Thursday, March 20.

FIRST DIVISION.

[Lord Curriehill Ordinary.

KENNEDY AND OTHERS *v.* MORRISON AND OTHERS (MANAGERS OF A REFORMED PRESBYTERIAN CONGREGATION IN GLASGOW).

Church—Right to Fabric of a Reformed Presbyterian Church where title to "Members of Congregation" has been Exchanged for one giving Power to two-thirds of Members, irrespective of distinctive Church principles.

The Reformed Presbyterian Church of West Campbell Street, Glasgow, was held by the congregation under a title dated 1836, which contained, *inter alia*, a conveyance of the subjects to trustees, with a declaration that they were to be held in trust for the behoof of those members of the congregation whose "names are duly registered in the session-books of the congregation, professing the terms of the ministerial and christian communion agreed upon by the Reformed Presbyterian Synod, said congregation assembling and worshipping in the church or chapel now erected on the area or piece of ground hereby disponed." In 1875 the congregation came to a resolution to dispose of the church built upon the piece of ground mentioned in the above trust-title, and to build another in a different situation. A congregational meeting was then called in in order that, *inter alia*, the terms of the title under which the new piece of ground and church were to be held should be submitted to the congregation. At the meeting, which was attended only by a small number of the members, a title containing, *inter alia*, the following terms was unanimously agreed to:—"In the event of there being at any time hereafter a split or schism in the Synod of said Church, or in the Synod or Superior Court of any Church with which said Synod or congregation may be hereafter united, the said subjects shall be held for behoof of that section of the members of said congregation who shall adhere to the majority of the Synod or other Superior Court; but declaring that if a majority of the members of the congregation shall determine not to adhere to the majority of Synod or other Superior Court at a meeting of the congregation duly called, and if such resolution shall be afterwards approved of and confirmed in writing by two-thirds of the members whose names shall have been twelve months on the communicants' roll of said congregation prior to said union, split, or schism, and who shall be in full communion at the time, and provided such resolution shall be so carried, approved of, and confirmed within three months of the date of said union, split, or schism, then and in such event the said subjects shall be held for behoof of such two-thirds on their relieving the other members of all liability in respect of said subjects."

In 1876 the Reformed Presbyterian Church joined the Free Church, and subsequently a motion was carried by a majority of the congregation to join the Established Church of Scotland. In these circumstances the minority brought an action to have it declared that the majority were not entitled to carry into the Established Church the money which was got for the sale (in 1875) of the old church building, or to hold the new church, as was now proposed, as a *quoad sacra* church in connection with the Establishment. The Court—affirming the decision of the Lord Ordinary (Curriehill)—*held* that considering the terms of the new title of 1875 were submitted to the congregation and assented to by them without objection, that that title was the regulating deed, and the one whose terms should alone be taken into account; that by that deed the church was to be held for behoof of the majority of two-thirds of the congregation there mentioned, and that, it being thus their absolute property, the majority were entitled either to retain the church or to hand it over, as they had done, to the Established Church, or any other ecclesiastical body.

Counsel for Pursuers (Reclaimers)—Balfour—Taylor Innes. Agent—John Galletly, S.S.C.

Counsel for Defenders (Respondents)—Lee—Kinnear—J. A. Reid. Agents—J. B. Mackintosh, S.S.C.

Thursday, March 20.*

OUTER HOUSE.

M'FARLAN *v.* PRESBYTERY OF CUPAR AND SCOULAR.

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

Held by Lord Young (Ordinary), and acquiesced in, that under the Church Patronage (Scotland) Act 1874 the question whether in any particular case there is or is not a valid appointment by the proper party under the Act is a question of civil law, and for the determination of the Civil Court.

Circumstances under which it was *held*, notwithstanding the lapse of the statutory period of six months, that the right of appointment of a minister to a vacant parish had not fallen to the presbytery *jure devoluto*, there having been a miscarriage of justice owing to an erroneous ruling of the moderator appointed by the presbytery.

This was an action at the instance of the Rev. W. L. M'Farlan against the Presbytery of Cupar and the Rev. J. R. Scoular, which arose under the following circumstances—the following narrative of which is taken from the note to the interlocutor of the Lord Ordinary (Young):—

"The pursuer was formally appointed to the first charge of the parish of Cupar on 26th February 1878 by the presbytery of the bounds,

* Decided December 18, 1878.

in the professed exercise of the *jus devolutum* which they assumed to have devolved on them under section 7 of the recent Act, and he now asks declarator to the effect—1st, that the *jus devolutum* had devolved on the presbytery, and 2d, that it was validly and conclusively exercised in his favour. There are subordinate conclusions which I omit for the present to notice.

"The vacancy occasioned by the death of the last incumbent on 21st May 1877 was filled, so far as the congregation were concerned, by the appointment of Mr Gordon on 3d October following. This appointment, which I must assume to have been made in good faith, and to have been legal in all respects, was not sustained because the appointee on 16th October declined to accept it. The dates suggest that he was originally willing to accept, but afterwards, no doubt for good reasons, changed his mind, and there is no reason to suspect an intention to prolong the vacancy, or the term allowed the congregation to fill it by an appointment in favour of one known to be certain or likely to decline it. In consequence of Mr Gordon's declinature the congregation on 29th October appointed a new committee of selection. The committee recommended Mr Scoular for the appointment, and at a meeting held on 20th November—being the last day of the original term of six months—the congregation, having first resolved by a majority of 441 to 431 to proceed with the election, went on to vote upon the question that Mr Scoular be approved of, when 443 voted in the affirmative, and not one in the negative. Had the proceedings been conducted in the way usual at meetings where questions are put to the vote, the questions thus put would of course have been decided in the affirmative, and Mr Scoular's election secured. It appears, however, that the moderator having "a peculiar" and admittedly erroneous view of his own, did not regard the question that Mr Scoular be approved of as an important question to be voted upon aye or no, but as half a question to be voted on by those only who desired to say aye to it, and to be followed by the other half, viz., that Mr Scoular be not approved of, which in its turn could be voted upon only by those who desired to say aye to it—that is, to say no to the first half of the question. The fact is that the only question put to the vote was that Mr Scoular be approved of, and that the moderator, who erroneously regarded it as only half a question, declined to put what he thought was the other half, viz., the corresponding negative, because the number of those who had voted upon it was not a majority of those who had voted on the previous question of 'proceed' or 'delay' in the matter of the election, and 'ruled that there had been no election.' A motion to adjourn the meeting was then made, but this the moderator 'ruled' to be incompetent. A motion to appoint a new committee of selection was put and carried by 185 to 134, both numbers together being less than that by which Mr Scoular had been approved. A large number of the congregation thereafter concurred in a petition to the presbytery, praying that it should be found that Mr Scoular had been duly elected by the congregation on 20th November, but this petition the presbytery refused to receive. The presbytery also affirmed the ruling of the moderator—that there was no election by the congregation on 20th November. Subsequently to this affirmation, and on 26th February 1878, the presbytery, in the view that the right of appointment was with them *jure devoluto* under section 7 of the Act, appointed the pursuer to the vacant charge. A call in his favour was thereafter moderated in and sustained, and by him accepted. Against these proceedings appeals and dissents were taken to the Synod, who referred them all to the General Assembly, by whom they were disposed of in the manner stated at length in article 7 of the condescendence. The result of the judgment was that the proceedings of the congregation on 20th November had totally miscarried in consequence of the errors of the moderator in taking the votes, that the *jus devolutum* did not thereby accrue to the presbytery, and that the congregation ought to have an opportunity of resuming the subject of the election as of that date, and of making an election if they could contrive to do so without any fatal miscarriage; and it is impossible not to recognise the good sense of the views on which the judgment proceeded, though one is struck with the ponderous dilatory and inconvenient character of the procedure by which the result was at last reached. On 25th June (thirteen months after the occurrence of the original vacancy) the congregation met and elected Mr Scoular."

The Lord Ordinary (YOUNG) pronounced an interlocutor dismissing the action, and decerning and finding no expenses due to or by either party. He added this note:—

"*Note.*—[*After narrating the facts as above*]—The points which the pursuer now seeks to make are—1st, that the question whether or not the right of appointment accrued to the presbytery, so as to warrant their appointment of himself, is a question, not of ecclesiastical law for the Church Courts, but of civil law for this Court; and 2d, that it had accrued according to the true construction of the Act as applicable to the admitted facts; and these accordingly were the points argued before me.

"On the first point my opinion is with the pursuer, and on the second against him.

"(1) On the first point it would be unprofitable to repeat the legal views which I expressed in the *New Deer* case, Nov. 27, 1878, 16 Scot. Law Rep. 167, and to which I adhere. My opinion is that the question whether in any particular case there is or is not a valid appointment by the proper party under the Act is a question of civil law and for the determination of the Civil Court. Assuming a good appointment, the Ecclesiastical Courts may deal with it as they please, that is, may sustain or reject it finally and conclusively with reference to the qualifications of the appointee and the propriety and fitness of the appointment on any ground whatever, except only that it is not legally valid and so such as they ought to consider and judge of as Ecclesiastical Courts to whom a valid appointment is presented. If the congregation of a vacant church has made a valid appointment under the Act within the statutory period, the Church Court may conclusively and finally refuse to sustain it, but cannot refuse to consider it as a valid appointment which they are bound to deal with accordingly—that is to say, they cannot reject it as invalid, and so incapable of being considered with reference to the qualifications of the presentee and its propriety and fit-

ness. Under the statute there can never be any question as to who had the right of appointment except between the congregation and the presbytery, and there cannot of course be any right *jure devoluto* in the presbytery except only by the reason of a failure by the congregation duly and timeously to exercise their prior right. It seems to follow that if the Ecclesiastical Courts have supreme jurisdiction in this matter, they have supreme jurisdiction in the only matter having a civil aspect that can possibly be brought into controversy. For the reasons which I have stated (and more fully elsewhere) I must for my own part reject this contention, and hold by the distinction between the ecclesiastical and the civil which I have, I hope, sufficiently explained according to my view of it.

"(2) On the second point, I am of opinion that the right of appointment was not with the presbytery *jure devoluto* on 26th February when they appointed the pursuer. There are, I think, reasons of weight for holding that the congregation validly elected Mr Scoular on 20th November, and that the moderator's ruling to the contrary ought to be disregarded as erroneous, although I appreciate the view of the General Assembly that the conduct of the moderator makes it uncertain whether electors who were adverse to the election were not hindered from voting. If it were necessary to decide the point, I should be disposed to hold that the vote taken must have effect, and that Mr Scoular was thereby well elected, although there may have been, and probably were, electors present who were improperly excluded from voting. But I think it unnecessary to decide this point, being of opinion that a miscarriage (taking that view of it) such as was here occasioned by the misconduct of the moderator appointed by the presbytery did not deprive the congregation of their right and raise the *jus devolutum*. The remedy or mode of taking up the loop that the moderator had let fall is not a matter in which the pursuer is interested, and I decline to express an opinion upon it in this action, which I dispose of according to my judgment by deciding that the effect of the miscarriage (assuming it to have been so) was not such as to raise the *jus devolutum*, on the exercise of which he relies. I should, if necessary to the decision of the case, have held that Mr Scoular was well elected by the congregation on 20th November. But whether he was well elected then or subsequently on 25th June, the pursuer has no interest to ascertain, unless in so far as the question might bear on the validity of his own appointment by the presbytery on 26th February. That appointment, however, I hold to be bad, irrespective of the question whether Mr Scoular was well appointed or not, and whether in November or June.

"These views on the substantial question in the case render it unnecessary to advert to subordinate points, especially those which relate to mere instance or title and pleading. Such a case could not for obvious reasons be decided otherwise than on the merits or *causa cognita*, and I am obliged to the defenders for aiding in the consideration of it. The conduct of the presbytery has however led to the complications out of which the litigation has arisen, and therefore while I dismiss the action, I do so without expenses to the defenders, although they opposed the majority of the body to which they belong.

The interlocutor was acquiesced in.

Counsel for Pursuer—Dean of Faculty (Fraser) —Mair. Agent—C. S. Taylor, S.S.C.

Counsel for Defenders—Lee. Agents—Menzies, Coventry, & Soote, W.S.