nating their ministers; which, in the first instance, is vested in the heritors and elders.

No 189.
ters under act 1690, competent in the civil courts.

A vacancy having happened, those of Calder split into two parties, each contending that it composed a legal majority of electors.

An action of declarator having been instituted by one of the parties against the other, for ascertaining their legal qualifications; it was

Objected, That such action was incompetent before a civil court. For the statute ordains, that upon the heritors and elders naming and proposing to the congregation a person as their minister, "to be approven or disapproven by them; if they disapprove, the disapprovers shall give in their reasons, to the effect the affair may be cognosced upon by the presbytery of the bounds, at whose judgment, and by whose determination, the calling and entry of a particular minister is to be ordered and concluded. And thus it appears, that every point in dispute among the collective body of heritors and elders, is subjected to the exclusive determination of the church-courts.

Answered, The objection has arisen from inattention to the distinction between matters of a spiritual nature, which belong to the ecclesiastical judicatories, and those which, being patrimonial, fall under the jurisdiction of civil courts. Among these last, rights of patronage have always been reckoned, as comprehending the disposal of the benefice or stipend. The church-courts indeed may have the exclusive cognizance of the pastoral or spiritual relation, but the temporal benefice is placed under the controul of the civil power; insomuch, that in the case of the parish of Lanark, * a person, though invested with the ministerial office, was, by this Court, denied the enjoyment of the stipend.

Nor is the case of a single patron different from that in which, by the statute in question, the power of nomination is conferred on a plurality; for the circumstance of a right being vested in an individual, or in a collective body, does not vary its nature, 16th June 1772, Logan *contra* Snodgrass, No 95. p. 7374.

The LORD ORDINARY reported the cause upon informations.

The Court found the action competent.

Reporter, *Lord Justice Clerk.* Act. *Jo. Millar, junior.* Alt. *Muir.* Clerk, *Home.*

S. *Fol. Dic. v. 3. p. 347. Fac. Col. No 194. p. 404.*

1793. *November* 26. MICHAEL M'CULLOCH *against* WILLIAM ALLAN.

No 190.
Found competent to the Court of Session, and not to the supe-

WILLIAM ALLAN having been appointed schoolmaster of the parish of Bothwell, by a majority of the heritors, the presbytery of the bounds found him qualified for the office.

* Examine General List of Names.

No 190.
rior church-courts, to review the sentences of presbyteries, in the exercise their powers with regard to parochial schoolmasters. This judgment was reversed upon appeal.

Against this judgment, Mr M'Culloch, the minister of the parish, entered an appeal to the Synod. Upon which Allan presented a bill of advocation to the Court of Session, in which he contended, that the appeal was incompetent. Mr M'Culloch

Pleaded, Although neither the office nor the character of a schoolmaster are ecclesiastical, they are both intimately connected with the church, and therefore naturally fall under its jurisdiction. One of the most important branches of the schoolmaster's duty is to instruct the young in the same principles which the clergymen teaches to people of all ages; and on the well-directed exertions of the former, will in a great measure depend the success attending the labours of the latter. This natural connection between the church and those who superintend the education of youth was, during the dark ages, much strengthened by the circumstance of learning being confined almost entirely to the clergy, and by the great influence then possessed by that body. And although at the reformation, this additional bond of connection was lost, still the church was uniformly considered as having a jurisdiction over seminaries of learning.

In the form of church-policy drawn up by John Knox in 1560, as well as in that afterwards drawn up in 1578, c. 9. § 10. schools are considered as part of the ecclesiastical establishment, and therefore to be maintained out of its funds; Spottiswood, p. 160. 297.

In 1565, and in 1567, the General Assembly claimed from Queen Mary that no person should be allowed to have the charge of schools or universities, unless found qualified for the office by the superintendents and visitors of the church; Book of the universal kirk of Scotland, p. 34. The act 1567, c. 11. was accordingly passed at their desire, and in terms of their request. Now, the superintendents at that time constituted an acknowledged branch of the ecclesiastical government of the country. It was in this character that the charge in question was entrusted to them, and in the exercise of it they were no doubt liable to the controul of the superior church judicatories.

At the General Assembly, which met in April 1581, the office of superintendents was abolished, and presbyteries were introduced, to whom it was proposed by the Synod of Lothian to the Assembly, that the trial and admission of schoolmasters should in future be committed, which clearly shews their idea of the nature of this jurisdiction; Calderwood, p. 120.

By statute 1581, c. 99. which was passed in October of that year, intended to ratify the privileges of the church, (and which has since been often confirmed; 1592, c. 116.; 1690, c. 5.; 1707, c. 6.) the act 1567 is expressly ratified; and as the office of superintendent was now at an end, the powers formerly enjoyed by them must have been understood to have devolved on the presbyteries and the other church-courts which supplied their place.

Upon the restoration of episcopacy, it was ordained by an act of the Privy Council in 1616, and afterwards by statue 1633, c. 5. that parish schoolmas-

ters should be maintained by the parishioners, and named by the heritors at the sight of the bishop. No 190.

When the presbyterian churgh-government was re-established, various acts were passed by the General Assembly, declaratory of its right to this jurisdiction, 1638, 1642. And when episcopacy was once more restored, the act 1662, c. 4. directed that school-masters should be licensed by the ordinary of the diocese.

At the Revolution, the presbyterian religion was finally restored, and with it the jurisdiction of presbyteries over schools as a matter of course.

At last, the act 1693, c. 22. was passed, confirming the acts 1567, 1581, and 1592, and declaring, 'That all schoolmasters and teachers of youth in 'schools are, and shall be liable to the trial, judgment, and censure of the 'presbytery of the bounds, for their sufficiency, qualification and deport-'ment in the said office.' And that this act was considered not as conferring a new jurisdiction on the presbytery, but as ratifying the inherent right of the church, is evident, both from its using declaratory words, and from its being entitled 'an act for settling the quiet of the church.' It is true, indeed, that presbyteries alone are mentioned; but nothing short of an express enactment of the legislature can exclude the usual right of a superior court to review the judgment of an inferior one; Erskine, b. 1. tit. 3. § 20.; Buchanan against Towart, No 81. p. 7347. And in this case no such exclusion of the superior church-courts was intended. In the clause immediately subseqent to that relating to schools, the act speaks 'of the church and judicatories thereof.' The nature of the presbyterian form of government was perfectly familiar to the legislature when this statute was passed, and it ratifies the act 1690, c. 5. establishing that form of which the subordination of the different Courts is the basis. Accordingly, it has always been understood, that the superior church-courts have the jurisdiction now claimed; act of Assembly 1699; 1725, Shiels, Synod of Glasgow; 1727, Gillach, Synod of Lothian; 1774, Frazer, Synod of Dumfries; 1763, Sangster, Synod of Aberdeen; 1739, Kemp, General Assembly; 1690, Telfer, General Assembly.

Answered; A parish schoolmaster holds a civil office; he is appointed and paid by laymen, and he possesses no ecclesiastical character. All matters relating to his interest should therefore be cognizable by the civil courts.

The judgment of the church-court can affect patrimonial interest only when it is dependent on the ecclesiastical character. When this is wanting, no connection with the church, however intimate, will vest a jurisdiction in its courts, even as to officers appointed by themselves, and acting in their own presence; 17th November 1785, Rutherford against Presbytery of Kirkcaldy, No 188. p. 7469.; 27th July 1756, Harvie against Bogle, *voce* PUBLIC OFFICER.

During the first centuries of the Christian æra, the church pretended to no civil jurisdiction. In the course of the dark ages, they usurped it in many cases; and that they should have done so with regard to schools, is not surpris-

No 190. ing, when it is considered that the clergy were the only persons capable of teaching, and, with few exceptions, the only persons ambitious of being taught; and that the schools were maintained out of the funds of the church.

But, at the Reformation, the church-courts were stripped of their civil jurisdiction; and although various attempts have been since made to recover it, they have uniformly proved unsuccessful; Spottiswood, p. 185. 190. 195. The Forms of church-policy were rejected; Spottiswood, p. 150.; Calderwood, p. 24. The acts of Assembly in 1565, and 1567, do not state the jurisdiction of the superintendents as a matter of right, but of expediency, as a future regulation; and they were not confined to this subject.

The act 1567, c. 11. rejected the other demands of the clergy; but declared, that schoolmasters, &c. should be tried by the superintendents. This jurisdiction, however, they were to exercise not as an ecclesiastical court, but as parliamentary commissioners. The act does not proceed upon the narrative of there being any antecedent right in the church; the office of superintendent was never sanctioned by the legislature; Spottiswood, p. 258. Besides, though it was abolished by the General Assembly in 1581, the jurisdiction of the superintendents, as to schoolmasters, &c. was confirmed by act 1581, c. 99. And there is no instance of an appeal from them to the church-courts.

Both the church and legislature seem to have considered the act 1567 in this light. The former afterwards made frequent applications for, but were refused that jurisdiction, which the opposite opinion supposes to have been conferred by that act; Spottiswood, p. 382.; while, at the same time, various commissions for the visitation of schools, &c. were appointed by the Crown; 1577, 1578, 1590.

During episcopacy, while the bishop, with consent of the heritors, assessed the parishioners for maintaining the schoolmaster, persons aggrieved were directed to apply to the Privy Council, which shows that the bishops did not act in an ecclesiastical capacity.

During the usurpation, the presbyterian church-government was restored; but nothing was said as to the jurisdiction of the presbytery over schools.

In 1690, the church-government was put on its present footing; yet a parliamentary commission was appointed for the visitation of colleges and schools; 1690, c. 17.

The act 1693 was, as to this subject, just the appointment of a similar commission. It does not give a jurisdiction to the presbytery as a matter of right. If it had been passed in that view, it would have given them the same powers as to colleges which they formerly claimed.

The act is silent as to the right of reviewing the judgments of the presbytery. Where that power lies must be determined from the nature of the subject. The acts 1572, c. 48. and 1663, c. 21. upon which depends the jurisdiction of the presbytery as to kirks, manses, and glebes, and the acts 1597, c. 272.; 1600, c. 19.; 1606, c. 13.; and 1685, c. 20. conferring certain branches of

jurisdiction on kirk-sessions, are in the same situation. Yet, merely from the nature of the subject, a power of review has always been, and can only be exercised by the Court of Session. For the same reason, if the judgments of the presbytery in the present instance are not final, they can only be reviewed by this Court; Dalr. 18th January 1710, Strachan, *voce* PUBLIC OFFICER; Act of Assembly 1700, c. 10.; 29th June 1769, Hastie against Campbell. IBIDEM. No 190.

Besides, the jurisdiction of the ecclesiastical courts was evidently meant to be excluded. That part of the act which relates to the admission of ministers, gives a jurisdiction to the General Assembly, and "the other judicatories of the church;" but when it speaks of the jurisdiction of the presbytery, as to schools, these words are purposely omitted.

The question of jurisdiction has never been tried by the church-courts. In the cases quoted, the higher Court judged by reference or prorogation.

So far as relates to the professional skill of a candidate, this Court perhaps would not chuse to interfere with the judgments of the presbytery, but in various other matters, for instance, if the presbytery should depose a schoolmaster for cruelty to his scholars, there would be no impropriety in this Court reviewing their judgment.

THE LORD ORDINARY reported the cause on informations; and the Lords, 25th May 1792, remitted it *simpliciter*.

A reclaiming petition was followed with answers, and memorials were ordered by the Court. At advising which, three separate opinions were entertained on the Bench.

One Judge *observed;* When a schoolmaster is once vested with the office, the trial of his deportment may be considered as a judicial act, subject to review; but the trial of his qualifications, before admission, is purely ministerial, and cannot be reviewed. A court of review can only proceed upon what was done by the inferior court; and therefore, if such a power had been intended, the legislature would have directed the whole procedure to be recorded.

The rest of the Judges were clear that the proceedings of the presbytery were not final in either case, because nothing short of an express enactment of the legislature can vest an inferior court with an ultimate jurisdiction. Upon this principle (it was observed) it has been determined, that the judgments of the Commissioners of Supply, although they act under a parliamentary commission, are not final. But they were not agreed as to the court to whom the appeal was competent.

Some Judges said, that questions with regard to schoolmasters, had always been held to be of ecclesiastical cognizance; that it was on this account that jurisdiction was given to the presbytery by the act 1693, the words of which are merely declaratory; and that, in order to give the higher church-courts a right to review their judgments, it was no more necessary that it should be mentioned in the statute, than it would be in an act conferring jurisdiction on

No 190. the Sheriffs or Justices of the Peace, to mention the controuling power of the Court of Session.

A majority, however, were of opinion, that as all civil power had been taken from the clergy at the Reformation, and as the office and character of a schoolmaster were in no respect ecclesiastical, all questions relating to them fell to be determined by the civil courts. That in the act 1693, the presbytery were not considered as an ecclesiastical court, but merely as a body of men, in whom that power might with propriety be vested, subject to the controul of this Court; in the same manner as in their jurisdiction with regard to manses and glebes, or as in that of the kirk-session on other points.

The COURT, May 21. 1793, altered the interlocutor reclaimed against, and 'found, that the sentence of the presbytery was not final, but that the power of review lay in this Court, and not in the superior church-judicatories; and therefore advocated the cause, and remitted to the Lord Ordinary to proceed accordingly, and to do further as he should see just.'

And upon advising a reclaiming petition and answers, 'the LORDS adhered.'

Lord Ordinary, *Justice-Clerk.* For Allan, *Dean of Faculty Erskine, Jo. Millar, jun.*
Alt. *Solicitor-General Blair, M. Ross, W. Robertson.* Clerk, *Sinclair.*

D. D. *Fol. Dic. v.* 3. *p.* 347. *Fac. Col. No* 74. *p.* 161.

*** This case was appealed:

THE HOUSE of LORDS ORDERED and ADJUDGED that the interlocutors of the urt of Session should be reversed. *See* SYNOPSIS.

SECT. XI.

diction of the Court of Session as a commission of Tythes.

1763. *January* 19.

No 191. The teind-court sustained its jurisdiction in a

The MINISTERS of Edinburgh *against* The MAGISTRATES and TOWN-COUNCIL.

THE ministers of the city of Edinburgh having received no addition to their stipends since the year 1693, brought an action before the Lords of Session, as