a parish *quoad sacra tantum*, either by the Lords of Plantation of Kirks, or by any Presbytery of the church; and that though there are many examples of *annexations quoad sacra*, these cannot, as precedents, warrant the disjunction and erection of new parishes *quoad sacra tantum*, without any *direct* precedent or authority whatever. 3d, Because the examples chiefly relied on as precedents are all taken from burghs, in which the division into parishes within the burghs does not prevent the different districts from remaining, in many respects, substantially but one parish, notwithstanding the division, and are quite inapplicable to the present case. 4th, Because there is no example, before this decree of the Presbytery dissented from, of the erection of a parish, within which there are no inhabitants to form a congregation at the date of the erection; and that, in this respect, the decree of the Presbytery is without any parallel or precedent whatever in the records, either in the Court of Teinds, or of the ecclesiastical courts. 5th, Because, though it is admitted that Presbyteries have no power to make new erections where the livings of the incumbents are to arise from teinds, it appears clearly, from the precedents which have been quoted as precedents for the decree of the Presbytery, that many of the parishes originally created by the sole authority of the

Church Courts on funds independent of teinds, have ultimately had the stipends of the incumbents augmented from teinds, as in the case of the second charges of Haddington and Cupar; and that it must be equally evident, that if such a proceeding can still be resorted to, the Church Courts would have a power of erecting parishes indirectly on teinds as well as on other funds,—a power which has never yet been openly contended for, and which, if it could ever be legally claimed, would effectually counteract all the law which has hitherto been understood to exist on the subject. 6th, Because the act of Parliament in 1707, by which the present Court for Plantation of Kirks was established, professes to remedy 'the prejudice which had before redounded to this nation, through the want of an established and fixed judicature' for plantation of kirks, and valuation of teinds; and gives to the court, which was by that act created as a fixed and permanent judicature, the power, without limitation or reserve, of transporting kirks, disjoining large parishes, and erecting and building new kirks, under the conditions specified in the act; and it seems to be an irresistible conclusion from the language of that act, that it could not have been in the contemplation of the legislature, that there were to be still existing in the kingdom no less than seventy-eight co-ordinate courts besides, who were to have the power of exercising a large proportion of the same jurisdiction. 7th, Because the cases quoted in support of the co-ordinate jurisdiction of Presbyteries, taken from the powers vested in the Sheriff's, or other civil criminal courts, are all cases founded on positive statutes, which can have no analogy to the power assumed by the Presbytery, which no statute had ever authorised. 8th, Because the act of Parliament 1707 requires, that in every disjunction or new erection, the consent of the heritors, of at least three parts in four of the valuation of the original parish, shall be obtained before the decree can be legally pronounced, and that it does not appear to the dissenter that any evidence to this effect was laid before the Presbytery, when they pronounced the decree in question: That though a report was made to the Presbytery that there had been a meeting of heritors held at South Leith, no evidence was laid before the Presbytery that the heritors of three parts in four of the valuation of the parish had either attended that meeting, or signified any consent on the subject; and that in the opinion of the dissenter, with such documents as were before the Presbytery, no decree of disjunction or erection could have been legally pronounced. 9th, Because there are a variety of civil rights vested in every parish legally constituted, to the exercise of which, a parish erected contrary to law might be completely incompetent; and because, in all the circumstances, it was very inexpedient that the Presbytery should have assumed a power of erecting a parish, to which so many serious and legal objections can be stated. 10th, Because the Governors of George Heriot's Hospital, in their memorial and petition, have preferred to reserve to themselves, as the authors of the endowment, the patronage of the new erected parish, although both the House of Lords and the Court of Session have long ago decided that the right of patronage in a new erection belongs to the patron of the original parish within which the new erection is made.

(Signed) "H. MONCRIEFF WELLWOOD."