have already had occasion to explain the grounds on which it appears to me that the directors of the bank were entitled and indeed bound to decline to register transfers after the 2d October, and at all events after the 5th October. I think they were bound to hold the register closed so far as they were concerned at least by the 5th October, and that in any application to rectify the register now under the 35th clause of the Act of 1862 the question must be determined on the footing that the register was closed by that date, and that the rights of all parties depend on what had occurred prior to that date. The proposal of the petitioner to give effect to a resignation which occurred about a fortnight afterwards, and in respect of that resignation to have the register opened for the purpose of enabling him to be relieved of all liability to creditors of the bank, is clearly inadmissible, and must be rejected.

The Court therefore refused the petition, with expenses.

Counsel for Petitioner—M'Laren—Balfour—Pearson. Agents—Campbell & Smith, S.S.C.
Counsel for Liquidators — Kinnear — Asher—Lorimer. Agents—Davidson & Syme, W.S.

Saturday, December 21.

FIRST DIVISION.

CITY OF GLASGOW BANK LIQUIDATION—(*WILSON'S CASE*)—WILSON *v.* THE LIQUIDATORS.

Public Company—Winding-up—Action of Reduction of Transfer of Shares, and for Damages on Ground of Fraud—Motion to Stay Enforcement of Calls on Shares Pending Decision of Action.

An action having been brought by a shareholder against the directors of the City of Glasgow Bank subsequently to the commencement of the liquidation proceedings for reduction of a transfer of shares on the ground of fraud, and for damages, the Court, being moved by him to stay proceedings which it was in the power of the liquidators to take upon non-payment of a call made upon the shares, refused the motion, holding (1) that the case of *Oakes* v. *Turquand,* July 1867, L.R. (H. of L.) 2 Eng. and Ir. Apps. 325, ruled that the reduction could have no such effect; and (2) that the conclusion for damages could not be pleaded where the interest involved was that of creditors.

Counsel for Petitioner—Rhind. Agent—William Officer, S.S.C.

Counsel for Liquidators—Kinnear—Balfour—Asher—Lorimer. Agents—Davidson & Syme, W.S.

CITY OF GLASGOW BANK LIQUIDATION—(*TAIT'S CASE*)—TAIT AND OTHERS (HOUSTON'S TRUSTEES) *v.* THE LIQUIDATORS.

Public Company—Winding-up—List of Contributories—Provision for Repayment by Liquidators in event of Removal of Name from List by House of Lords if Appeal Sustained.

It having been brought under the notice of the Court that difficulty might arise as to the repayment of calls if there were a reversal by the House of Lords of decisions which the Court had given adversely to parties petitioning for removal from the list of contributories, the Court, in the view that it would be for the advantage of the liquidators, and at any rate useful for their guidance as well as beneficial to the petitioners, pronounced the following general order:—"On application of several contributories for an order on the liquidators that the call already made should not be enforced in the meantime against them, on the ground that they might have duly applied to have their names removed from the list of contributories, and that their application cannot be finally disposed of before the said call becomes payable, and that they are apprehensive that if they should pay the said call, and afterwards succeed in obtaining a judgment of the Court or of the House of Lords directing their names to be removed from the list of contributories, they might not be able to obtain repetition of the amount of the calls so paid—the Court order and declare that the liquidators in enforcing payment of calls in such cases are under an obligation to repay, in whole or in part, the amount recovered from any contributory who thereafter obtains a judgment ordering his name to be removed from the list of contributories, or directing such variations of the list as will limit or postpone his liability for such calls."

Counsel for Petitioners—M'Laren.

Counsel for Liquidators—Kinnear—Balfour—Asher—Lorimer. Agents—Davidson & Syme, W.S.

Saturday, November 27.

SECOND DIVISION.

[Lord Young, Ordinary.

CASSIE AND OTHERS *v.* THE GENERAL ASSEMBLY, AND PRESBYTERY OF DEER, ETC.

Church—Stat. 37 and 38 Vict. c. 82 (Church Patronage (Scotland) Act 1874)—Jurisdiction—Jus devolutum—Powers of Church Courts under Patronage Act.

The operation and effect of the 3d section of the Church Patronage (Scotland) Act 1874, which enacts that the Courts of the Church are to have a right "to decide finally and conclusively upon the appointment, admission, and settlement of a minister," is to exclude the jurisdiction of

the Civil Courts, not only in questions relating to the qualifications of a presentee, but in matters relating to the conduct and regulation of the mode of appointment, but it does not deprive them of jurisdiction to correct any irregularity or excess in the exercise of the powers so conferred.

A vacancy having occurred in a parish, the roll of electors was subsequently made up in terms of the General Assembly's Regulations to that effect. An appointment was thereafter made, but the appointee subsequently withdrew his acceptance. Certain members of the congregation, who had been put upon the communion roll after the electoral roll had been made up, demanded that the latter should be made up of new, and that they should thus be allowed to take part in the appointment. Their demand was disallowed by the presbytery, the Synod, and the General Assembly in turn. *Held* by the Lord Justice-Clerk (Moncreiff), and Lord Ormidale (*rev.* Lord Young, Ordinary) that that was a matter in which, under the 3d section of the Act above quoted, the decision of the church judicatories was final.

Church—Jus devolutum.

Where a congregation had appointed a minister on the last day of the six months available to them, and he had thereafter declined the appointment, and the General Assembly on appeal against the assumption by the presbytery of the *jus devolutum* had granted an additional period of six months to the congregation in which to appoint.—*held per* Lord Gifford and Lord Young (Ordinary) that such an exercise of power by the Assembly was incompetent, and (*opinion per* Lord Gifford) that the *jus devolutum* must be held to commence immediately on the lapse of six months after the occurrence of a vacancy, even where an appointee declines to accept or withdraw his acceptance.

Observations per Lord Gifford on the case of *Dundonald*, March 2, 1762, M. 9961.

This action arose in consequence of a vacancy which occurred in the parish of New Deer, in Aberdeenshire, by the death of the minister, the Rev. Mr Wallace, on 26th December 1875. The summons concluded for reduction of a judgment or ruling of the Moderator of the kirk-session of the parish and of the judgments respectively of the presbytery, and synod, and General Assembly affirming it. There were also declaratory conclusions to the effect that the pursuers, with the exceptions noticed below, were entitled to take part in the election of a minister, from which right they had been excluded.

The questions at issue involved a consideration of the following sections of the Church Patronage (Scotland) Act 1874:—(Sec. 3) From and after August 1874 "the right of electing and appointing ministers to vacant churches and parishes in Scotland is hereby declared to be vested in the congregations of such vacant churches and parishes respectively, subject to such regulations in regard to the mode of naming and proposing such ministers by means of a committee chosen by the congregation, and of conducting the election and of making the appointment by the congregation" as the General Assembly may frame from time to time; "provided always that with respect to the admission and settlement of ministers appointed in terms of this Act, nothing herein contained shall affect or prejudice the right of the said Church in the exercise of its undoubted powers to try the qualifications of persons appointed to vacant parishes. And the Courts of the said Church are hereby declared to have the right to decide finally and conclusively upon the appointment, admission, and settlement in any church and parish of any person as minister thereof." Section 7 provides that "If, on occasion of a vacancy in any parish, no appointment of a minister shall be made by the congregation within the space of six months after the vacancy has occurred, the right of appointment shall accrue and belong for the time to the presbytery of the bounds where such parish is, who may proceed to appoint a minister to the said parish *tanquam jure devoluto*." The term "congregation" was defined in the Act to mean communicants and such other adherents as the kirk-session under the Assembly's regulations might determine to be members of the congregation for the purposes of the Act.

The parish became vacant on 26th December 1875 by the death of Mr Wallace. On 26th June following, being the last day of the six months allowed by the Act, the congregation appointed a Mr Bruce, who retained the appointment for four months, viz., till 27th October, when he withdrew his acceptance. The presbytery thereupon claimed the right of appointment *jure devoluto*, but the claim was on 2d June 1877 disallowed by the General Assembly, which pronounced the following deliverance:—"Find that in consequence of the withdrawal of Mr Bruce's acceptance, by his letter of 27th October 1876, a vacancy arose at that date; but in consequence of the proceedings of the presbytery before rescinded, the congregation have hitherto been prevented from proceeding to exercise their right of election: Find, therefore, that the said right of election belongs for a period of six months from this date to the congregation; and remit to the presbytery and the moderator of the kirk-session to take without delay the steps required by the regulations of the General Assembly providing for the case of an appointment not being proceeded with owing to the resignation of the person elected." At the date of this judgment, viz., 2d June 1877, the pursuers in the present action were all of them, eleven in number, parishioners of New Deer, and two of them, James Cassie and James Brown, were on the roll of the congregation made up in January 1876 for the election of a minister. The remaining pursuers were put on the communion roll on 1st July 1877.

Immediately upon the above deliverance of the General Assembly, the pursuers, on 4th June, applied to the presbytery to have a new roll of the congregation made up, in order that their names (with the exception of Cassie's and Brown's, which were already on) might be put on it, and that they should have a right to vote in the election of a new minister.

The presbytery on 26th June instructed the moderator of the kirk-session of New Deer to call a meeting of the congregation to take steps towards electing a minister, which meeting was accordingly held on 9th of July. At this meeting the pursuers, other than Cassie and Brown, claimed right to take part in the election; but the moderator, in conformity

with instructions from the Church Courts, refused to allow anyone to take part whose name did not appear on the congregational roll of January 1876. A committee was then named, who proposed the Rev. Mr Bruce to the congregation, and on 10th September 1877 Mr Bruce was again elected as minister. The presbytery declined to sustain the appointment, and this decision was confirmed by the Church Courts.

Another meeting was held on the 25th of October 1877, when the pursuers, other than Cassie and Brown, again appeared and claimed to be put on the roll. The moderator refused, and a new committee was appointed. Mr Cassie, seconded by Mr Brown, had prior to that being done proposed that the parties who were the pursuers in this action, other than themselves, should be elected a committee of the congregation, but the moderator refused to put the motion to the meeting. The pursuers then protested and appealed. The minute of this meeting was the first sought to be reduced in the present action. This appeal came in succession before the Presbytery of Deer, the Synod, and on 30th May 1878 the General Assembly, who all affirmed the ruling appealed against. The deliverances of these bodies were the second and third and fourth documents of which reduction was sought.

The committee appointed on 25th October 1877 never reported to the congregation, and on 27th March 1878 the presbytery passed a resolution claiming the right of presentation *tanquam jure devoluto*. Following on this, they, on 24th April 1878, appointed the Rev. G. F. I. Philip to be the minister of New Deer.

The fifth document sought to be reduced was the regulations of the General Assembly enacted to be observed in the election of ministers during 1876 and 1877. These regulations in substance provided—(1) A moderator of kirk-session shall be appointed by the presbytery; (2) such moderator shall arrange for the kirk-session making up a roll of the congregation for the purpose of determining the persons entitled to take part in the election of a minister; (3) the roll of the congregation shall include, firstly, as communicants, all persons not being under church discipline whose names appear on the roll of communicants, and who have not ceased to be members of the congregation by receiving certificates of transference or otherwise, and secondly, as adherents, only such other persons being parishioners of full age as have claimed and are qualified in terms of the regulations on that subject; (4) the roll made up by the kirk-session is to be open for inspection, and is, on a day to be named, to be revised and adjusted, and thereafter attested, "and the roll so made up and attested shall be held to be the roll of the congregation for the purpose of the regulations, and a certified copy thereof shall be transmitted to the presbytery of the bounds."

The action was raised in name of the pursuers as residents in the parish, and members and communicants of the congregation of New Deer, and was directed against the General Assembly, its moderator and clerks, the moderator of the kirk-session of the parish of New Deer, the Presbytery of Deer, the Synod of Aberdeen, and the presentee. The pursuers averred that the pretended right to appoint *tanquam jure devoluto* and the appointment of Mr Philip was directly referable to their illegal exclusion.

The pursuers' pleas were as follows:—"(1) The pursuers John Petrie and others being communicants and members of the congregation of the parish of New Deer, and on the communion roll thereof, were from 1st July 1877 entitled to take part in the election of a minister to the said parish. (2) The pursuers having been illegally deprived of their said rights, the judgments complained of were illegal, in excess of jurisdiction, and *ultra vires* of the Church Courts, and ought to be reduced. (3) The regulations of the General Assemblies of 1876 and 1877, in so far as they support the said judgments, and in so far as they exclude the pursuers' lawful rights, are illegal, in excess of jurisdiction, and *ultra vires* of the General Assembly, and ought to be reduced. (4) There being at the dates of the pursuers' illegal exclusion an unexpired period available to the congregation for appointing a minister, decree ought to be pronounced in terms of the declaratory and petitory conclusions of the summons."

The defenders' pleas were, *inter alia*, as follows:—"1. The pursuers have no title to sue, in respect (1) it has been finally decided that the pursuers, who are alleged to have been wrongly excluded, were not members of the congregation for the purpose of filling the vacancy in question; (2) the proceedings in question are not examinable by this Court upon any of the grounds stated; (3) even if an entirely new vacancy arose as at 27th October 1876, the pursuers, who are alleged to have been wrongly excluded, being none of them persons whose names appeared then on the roll of communicants, had no good claim according to the laws of the Church to be placed on the roll of the congregation for that vacancy. 2. The action is incompetent and ought to be dismissed, because the Courts of the Church of Scotland have sole jurisdiction in the matters alleged. 3. The action ought to be dismissed, because it is excluded by section 3 of the Church Patronage (Scotland) Act 1874. 4. The averments of the pursuers are not relevant or sufficient to support the conclusions of the summons. 5. The pursuers are barred by their proceedings in the Church Courts from challenging the validity of the regulation brought under reduction."

At the instance of the Lord Ordinary (YOUNG) the defenders added the following plea:—"(7) *Separatim*, the action cannot be maintained, the right of appointment having devolved upon and having been duly exercised by the Presbytery of Deer in terms of sec. 7 of the Church Patronage (Scotland) Act 1874"; and his Lordship thereafter pronounced an interlocutor sustaining that plea, and assoilzing the defenders. The following was the judgment delivered:—"Church patronage has since the Reformation, speaking generally, been governed by statute, and the rights of patrons have been regarded as civil rights, cognisable only in the Civil Courts. In 1874 Parliament, by the Act 37 and 38 Vict. cap. 82, transferred all such patronage from the then existing patrons to popular constituencies composed of persons who were presumably most nearly interested in its right exercise—namely, the congregations of the several churches and parishes as they became vacant, but 'subject to such regulations in regard to the mode of naming and proposing such ministers by means of a committee chosen by the congregation, and conducting the election, and making the ap-

pointment by the congregation as might from time to time be framed by the General Assembly of the Church of Scotland.' A provision is added to the effect that nothing in the Act shall prejudice the right of the church to try the qualifications of the appointees, together with a declaration in these terms—'and the Courts of the said Church are hereby declared to have the right to decide finally and conclusively upon the appointment, admission, and settlement in any church and parish of any person as minister thereof.' The general scheme of the statute is completed by the provision of section 7—that 'if on the occasion of a vacancy in any parish no appointment of a minister shall be made by the congregation within the space of six months after the vacancy has occurred, the right of appointment shall accrue and belong for the time to the presbytery of the bounds where such parish is, who may proceed to appoint a minister to such parish *tanquam jure devoluto*.'

"The questions raised in this case regard (1) the legal character and the extent of the right which the statute confers on the congregation of a vacant church and parish; (2) the extent of the power and jurisdiction thereby conferred on the Courts of the Church, including the validity of the regulations framed by the General Assembly professedly in pursuance of its provisions; and lastly, the operation of section 7 of the Act as applicable to the facts of the particular case. These questions were fully argued before me, and although I feel constrained, by reasons which I will try to explain, to put my decision on the last, I think it is necessary, or at least proper, not only to notice, but to express my opinion on the others in order to explain fully and intelligibly the grounds of my judgment.

"I. With respect to the character and extent of the right conferred by the Act on the congregation of a vacant church and parish, I am of opinion that it is a civil right which, *prima facie* and in the absence of any provision to the contrary, is cognisable in the Civil Court; and that in point of extent it corresponds with the right of patronage that formerly belonged to the patron of the parish. The only distinction which the counsel for the defenders attempted to make between the former right of patrons and the existing right of congregations was that the former was saleable or marketable, which the latter is not. I do not think this, which is a mere incident, affects the quality of the right itself. Saleability is no criterion of the character of a right as civil or not, and instances of civil rights which are not saleable are numerous. Indeed the most important and conspicuous are not—such as personal liberty, character, and generally all the rights of citizenship, as recognised and protected by law. The statute on which the right in question stands describes it as 'the right of electing and appointing ministers;' and I think that every right conferred by Act of Parliament is a civil right, which, in the absence of provision to the contrary, is cognisable in the Civil Court, whose duty is to interpret and enforce it so that it shall correspond in fact to the description which the Act gives of it.

"II. The General Assembly has authority—but only by virtue of the statute—to regulate 'the mode of naming and proposing ministers by means of a committee chosen by the congregation,' and the mode of 'conducting the election, and making the appointment by the congregation.' No further or other power of regulation or interference with a congregation in the exercise of its statutory right is accorded to the General Assembly by the Act. The power is thus, for intelligible reasons, strictly limited by the Act that confers it; and any congregation is in my opinion entitled to complain to the Civil Court if it is exceeded to the prejudice of their right—that is, of course, if it is not otherwise provided by the statute. The general rule is that the Civil Court—as alone possessing general jurisdiction to construe and enforce Acts of Parliament according to their true intent and meaning—has authority to correct any irregularity or restrain any excess in the professed exercise of a power conferred by statute. I know of no exception to this rule which does not stand on express enactment of the Legislature. And it is plain that when what is relied on as amounting to such exceptional enactment is pleaded, it must itself be construed by the Civil Court, whose general *prima facie* jurisdiction is thereby alleged to be excluded.

"Parliament not unfrequently excludes the jurisdiction of the Supreme Court in matters which it is thought fitting on considerations of public policy or general convenience to commit to the exclusive jurisdiction of some inferior tribunal; and a similar exclusion proceeding on similar considerations in favour of Church Courts, or, I should rather say, to the effect of conferring an exclusive jurisdiction on these Courts (for there is no favour in the matter), is quite intelligible, and without antecedent general improbability. But in both cases alike the question, if the parties interested differ upon it, must be referred as a question of statute law to the decision of the supreme Civil Court, which to this extent has undoubted and necessary jurisdiction. The pursuers here complain of the regulations framed by the General Assembly professedly in pursuance of the power conferred by the Act as being in excess of that power, and as having in consequence operated to the prejudice of their legal right. The defenders may, and indeed do, join issue on the question whether or not the complaint is well founded, and contend that it is not. But they plead prejudicially in the first instance that this Court has no jurisdiction in the matter, in respect that all jurisdiction on the subject is by the Act conferred on the Courts of the Church, and so finally on the General Assembly. The argument in support of this conclusion is substantially as follows:—The regulations complained of, say the defenders, relate to the appointment of ministers, and although the language of the Act empowering the Assembly to frame them may seem to limit the power, it must nevertheless be taken as practically unlimited or subject to no other limitation than the judgment of the Assembly itself, by reason of the declaration that the Courts of the Church (meaning the Assembly in the last resort) have the right to decide finally and conclusively upon the appointment of ministers.

"I cannot assent to this argument, which plainly and avowedly goes to this—that the whole subject-matter of the statute is so within the power and control of the Church Courts that congregations have practically no rights whatever

except such as these Courts may be pleased from time to time to accord to them. The language of the Act does not enable me to impute this intention to the Legislature, and indeed it is, in my opinion, not only antecedently improbable, but at variance with the whole scope and tenor of the statute, taken according to what I think its plain meaning. I have already pointed out how limited is the power conferred on the General Assembly to interfere by regulations with congregations in the exercise of the right given to them by the Act, and I have to observe that it is, so far as I know, unprecedented, as it would assuredly be objectionable, for Parliament to authorise the party on whom a limited power is conferred himself to judge of the limits imposed, and to exceed them if he saw fit, without remedy or redress to those who are thereby prejudiced. Of the power of Parliament to do so there is, of course, no question, but its exercise is so unlikely and so unprecedented that I should prefer any reasonably admissible construction of the language employed to that which leads to the conclusion that it has been exercised in this instance. Nor do I find it necessary to be astute or ingenious in order to find a construction of the Act which will avoid a conclusion so unlikely to have been intended, and so undesirable, as that which the defenders contend for. The declaration on which they rely is appended to and forms part (as necessary to complete it) of the provision that the Church Courts shall not be prejudiced in their right to judge 'of the qualifications of persons appointed to vacant parishes,' referring, I assume, not merely to their general qualifications, but to their particular qualifications, on ecclesiastical considerations, each for the individual parish to which he has been appointed. This is a substantial and indeed a very large power, and the whole provision, including the declaration immediately in question, is, in my opinion, satisfied by it, without the further effect contended for by the defenders, which is, I think, repugnant and insensible. The Church Courts may, no doubt, conceivably so act, under the pretext and guise of the powers which they admittedly possess, as to accomplish what they have no authority to do directly and avowedly; but I am persuaded that it would be unjust to deem them capable of doing so. I therefore decline to attribute to them powers which the statute does not give them, because they may conceivably exercise them practically, though indirectly, through the medium and under the cover of other powers which the statute does give them.

"I am therefore of opinion that the General Assembly have not authority to frame any regulations they please, that they are not themselves the judges of the validity of their regulations, except, of course, in the first instance, and that any person interested may complain of them in this Court as in excess of the statutory power under which they necessarily profess to be framed.

"The record is strangely silent respecting the pursuers' complaints on this head. At the debate their counsel urged these objections—(1) That the congregation is by the regulations debarred from taking any action whatever under the statute except on the summons, and with the authority of a clerical president, not of its number, but imposed on it by the presbytery; and (2) that authority is conferred on this stranger and clerical president to paralyse the action of the congregation if he sees fit, and to hinder and frustrate the proceedings of any meeting of which he disapproves, whether in the exercise of his own judgment or in pursuance of the resolution and consequent instructions to him of his presbytery. These objections were illustrated by reference to the actual proceedings in this case, which showed, the pursuers said, that under these regulations this particular congregation of New Deer had in fact been so controlled and hindered in the exercise of their legal right by the action of this foreign president, acting under the dictation of his presbytery, that the General Assembly thought it necessary in the result to afford them, with at least questionable legality, six months after the final decision of appeals (the proceedings in which consumed eight months), in order to exercise the right which in the meantime was improperly denied them, the congregation being all the while absolutely helpless.

"I am unwilling to condemn regulations which were no doubt framed with care and good intentions; but I cannot avoid expressing my surprise that so much regulation in a very simple matter should have been thought necessary. I call it a very simple matter, for a congregation having to appoint a minister would no doubt find it so if let alone. It is indeed hard to see what difficulty a congregation would have in meeting to elect a committee of selection, and again to receive and decide on their report without the assistance and control of a clergyman appointed by the presbytery to preside over and to direct and control their proceedings, and that not necessarily according to his own judgment, but complicated with a minute code of regulations, and embarrassed besides by the orders of his presbytery, against which he might even think it only justice to himself to record his protest. It is apparently true that under the regulations a congregation cannot even meet with effect unless authorised and summoned by this clerical president; and if he declines to call a meeting, the only remedy (according to the contention of the defenders) is an appeal to the several Church Courts in succession up to the General Assembly, which meets for ten days once a year, and has (according to the same contention), absolute and supreme authority to allow the congregation to meet or not as it pleases, that is to say, to allow or not the congregation to appoint a minister. I must say distinctly, that, so construed, the regulations are repugnant to the rights of congregations under the Act. Had the Act conferred the right of appointing ministers to vacant parishes, not on the congregations, but on the Courts of the Church, with power to take such assistance from the congregation as they might see fit, the regulations would apparently have been quite in harmony with it.

"If the contention of the pursuers is otherwise sound, they have a practical grievance to complain of, for they allege that, although members of the congregation and communicants on the communion roll thereof, they were excluded and debarred from taking part in the proceedings of the congregation to elect a minister, and that by the ruling of the president imposed upon the congregation by the presbytery acting within his authority under the regulations complained of.

"III. Whatever may be the legal merits of the several questions which I have noticed, the fact

in this particular case is that the parish of New Deer, which became vacant by the death of the last minister, Mr Wallace, on 26th December 1875, was on 24th April 1878 found to be still vacant, and without any subsisting appointment by the congregation. The presbytery accordingly on that date (24th April 1878) appointed a minister (the defender Mr Philip) *jure devoluto* under section 7 of the Act. It is not surprising that the presbytery should have thought that about two years and a-half was a period somewhat too long for the vacancy to have lasted, and that it was time for them to fill it in the interests of the parish, under section 7 of the Act. The pursuers dispute their right to do so, and so also did the defenders originally, although they afterwards saw fit, on my suggestion, to alter their view on this subject, and add a plea which they at first hesitated about, as apparently at variance with the opinion of the General Assembly implied by their judgment of 2d June 1877. The pursuers' objection is quite intelligible, and is in substance and effect this—that the congregation was illegally regulated out of its statutory right of appointment, and that the presbytery may not benefit by this as if the congregation had been negligent in the matter —(His Lordship here further narrated the facts).

"At this time, that is down to the date of the Assembly's judgment, (2d June, 1877), the pursuers were not members of the congregation. It is not, I think, doubtful that the right of appointment had accrued to the presbytery before the date of the Assembly's judgment, and so before the pursuers had any interest in the matter. It is, I think, clear that if the congregation had allowed the 26th of June 1876 to pass without making an appointment, the right of appointment would, on the expiry of that day, have passed from them to the presbytery under section 7 of the Act.

"In this instance, the General Assembly assuming jurisdiction in the matter, and also the possession of a large equitable power to modify and, indeed, override the provisions of the statute, found that the right of election belonged to the congregation for six months from 2d June 1877. The language of the judgment of 2d June 1877 indicates that the Assembly thereby exercised jurisdiction to decide between the presbytery and the congregation as competitors for the right under the statute to fill up the vacancy 'that arose' on 27th October 1876, and declared the right to belong to the latter, that is, to the congregation, and that for a period of six months. To this extent the Assembly plainly intended no favour or indulgence, but a simple decision according to their opinion of the statutory right. In allowing the six months to be computed from the date of their judgment, the Assembly presumably intended to exercise some equitable power which they were thought to possess, but in declaring that the right belonged to the congregation from the date when the vacancy arose, and endured for six months thereafter, they simply decided the case according to what they held to be the strict law of it under the statute, and gave the congregation nothing which could in their opinion be legally withheld. The legal question which the Assembly thus assumed jurisdiction to decide was a general and important one, namely, whether an appointment by a congregation on the last day of the six months allowed to them by the statute is efficacious to preserve their right for another period of six months in case the appointee shall decline to accept or withdraw his acceptance so that his settlement is not proceeded with. The pursuers must here maintain—contrary to their general argument regarding the jurisdiction of the Church Courts under the recent Act—that the General Assembly had jurisdiction to decide this question, and that their decision of it is conclusive, or otherwise that the judgment of this Court upon the question ought to be in accordance with that of the General Assembly as being right in itself. For if the right of the congregation was exhausted by the appointment of Mr Bruce, so that on his withdrawing his acceptance the appointment accrued to the presbytery *jure devoluto*, the pursuers, who were not then members of the congregation, have obviously no title, it being of course immaterial that the presbytery did not in fact exercise their right till April 1878. It being thus necessary for me to determine this matter, I have to say that in my opinion the General Assembly had no jurisdiction to decide the question, and that they decided it erroneously. I find nothing in the statute which can be construed as conferring jurisdiction on the Courts of the Church to decide a competition between a congregation and a presbytery as to which of them has the statutory right of appointment. It would be extravagant to suggest that the presbytery itself has such jurisdiction, and if it is in the Synod or the General Assembly it must be by express or necessarily implied enactment of the Legislature to that effect. I find none such, and I do not repeat the views which I have already expressed as to the limit and true meaning of the general declaration relied on by the defenders, these being in accordance with the general argument of the pursuers, although they are constrained by the necessity of their case to depart from it in this instance. On the merits of the question, I am of opinion that the congregation having delayed to make an appointment till the last moment, exhausted their right when they made the appointment, and that the General Assembly had no power to restore it to them, or grant them a new term on the appointment proving abortive by the withdrawal of the appointee. If at the date of the appointment by the congregation any portion of the six months remains over, the congregation may, in certain circumstances, be entitled to have an equal space of time allowed to them in order to make another. For this there may be reason, and also the authority of judgments under the former law, which may be thought applicable. But when the whole six months have been allowed to expire, and the appointment made on the last day, the congregation or other patron thus running the thing to the last, must, I think, take the risk of the appointment proving abortive, and cannot have the vacancy continued for another term. The evil consequences of a different view of the law need not be imagined, for this case exhibits them practically. The parish of New Deer remained vacant for six months with an appointment made on the day they expired. This tardy appointment (it was as tardy as it possibly could be) failing, the vacancy continued till 2d June 1877, *i.e.*, for about a year longer, when the Assembly allowed the congregation six months from that date to fill up the vacancy, thus maintaining the vacancy for it might be two years. It would not

necessarily terminate even then, for an appointment made on the last day of the last term of six months might quite conceivably run a course similar to that of the appointment made on the last day of the first term, and so on without any legal limit that I can see. Nor, viewing the quesas one of legal right, can I find room for distinguishing between the failure of an appointment (being a valid appointment) by resignation and by the declinature of the Church Courts to sustain it on any ground competent to them. Both cases alike fall under the regulations providing for the case of an appointment not proceeded with, and are, so far as I can see, of exactly the same legal character. Yet when the presbytery on 28th September 1877 declined to sustain the appointment of Mr Bruce made on the 10th of that month, it does not seem to have occurred to any one that a vacancy thereby 'arose,' and that the right of election belonged to the congregation for six months from that date.

"I have pointed out that Mr Bruce resigned his appointment (before induction) on 27th October 1876. The pursuers did not become members of the congregation till July following, and it is not alleged that in the interval (of about ten months) any appointment was made by the congregation other than that of 10th September 1877, of which the parties seemed to be agreed, I think properly, that no account can be taken. If it is assumed that during this interval, or any part of it, the congregation had the right of appointment, it may be that it was frustrated by the pretensions of the presbytery, and the consequent omission of their member who was appointed to the office of moderator of the kirk-session to afford the congregation an opportunity under the regulations of exercising it. This indeed is what the Assembly refer to in their judgment of 2d June 1877 as their motive for allowing the congregation six months from the date of it to exercise their right, and forcibly illustrates the inconvenience that may arise from the extraneous clerical interference to which congregations are subjected by the regulations in the performance of their duty or the exercise of their right, which they would, I think, find very simple if let alone to act as they pleased subject only to the ordinary rules of law. I think the congregation had not the right during any part of the interval referred to, and I am clearly of opinion that they had not after 27th April 1877, being six months from Mr Bruce's resignation. But assuming that they had, the denial of it or frustration of it was not to the prejudice or injury of the pursuers, who were not then members of the congregation. I make no distinction between the two first-named pursuers and the others, for although they were members of the congregation at an earlier period, and at least from January 1876, they make no separate case for themselves, but, taking common ground with the others, confine their complaint to the rejection of their motions and consequent failure of their attempts to have the others recognised as members of the congregation, and as such admitted to take part in election meetings. They were themselves so admitted, and they make no complaint on their own account other than I have stated.

"It is perhaps superfluous to express any opinion on the assumption of the validity of the Assembly's judgment of 2d June 1877, but to exhaust the questions argued before me I may say that on that assumption I am unable to appreciate the argument on which the pursuers were excluded from taking part as members of the congregation in the proceedings consequent on it. The judgment was to the effect that such a vacancy occurred or 'arose' by the resignation of Mr Bruce; that the congregation had by the statute six months to fill it. If that was so, the right clearly belonged to the existing congregation, and the attempt so to 'regulate' the election proceedings as to exclude all members of the congregation who had been admitted within the preceding eighteen months or two years was quite indefensible. The roll of the congregation might have been brought down to date in a few minutes by reference to the communion roll, which is a satisfactory and authoritative register of the members of the congregation as existing at any time proper to be fixed on. The roll of electors is indeed only a copy of the communion-roll with the names of persons admitted by the session as 'adherents' added thereto. As to the 'adherents," there was in this case no question at all, while as to the communicants there was none, except only as to the competency of bringing the roll down to date with respect to them. I say 'as to the competency'—for as to the propriety and even justice of the step, if competent, no one seems to have felt a doubt—and it is not wonderful that the moderator of session should have recorded his protest against the instructions given to him by the presbytery for the 'exclusion, from the electoral roll, and from the right to vote in the election of a minister, of such persons in communion with the church as had become resident in the parish of New Deer since the roll of the congregation was made up in January 1876.' I do not inquire whether these instructions are warranted by the Assembly's regulations. If they are, the regulations that warranted them are for that reason themselves unwarrantable and, I think, illegal, as leading to the exclusion of the statutory constituency in greater or less number as may happen. In the present instance it is admitted that fifty undoubted members were thus excluded, and had I been of opinion that the right of election was in the congregation when they were so excluded, I should have thought that they were entitled to a remedy in this Court, although in what form or to what effect I need not consider.

"The opinion which I have expressed to the effect that the right of the congregation was exhausted by the appointment of Mr Bruce on the 26th June 1876, and that on his withdrawal the right of appointment accrued to the presbytery under section 7 of the Act, is conclusive of the case in my judgment. Having that opinion, I must disregard the Assembly's deliverance of 2d June 1877, unless, indeed, I thought it was entitled to be recognised as the judgment of a competent tribunal on a question within its jurisdiction, which, for the reasons I have stated, I do not. Were I able to assume, which I am not, that the congregation's right revived for six months after Mr Bruce's withdrawal, I should still be obliged to hold that the pursuers had suffered no wrong; for this six months expired before their membership began. Farther, even on the assumption that the Assembly had validly restored the right to the congregation for six months from 2d June 1877, I greatly doubt if I could, consistently with the operation and effect of section 7 of the Act as

applicable to the facts of the case, grant to the pursuers the remedy now asked, which is, in substance, that matters shall, by reduction and declarator be restored to such a position that they may still take part in the election of a minister on the footing that the parish remains vacant, the appointment by the presbytery being set aside as illegal. On the assumption I am now making, the pursuers, and many others whom they may be taken as representing, were certainly, as I think, wronged; but whether they can have such a remedy as would necessitate the restoration of the parish to a state of vacancy, to be continued till they are righted in the form of being allowed to take part in the election, is another matter. It is an accident that the wrong complained of affected so many members of the congregation, for if it had affected only one member its legal character would have been the same; and I cannot say that the wrongful exclusion of one or even several electors would invalidate an appointment by the rest, or suspend the *jus devolutum*, and prevent the application of section 7 of the Act. Considerations of public policy and general convenience, as well as the true intention of section 7 of the Act, are here involved, and these might, and I think probably would, be found inconsistent with giving a remedy by restoration. I do not further pursue this view of the case, which does not arise according to the opinion which I have formed and expressed, and I have noticed it and the considerations which it seems to involve only that I might exhaust all the questions that were argued.

"The result is that, in my opinion, this action cannot be sustained, and I put my judgment to that effect on the only ground on which I wish to rest, it by sustaining the seventh plea for the defenders, and in respect thereof granting decree of absolvitor, with expenses. I ought, perhaps, to observe that the only practical results that have followed from the erroneous view (as I think it) taken of the effect of Mr Bruce's resignation in October 1876 consists in the fruitless procedure and controversies consequent thereon, and the prolongation of the vacancy in the parish for an undue length of time, and that the validity of the appointment made by the presbytery is not affected by the delay in making it, which was in the circumstances excusable, and perhaps even unavoidable on the part of the presbytery, for although an appointment by them at any time after the 27th October 1876 would have been valid in my opinion, and entitled to effect accordingly without any power in the General Assembly to declare that it was not, the presbytery are certainly not censurable for not making it earlier than they did."

The pursuers reclaimed, and argued, *inter alia*—The privilege of electing a minister was a statutory power and privilege, and they were entitled to come to the Court to have it vindicated. The Assembly had power to make regulations in regard to the machinery of election, the making up of the roll, &c., which when made acquired statutory authority. But if the General Assembly went outside of the statute this Court had power to review and alter their regulations and decisions. Here the Assembly had done so, and their action was incompetent. A sharp distinction was to be drawn between the powers of the congregation and of the presbytery—the proviso was put in, to save the rights of the Church, of excluding certain parties from the communion-roll, but not to affect their civil rights under the statute. In regard to the *jus devolutum*, it could not be held to have taken place, because the congregation had been deprived by them of their legal rights.

Authorities quoted — *Tennent* v. *Crawford*, January 12, 1878, 5 R. 433; *Latta* v. *Dall*, November 28, 1865, 4 Macph. 100; *Dundonald*, March 2, 1762, M. 9961; *Presbytery of Inverness* v. *Fraser*, June 10, 1823, 2 S. 341; Stair, i. 8, 35; Dunlop, 245; *Stewart* v. *Presbytery of Paisley*, and cases quoted there.

Argued, *inter alia*, for the respondents—The pursuers had stated no relevant case, for in all the matters which they complained of the decision of the Church Courts was by statute final. What was the "congregation" was handed over to be decided by the Church Courts, and they were exclusively entitled to deal with it. Even if their Lordships came to discuss the judgments of the Church Courts, there was in them no excess of the regulations. The *jus devolutum* must in the circumstances be held to have fallen to the presbytery, and there was no such interference with the right of the congregation as to prevent it.

Authorities—*Campbell* v. *Presbytery of Kintyre*, February 21, 1843, 5 D. 657: *Dundonald*, quoted *supra*. *Stewart* v. *Presbytery of Paisley*, *ante*, p. 105, and cases quoted there.

At advising—

Lord Justice-Clerk—If the cause before us obliged us to decide, or even to indicate, an opinion on some of the questions which have been argued before us, it would assume an aspect of great gravity. These questions belong to a class on which eminent divines, lawyers, and statesmen have held conflicting views throughout the whole history of the Reformed Church in Scotland; and they involve practical results on the social condition of the people far beyond the bounds of abstract jurisprudence. Being of opinion that none of these general questions arise in the case now before us, and that its merits are not attended with any difficulty, I shall abstain entirely from expressing any speculative views on these long-agitated controversies, as these topics do not arise for decision.

The simple proposition on which my opinion in the present case proceeds is, that the pursuers have stated no relevant ground which should induce us to interfere with the action of the ecclesiastical authorities in the proceedings which are the subject of this action. The title set out by the pursuers is that of members of the congregation of the parish of New Deer, in respect of being communicants in that parish under the recent Patronage Act 1874, and their complaint in substance is that the presbytery have claimed, and in point of fact have now exercised, the right of presentation to that parish *tanquam jure devoluto* to the prejudice of their rights as communicants to take part in the election of a minister.

In support of this complaint it is not said that the congregation made any appointment of a minister under the statute in question within the period limited by law. But it is averred that they were prevented from doing so by the illegal action of the General Assembly in refusing to allow their names to be added to the roll of electors, or

themselves to take action in that capacity with a view to the appointment of a minister.

The circumstances in which this application for our interference is made are these—A vacancy occurred in this parish by the death of the incumbent on the 26th December 1875. On the 26th of June, being six months from the date of the vacancy, the congregation appointed Mr William Bruce to be minister of the parish. Mr Bruce withdrew his acceptance of the appointment on the 27th of October 1876, and it seems that the presbytery claimed the right to appoint *jure devoluto*. This, however, was not allowed by the General Assembly, who on the 2d of June 1877 found that by Mr Bruce's declinature a vacancy had occurred in the parish, that the *jus devolutum* had not accrued, seeing that the congregation had been prevented from proceeding to elect by procedure in the Church Courts, and that the right of election belonged for six months from that date to the congregation, and remitted to the presbytery to take the necessary steps required by the regulation of the General Assembly. No complaint is made by the parties to this process of the procedure thus adopted, and it must be assumed to have been regular as far as this case is concerned.

The complainers—or at least all but two of them—were not communicants at the date of this deliverance of the General Assembly. They became communicants on the 1st of July thereafter; and the ground of their challenge of the subsequent proceedings, and of the right of the presbytery to appoint *tanquam jure devoluto*, is, that by the regulations of the General Assembly, proceeding on the provisions of the Patronage Act, the roll of electors applicable to that election was that made up in January 1876, immediately after the vacancy occurred, and the names of the pursuers of course did not appear on it. After exhausting all their remedies in the Church Courts they have now resorted to this action in order to set aside these proceedings, and to have their rights as communicants made effectual.

I am of opinion that by the terms of the 3d section of the statute the subject-matter of this action is wholly within the cognisance of the General Assembly, and has been conclusively settled by them; and if that be so, it is idle to travel further into the topics of controversy which have been presented. I think the clause in the statute was framed expressly for the purpose of excluding all such questions from arising in the Civil Courts, and that as far as this case is concerned its provisions are free from any ambiguity.

It must be kept in mind, however, what is the precise nature of the right conferred by this statute on the congregation. It is not in any sense a right of patronage. It is not a patrimonial right vested in the individual members of the congregation as defined by the statute, but a privilege conferred on a body purely ecclesiastical, constituted by a franchise founded on one of the most solemn rites of the Church, to elect their own spiritual pastor. The exercise of this privilege no doubt is followed by important civil effects, and in some of its aspects is a civil right conferred by statute. It certainly could not have been bestowed by the authority of the Church under any view of its constitution. But it is too clear to require illustration that a franchise of this kind would never have been created by statute without provision being made for the details of its operation. The argument we have heard suggests the conflicting views which were certain to have come into collision at the threshold of its procedure had no regulating power been constituted.

On one hand it might have been contended, as indeed has been argued in this case, that now that patronage has been abolished, the intervention of the congregation recognised, and the astricting clause of the Act 1592, cap. 117, repealed, the right of collation belongs exclusively to the Church by virtue of that statute, and that the conditions on which the *Auchterarder* case (*Earl of Kinnoul* v. *Presbytery of Auchterarder*, March 5, 1838, 16 S. 661) proceeded can never occur again. On the other hand, it might have been, and has been, urged that since the decisions in the cases which followed on that of *Auchterarder* the idea of any power residing in the Church which is not directly derived from the Legislature and conferred by statute is wholly visionary; that not only the right of collation, but all the other matters mentioned in the Act 1690, cap. 5—the administration of ordinances, church discipline, and the like—are the mere gifts of the civil magistrate; and it might be with some show of logic inferred that when admission to the communion becomes a franchise for the exercise of a civil right it is necessarily cognisable in all its incidents by the civil tribunals. Without solving these or the many cognate questions which might have arisen, the statute has excluded them by conferring on the Church Courts ample power to regulate procedure under it, and by vesting in these Courts in very comprehensive words the right of deciding all questions as to the appointment of ministers, and has by the 3d section declared their judgment on them to be final and conclusive.

There are two objections made to this reading of the statute and its application, to neither of which am I prepared to assent. It is maintained, in the first place, that these words in the statute are a mere repetition in positive words of the negative words in the clause immediately preceding, and refer solely to the province of the Church in deciding on the qualifications of a presentee, in which its powers has always been supreme and conclusive, and that it has no effect in conferring on the Church Courts the right of judging finally in questions relative to the appointment of ministers arising out of the new mode of election. I can find no support to this construction either in the words of this clause or in the reason and scope of the statute. The power of judging on questions relative to the appointment of ministers is specially given in addition to, and in contrast with, those relative to trial and qualification, and it would manifestly frustrate the whole policy of the statute if the numberless difficulties of detail which were certain to arise in the procedure under the new system at and prior to appointment were to be removed from the cognisance of the Church Courts. It is said, in the second place, that the Church Courts in refusing to recognise the rights of the pursuers as communicants to vote in this particular election, although acting strictly in terms of their own regulations, have gone beyond the statute, and can be controlled by this Court; and we are invited again to enter on the well-worn illustrations of this proposition with which some of us were wont to be familar in former

times. It is quite sufficient for the purposes of this case to say that the statements on which the action proceeds disclose no such deviation from the statute as would be necessary even to raise the plea. The argument is founded on a fundamental fallacy. It is assumed that the statute confers on every one who at the date of any election is a communicant in the parish a vested right of patronage irrespectively of time, manner, and circumstance, and without regard to the general machinery which under their statutory powers the Church judicatories have prescribed. This is not so. The right is conferred on the congregation, and is to be exercised only in conformity with the regulations. At what period the election-roll is to be made up is a pure matter of detail, but one on which regulation was essential. The General Assembly's regulations provide that the roll shall be made up immediately after the vacancy occurs, and very grave reasons of expediency may manifestly exist for not permitting during a heated contest any additions to be made to it pending discussions in the Church Courts. At all events, this was a matter, in my opinion, eminently within the regulating power of the Church Courts, and therefore finally concluded by their judgment.

As to the point whether the General Assembly had power to come to the resolution of the 2d June 1877, and to give the congregation a fresh period of six months during which to make an appointment, it is enough to say that neither of the parties to this process have raised any dispute in regard to it, and both have assumed, as I think we must assume, that no good objection exists to the procedure. I entirely reserve my opinion on it should any such question arise in the future. The result is, that there being no relevant allegation made against the exercise by the presbytery of the *jus devolutum*, we sustain the action of the presbytery in this matter, and therefore adhere to the interlocutor of the Lord Ordinary, without, however, as far as I am concerned, adopting the reasons on which he proceeded.

It may be right that I should add that I have not adverted to the general plea of want of jurisdiction which the defenders have placed on record, because I did not understand that it was maintained to the effect of excluding us from entertaining the action and construing the statute. I think it cannot be supported if so stated. The right in question is beyond doubt one conferred by statute, and we must have the power of reading the statute and ascertaining the nature and limits of the powers conferred by it. Beyond that point no question of jurisdiction seems to arise. I have thought it right to express the opinion I have formed without direct reference to the recent case of *Stewart* v. *The Presbytery of Paisley*, Nov. 15, 1878, 16 S.L.R. 105, in the First Division, but it coincides in all points with the result arrived at in that case and the opinion of the Lord President, which I entirely adopt.

Lord Ormidale—It does not appear to me that any question as to whether and when the right of election of a minister passed from the congregation of New Deer to the presbytery *tanquam jure devoluto* arises in this case. It is true that the pursuers conclude for a declarator to the effect that the right of appointing the minister still belongs to them, never having fallen to the presbytery; but when the reductive conclusions of the summons which precede the declaratory conclusions are kept in view, in connection with the statements by the pursuer in the record, it becomes obvious that the right claimed by the pursuers depends not upon when the nomination and election accrued to them, or devolved upon the presbytery, but upon the mode in which the nomination and election were exercised, or attempted to be exercised, by the congregation. In regard to this matter, the pursuers contend that they have been so obstructed in the exercise of their right by the Church judicatories as to be in effect excluded altogether from the enjoyment of it; while, on the other hand, the defenders deny that anything was unduly, irregularly, or illegally done by them calculated to prevent the pursuers' exercise of their right of election, and plead that at any rate all such questions are and were for the Church Courts alone to settle, and that the way in which they have been settled by these Courts cannot be examined or reviewed by this Court.

The question of competency thus raised falls to be first considered, for if it should appear that this Court has no power or jurisdiction to review the proceedings of the Church Courts in relation to the election and nomination of a minister, but that the proceedings which have been taken in the present instance for that purpose are final and conclusive, there must be an end to this action. Now, I may say that it does not appear to me to be unreasonable that proceedings, *modo et forma*, in connection with the nomination and election of a minister to fill up a vacancy in a parish should be left entirely to the decision of the Church Courts, seeing that such matters, being of an ecclesiastical character, pertain more naturally to these Courts than to the Civil Courts. Notwithstanding, however, of this, it cannot be doubted that the Legislature might, if it had been thought advisable, have ordered otherwise, and whether it has done so or not depends upon the terms of the Church Patronage Act of 1874. After a careful consideration of that Act I fail to see that it has directed such proceedings and disputes as those here in question to be dealt with and disposed of otherwise than in and by the Courts of the Church. On the contrary, it appears to me that the Act, while it declares by section 3 the right itself of election to be vested in the congregation, and provides that "the mode of naming and proposing the minister by means of a committee chosen by the congregation, and of conducting the election and making the appointment" shall belong to the congregation, it at the same time provides that this is "subject to such regulations . . . as may from time to time be framed by the General Assembly of the Church of Scotland." Looking then at the enactment as so expressed, especially in connection with the declaration which follows, to the effect that "the Courts of the said Church are hereby declared to have the right to decide finally and conclusively upon the appointment, admission, and settlement in any church and parish of any person as minister thereof," I think the conclusion is unavoidable that the proceedings of which the pursuers complain in the present action were for the Church Courts and not for this Court to consider and dispose of.

It is unnecessary, however, to hold, and I do not hold, that there might not be such an abuse or excess of the powers of the Church Courts as

to warrant the interference of this Court. But the present is not a case of that description at all, or anything like it. The pursuers' objections to the proceedings in question are to the effect that the moderator of the kirk-session was appointed by the presbytery, and that by his rulings and deliverances as such moderator they were prevented from taking part in the election of a minister. Now in regard to these objections it might be enough to say that they could not be entertained consistently with what I understand to have been the unanimous judgment of the First Division of the Court pronounced about a week ago in what is called the Paisley case—*Stewart, &c.* v. *Presbytery of Paisley*, 16 S. L. R. 185. In that case the Lord President, who delivered the judgment of the Court, remarked in regard to the appointment of a moderator to the kirk-session by the presbytery—"But if the kirk-session are to act they must have a moderator. No Church Court can lawfully act without such a president. And it is as clear as the uninterrupted practice of nearly two hundred years can make it that the moderator of a kirk-session must be a clergyman, and that any meeting of a kirk-session without such a moderator might be open to challenge. While the cure is full the parish minister is *ex officio* moderator of the kirk-session; but when a vacancy occurs the presbytery always supply the want of a moderator by appointing one of their number to act *pro tempore*; and no kirk-session would think of performing any important act, whether ecclesiastical or civil, without the presence of a clerical moderator." And in regard to the power of the Church Courts in such matters as these now in dispute, the Lord President observed that the right of the Courts of the Church to decide finally and conclusively on "the appointment, admission, and settlement" of a minister to a vacant charge as conferred by the 3d section of the Church Patronage Act "must be held to include a final decision on all questions as to the exercise of their right by the congregation in each particular case, and on all questions as to the time, place, and manner in which the admission and setltement of the minister is to be carried to a conclusion."

I must hold, therefore, that the refusal of the Church Courts in the present instance to allow or require a new electoral roll to be made up when the congregation came ultimately, in consequence of the extended time allowed to them by the deliverance of the General Assembly of 2d June 1877, to exercise their right of election of a minister, so as to include the pursuers, was within their power, and cannot now be complained of in this Court. The demand of the pursuers to have a new electoral roll made up including their names, could not indeed have been acceded to without violating the General Assembly's regulations in force at the time, and more particularly regulations 1 and 2. By the former it is provided that a moderator to the kirk-session shall be appointed by the presbytery within ten days of a vacancy occurring in the ministry of a parish coming within their knowledge; and by the latter it is provided that the minister appointed to intimate the vacancy "shall at the same time intimate that the kirk-session are to proceed to make up a roll of the congregation for the purpose of determining the persons entitled to take part in the election of a minister." A roll was accordingly made up in accordance with this regulation in January 1876, a short time after the vacancy occurred, which was in December preceding. It is not said by the pursuers that their names were improperly excluded from that roll, and this could not have been said—the fact being, on their own showing, that they did not become members of the congregation till July 1877. But, although no new vacancy had in any correct sense occurred, that of December 1875 not having been filled up, the complaint of the pursuers is that a new roll was not made up in July 1877 so as to include their names, they having about that time become members of the congregation. For my own part, I fail to see any sufficient ground in the circumstances of the present case for this complaint. And, at any rate, it was for the Church Courts, and not for this Court, to determine whether there was or was not. The pursuers accordingly brought the matter by appeal under the consideration of all the Church Courts, from the kirk-session upwards, and it was only after it had been decided by these Courts in succession adversely to the pursuers that they have resorted to this Court.

In these circumstances, and for the reasons stated, I have come, although in some respects on different grounds, to the same conclusion as the Lord Ordinary, and therefore I think the reclaiming note ought to be refused. I have come to this conclusion without thinking it necessary to advert to the line of demarcation between the jurisdiction of the Church Courts and the Civil Courts, apart from the particular case we have been called upon to deal with.

LORD GIFFORD—This case raises questions of very great importance and of very general interest in reference to the appointment of ministers of the Church of Scotland under the Statute of 1874 (37 and 38 Vict. c. 82).

The substance of the action is found in the declaratory conclusions, in which the pursuers, who allege themselves to be communicants in the church and parish of New Deer, Aberdeenshire, seek to have it found and declared that the right of appointment of a minister to the said church and parish did not fall and has not fallen *tanquam jure devoluto* to the Presbytery of Deer, but that the said right of appointment still belongs, and will belong for such period as this Court may fix, to the pursuers and to the other members of the church and parish of New Deer.

The church and parish of New Deer became vacant so long ago as 26th December 1875 by the death of the Rev. John Wallace, the then minister of the parish. A great variety of procedure has taken place regarding the appointment of a new minister, both in the congregation, in the presbytery, and in the Church Courts, and ultimately on 24th April 1878 the Presbytery of Deer, holding that the right of appointment of minister had fallen to them *tanquam jure devoluto*, appointed the Rev. Mr Philip to be minister of the parish of New Deer. This appointment was appealed against, but was confirmed by the General Assembly on 30th May 1878. No induction however has yet taken place, this action having been raised on 3d June 1878 questioning the validity of Mr Philip's appointment, and seeking to have it declared that the right of appointment has not yet fallen to the presbytery *jure devoluto*, but still remains with the congregation. The action con-

tains various reductive conclusions, but all of these are subsidiary to the main question, which is—Have the congregation of New Deer still the right to appoint the minister of the parish?

The first question raised in defence (apart from a plea to title which is obviously ill-founded) is whether this Court and the ordinary courts of the country (including the House of Lords as the court of appeal in the last resort) have any right to entertain the questions raised at all, or whether their jurisdiction is not altogether excluded by the terms of the Statute of 1874, and whether the sole right of determining finally and without appeal the whole questions at issue is not by the said statute vested in the Church Courts alone—that is, whether the Civil Courts of the country are by statute excluded (I presume it is contended in all cases) from determining the question whether the *jus devolutum* has or has not taken place. This is really the most important plea in the case, and it raises a question of the widest possible interest.

I am of opinion that the plea is ill-founded, and that this Court has full and ample jurisdiction to entertain and dispose of the questions raised, and in particular to decide on the merits of the declaratory conclusions of the action.

The words of the late statute (s. 3) are that from and after 7th August 1874 "the right of electing and appointing ministers to vacant churches and parishes in Scotland is hereby declared to be vested in the congregations of such vacant churches and parishes respectively, subject to such regulations in regard to the mode of naming and proposing such ministers" as the General Assembly may frame from time to time. The meaning of the word congregation is defined in the Act.

Section 7 of the statute provides that "If on occasion of a vacancy in any parish no appointment of a minister shall be made by the congregation within the space of six months after the vacancy has occurred, the right of appointment shall accrue and belong for that time to the presbytery of the bounds where such parish is, who may proceed to appoint a minister to the said parish *tanquam jure devoluto*."

Now, I am of opinion that the right to elect and appoint a minister thus vested by the statute in the "congregation" is a civil right created by the statute and by nothing else, and upon which the Civil Courts and the Civil Courts alone have the right to adjudicate and decide. And then a question arises, whether this "right of electing and appointing" has or has not fallen to the presbytery *jure devoluto* under sec. 7 of the statute. This question also must be decided, and decided exclusively, by the Civil Courts, just as they would have decided similar questions which arose under the old law between the patron and the presbytery.

It is no doubt true that the right vested by the statute in the congregation is not precisely the same as that formerly vested in the laic patron, but it is a right of precisely the same character, and in so far as regards the presentee or appointee it is followed with the same effects and results; and if it be admitted, as I think it must be, that the Civil Courts had the exclusive right of deciding whether under the old law the *jus devolutum* had or had not accrued to the presbytery, and whether the lay patron had or had not lost his right, I can see no reason either in the statute or elsewhere why the case should not be precisely the same under the new law. Of course I am at present speaking without reference to what has been called the finality clause in section 3 of the statute. I shall advert to that immediately; but I am now simply considering the nature of the right conferred upon the congregation by section 3, and the nature of the right conferred upon or continued in the presbytery by section 7 of the statute, and I say that the right and duty of the Civil Courts to decide between the congregation and the presbytery as to the *jus devolutum* is just as clear as was their right under the old law to decide as between the patron and the presbytery.

This seems to me so plain that I do not think anybody would have thought of disputing it apart from the finality clause of the Statute of 1874, and therefore it seems to me that the whole question turns, and turns exclusively, upon the words of that finality clause. To vary the expression, I think the only possible question is whether the Legislature has by express enactment conferred upon and given to the Church Courts a final and conclusive jurisdiction which, but for such enactment, the Church Courts could not have pretended to or claimed. The question turns upon the words of the statute itself. There is no inherent right of jurisdiction in such a matter in the Church Courts, and the only matter of debate is and must be—Has or has not the Legislature conferred upon the Church Courts a final and conclusive jurisdiction which they did not otherwise possess.

Now the words of the finality clause—I am using the expression for shortness—are these:—(sec. 3) "And the Courts of the Church are hereby declared to have the right to decide finally and conclusively upon the appointment, admission, and settlement in any church and parish of any person as minister thereof." The words of this enactment are certainly very broad and general, and they undoubtedly confer upon the Church Courts very important rights and privileges which the Church Courts did not possess or enjoy previous to the enactment. I may add that they also infer duties which previous to the statute were not incumbent upon the Church Courts. But the words, however broad, must be read in connection with the remainder of the statute, and when rights arise, either to congregations or to presbyteries, under other express provisions of the statute, I am clearly of opinion that this clause does not give the Church Courts any power whatever to decide finally regarding the validity of such rights. Any such construction is repugnant to the conception of the statute itself. It expressly enacts to whom the right of appointment shall belong, and then when it provides that the Church Courts shall decide finally "upon the appointment" it can only mean that the mode and details of the appointment are to be judged of by the Church Courts, but not the right of appointment itself. In the present case, if it were held that the Church Courts had right to decide the main question raised, viz., Whether the right of appointment for the present vacancy was in the congregation or in the presbytery, that would be giving the Church Courts power to decide not "upon the appointment," but upon the right to appoint, which is a totally different thing. It is hardly conceivable to suppose that the Legislature

which was expressly conferring upon the presbytery, failing the congregation, the right of appointment, intended that the presbytery itself, subject to the Superior Church Courts, should decide where the right of appointment was. This would be to make a grantee the final judge and interpreter of the meaning and extent of the grant itself—that is, to make the presbytery, to whom the right is given itself, the judge of what the right is, and of what is its nature and extent. And I am not aware of any instance in which this was ever done. Certainly there is every presumption against such a construction, and the words of the finality clause are quite capable of having a different and a more reasonable meaning.

For I think that the object of the statute was to give to the Church Courts the right of finally deciding only upon matters of detail, and while I would be disposed to give a liberal interpretation to the clause so far as details are concerned, I think it would be a subversion of its meaning to extend it to matters quite different—matters of statutory and vested right. In matters of detail, such as the mode of calling meetings, the election of a president or moderator, the mode of taking votes, even the counting of majorities at a public meeting, and on all similar questions of detail, the Church Courts may very properly be made final. But it must be remembered that this finality is itself the mere creature of the statute, and does not depend in any degree upon any inherent right antecedently belonging to the Church Courts themselves. Their jurisdiction is purely spiritual, while the right of electing and appointing a minister is, as I have said, a civil right which formerly belonged to the lay patrons, and now belongs, without changing its nature, first to the congregation, and then only devolves upon the presbytery in the case of the statutory failure of the congregation to appoint. I am of opinion therefore that the plea to the jurisdiction of this Court falls to be repelled. I have found it impossible to proceed in the case without deciding this first and it appears to me preliminary question of jurisdiction. I am unable to adopt the view that the case may be disposed of on relevancy alone, for I cannot decide on the relevancy unless I have jurisdiction to do so. Indeed to decide on the relevancy is to affirm that this Court has jurisdiction to decide the whole question at issue.

The way being thus cleared for the consideration of the merits of the cause, I have not felt these merits to be attended with any considerable difficulty. I entirely agree with the Lord Ordinary in the conclusion at which he has arrived. In my view the sole question is—Had the *jus devolutum* in favour of the presbytery taken effect on or before 24th April 1878, when they appointed Mr Philip, or had it not? Or rather—for that is really the question—Had or had not the *jus devolutum* taken effect before the raising of this action? Now as the vacancy occurred on 26th December 1875, the six months allowed to the congregation expired on 26th June 1876, and it was not till that day, being the last day competent to them, that the congregation elected and nominated the Rev. Mr Bruce. That gentleman apparently at first accepted of the appointment, but ultimately withdrew his acceptance on 27th October 1876. From that day to this the congregation, from whatever reason, have made no new appointment whatever, and it was not till 24th April 1878, being two years and four months after the vacancy, that the presbytery claimed and exercised the *jus devolutum*. I think they were quite right in doing so. It appears to me that in every possible view of the case the *jus devolutum* had taken effect long before 24th April 1878.

No doubt it has been held, and quite reasonably, that where a patron (and in this respect I think the congregation are precisely on the same footing) had duly made the appointment or duly presented within the six months, and the presentee accepted—then, if from any cause not imputable to the patron the presentation became inoperative the patron did not thereby lose his right, but might present a new presentee. Thus, if the first presentee died, or if owing to the action of the presbytery or of the Church Courts the presentee withdrew, or if he got another presentation, or if the Church Courts within their statutory powers refused to induct, in all such cases the patron might nominate a new presentee. It seems to be not quite a decided question whether upon the failure of the first presentee from causes not imputable to the patron a new six months began to run, or whether the patron had only the unexhausted balance of the first six months within which to issue a new presentation. My opinion is, that in such cases the patron, and now the congregation, has only the balance remaining of the original six months; in other words, I think, there are only six effective months in all, and that this period cannot be extended by issuing abortive presentations, or by making abortive appointments, even although their abortion should not be imputable to the patron or the congregation. The contrary view, that a new six months begins to run over again from the date of the failure of the presentee, might lead to the indefinite prolongation of a vacancy, to the great prejudice of all concerned. The only case which seems to imply the more favourable view for the patron is the case of *Dundonald*, 2d March 1762, Mor. 9961; but in this case, although the second presentation was beyond the entire six months by a few days, the report bears that as the patron sent the second presentation in course of post, that is, immediately on hearing of the failure of the first one, and as he had three days of the six months left to do so, it was quite fairly held that he was in time, for the balance of his entire six months (being three days) could not fairly begin to run till the failure of the first presentee was intimated to him. It was only on this intimation that the three days began to run, and, if so, the second presentation sent in course of post was timeously made. I think this case gives no countenance to the doctrine that a new six months, like a new course of prescription, will begin to run.

In the present case, however, there is really no nicety of computation necessary as to time. The presentation to Mr Bruce not being issued till the last day, I agree with the Lord Ordinary in holding that the congregation thereby exhausted their right. No doubt a private patron watching the issue might issue a presentation in the course of an afternoon, thus availing himself of an unexhausted half day, but a congregation who under the regulations can only act at meetings, could not do that, and even apart from the regulations, they were practically helpless. On Mr Bruce's

failure, therefore, they had really no second chance. But, apart from this, I am of opinion that nothing happened or was done either in the Church Courts or otherwise which could possibly have the effect of prolonging the six months down to 24th April 1878, when the presbytery appointed Mr Philip, or to anything like that period. I agree with the Lord Ordinary that the General Assembly had no power to give the congregation a new six months from 2d June 1877, or from any other date. The General Assembly could not create a right of election in the congregation after the right had fallen to the presbytery. After that date the only way in which the wishes of the congregation could be given effect to would be by the presbytery appointing on the recommendation of the congregation. But this would be an exercise of the *jus devolutum*, and not the conferring of a right adverse thereto. In the whole circumstances, I am of opinion that the right of appointment effectually accrued to the presbytery *jure devoluto*, and therefore that the pursuers cannot prevail in the present action.

The Court therefore refused the reclaiming-note, and adhered.

Counsel for Pursuers (Reclaimers)—Asher—Rhind. Agent—W. Officer, S.S.C.

Counsel for Defenders (Respondents)—Lord Advocate (Watson)—Lee—J. P. B. Robertson. Agents—Menzies, Coventry & Soote, W.S.

HIGH COURT OF JUSTICIARY.

Wednesday, November 27.

WILLIAMS AND ANDERSON *v.* LINTON.

(Before Lord Justice-Clerk (Moncreiff), Lord Young, and Lord Adam.)

Justiciary Cases—Process—Right to Retract a Plea of Guilty—Circumstances where Permitted.

It is not a matter of course that a magistrate should grant delay in cases in the police court whenever it is asked, or that a panel should be allowed to retract a plea of guilty after it has been tendered.

Circumstances in which, upon the ground of the temporary absence of counsel whose services had been retained, it was *held* that the magistrate ought not to have refused the delay which was asked until he returned, and further ought on his return to have allowed a plea of guilty which had been tendered to ne retracted.

The suspenders in this case sought to have suspended a conviction and sentence pronounced against them in the Edinburgh Police Court by Bailie Colston, presiding magistrate, for trafficking in exciseable liquors without a license. It was alleged that the magistrate had refused, in the first place, to delay the case until the suspenders' counsel could attend, and further, that a request made by counsel, when he subsequently appeared, to be allowed to withdraw a plea of guilty before the conviction was signed had been also refused.

It appeared from the evidence taken in a proof before answer ordered by the High Court of Justiciary that counsel had informed the magistrate that he was engaged in one of the cases on the roll, and was about to go to the Law Room of the Parliament House to consult books. The magistrate it appeared did not know that that case was the one in question. It further appeared that when asked to plead the suspenders had desired delay until their "counsel or agent," whose services had been engaged should attend, that that request had been declined, whereupon the plea of "guilty" had been tendered, and that the bailie was in the act of pronouncing sentence when the counsel returned and desired leave to withdraw it. From a misapprehension of the powers he possessed this application was refused by the magistrate. There were also allegations as to corruption, &c., put on record, but no evidence was adduced in support of these statements, nor were they ever alluded to in the argument.

For the suspenders it was argued that the magistrate had erroneously believed himself to have no discretion in the matter. A judge had no doubt power to correct a sentence pronounced so long as the case was still before him. [Lord Justice-Clerk—In November 1865 a prisoner in the High Court of Justiciary was allowed to retract a plea of guilty, though it had been signed by the presiding judge.] The circumstances of this case afforded a proper occasion for the exercise of the discretionary power.

Argued for the respondent—Delay had been refused, as the case had been previously repeatedly delayed at the desire of the prisoners. [Lord Justice-Clerk—I think we may assume that it was all done in the best of faith; still the facts remain, that these prisoners were without professional assistance, that they asked for delay, and that this delay was refused.] That was admitted. If the magistrate had applied his mind to exercise his discretion he very likely would not have opened up the case, because at first the prisoners pleaded not guilty, then this was retracted, and their subsequent plea of guilty only tendered when the principal witness against them appeared in the box. There was no ground on which the Court should be asked to exercise its undoubted discretion.

At advising—

Lord Justice-Clerk—My first impression on reading the evidence in this case was that it was hardly a case for the interference of this Court, because I was quite satisfied that the presiding magistrate had acted to the best of his judgment, and that the allegations to the contrary were groundless. But although that is quite true, I must say that on reflection I have come to be clearly of opinion that the conviction cannot stand. I do not say that in all cases a prisoner undefended is entitled to have his case adjourned indefinitely in order that professional assistance may be procured, but the present case is one in which there was a serious charge, and where professional assistance had been engaged. The magistrate was informed of this, and delay was asked. He had himself been informed that counsel was engaged for some prisoner on the occasion in question, and though he did not know what the case