

[3d May 1839.]

(Appeal from the Court of Session, Scotland.)

(No. 9.) THE PRESBYTERY OF AUCHTERARDER, Appellants.—  
*Sir F. Pollock—Pemberton—R. Bell.*

The Earl of KINNOULL and the Rev. ROBERT YOUNG,  
Respondents. — *Attorney General (Campbell)—Knight  
Bruce—Whigham.*<sup>1</sup>

*Patronage—Church—Jurisdiction—Acquiescence.*—A patron granted a presentation to a vacant church and parish in favour of a presentee, who accepted of it; the presbytery of the bounds found that they must proceed to fill up the vacancy, in terms of an act of the general assembly 31st May 1834, entitled “Overture and Interim Act on “Calls,” and the relative act of assembly, 2d June 1834, entitled “Overture with Regulations for carrying the “above Act into effect,” in which sentence the patron acquiesced; the presbytery further “did, in pursuance of “the first regulation of the act of assembly anent calls, “in so far sustain the presentation as to find themselves “prepared to appoint a day for moderating in a call to “the presentee;” the call was signed by three individuals; no special objections were stated against the presentee, but a veto or dissent was lodged by a large majority of the male heads of families, members of the congregation, and in full communion with the church. The patron and presentee took appeals to the superior church courts against the admission of those dissents; but, on the ground exclusively that the provisions of the acts of assembly had not been adhered to, these appeals

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<sup>1</sup> Rep. 16 D. B. M. 661., and see “Report of Auchterarder Cause,” by Charles Robertson, Esq., Advocate, 2 vols. Edinburgh, 1838.

were dismissed. The presbytery thereafter, without taking the presentee on trials as to his life, doctrine, or literature, &c., did, in respect of that dissent or disapproval, and in conformity with the above acts of assembly, “reject the presentee, so far as regarded the particular presentation on their table, and the occasion of that vacancy in the parish.” The patron and presentee then raised a declarator against the presbytery, concluding, *inter alia*, that the presentee had been validly and effectually presented to the church and parish; that the presbytery were and are bound to make trial of his qualifications, and, if they found him qualified, were bound to receive and admit him as minister of the church and parish; and that their rejection of the presentee was illegal, and contrary to the laws and statutes libelled. The presbytery admitted the validity of the presentation, but, as to the other conclusions above recited, they declined the jurisdiction of the Civil Court as incompetent to determine as against them, their duty as a Church Court being in a matter ecclesiastical; but, under reservation of that objection, they pleaded in defence that their whole proceedings were, on the merits, unchallengeable:—Held (affirming the decision of the Court of Session) that the objection to the jurisdiction of the Court ought to be repelled; that the pursuer, the presentee, was validly and effectually presented to the church and parish; that the presbytery did and do refuse to take trial of his qualifications, and had rejected him as presentee, on the sole ground that a majority of the male heads of families, communicants in the said parish, had dissented, without any reason assigned, from his admission as minister; that the presbytery in so doing acted to the hurt and prejudice of the pursuers, illegally and in violation of their duty, and contrary to the provisions of the statutes libelled, particularly 10 Anne, c. 12., intituled “An Act to restore patrons to their ancient rights of presenting ministers to the churches vacant in that part of Great Britain called Scotland;” and that the defences of the presbytery should be in so far repelled.

1st DIVISION.  
 Lord Ordinary  
 Fullerton.

AT a meeting of the general assembly of the kirk of Scotland, held on 31st May 1834, it was declared and enacted, among other things, “ that it shall be an instruction to presbyteries, that if, at the moderating in a call to a vacant pastoral charge, the major part of the male heads of families, members of the vacant congregation and in full communion with the church, shall disapprove of the person in whose favour the call is proposed to be moderated in, such disapproval shall be deemed sufficient ground for the presbytery rejecting such person, and that he shall be rejected accordingly, and due notice thereof forthwith given to all concerned.” Regulations were framed at a meeting of assembly on 2d June 1834, and transmitted as an interim act to presbyteries for their approval.

The church and parish of Auchterarder became vacant by the death of the Rev. Charles Stewart, on 31st August 1834.

Upon the 16th September 1834 the Earl of Kinnoull, the undoubted patron of the said church and parish, granted a presentation in favour of the Rev. Robert Young, a duly qualified licentiate of the church of Scotland.

At a meeting of the presbytery of Auchterarder, held at Trinity Gask on the 14th of October 1834, Mr. Robert Hope Moncrieff, writer in Perth, on the part of the Earl of Kinnoull, laid on the table of the presbytery the said presentation, duly executed, his lordship in the usual form thereby nominating and appointing Mr. Young to be minister of the said church and parish, and requiring the reverend the moderator and presbytery of Auchterarder to take trial of the qualification, literature, good life, and conversation of the said

Robert Young; and after having found him fit and qualified for the functions of the ministry in the church and parish of Auchterarder, to admit and receive him thereto, by ordaining and admitting him in due and competent form accordingly, all conform to the deed of presentation itself.

There were produced to the presbytery by the said Robert Hope Moncrieff a certificate that the Earl of Kinnoull had, as patron, qualified himself to exercise his right of patronage by taking the requisite oaths to government; a letter of acceptance, by the Rev. Robert Young, of the presentation; a certificate of his having qualified himself to accept of and hold the said presentation, by taking the usual oaths to government; also the usual parochial certificate; and a certificate signed by five ministers of the presbytery of Dundee, that the pursuer, the Rev. Robert Young, was a duly qualified licentiate of the church of Scotland, having received his licence from the said presbytery. There was likewise produced an engagement to exhibit an extract of the pursuer's licence as soon as a meeting of the presbytery of Dundee should be held. The deed of presentation and relative papers having been read, they were appointed to lie on the table till next meeting of presbytery.

At a meeting of the presbytery, which was held at Auchterarder on the 27th of October 1834, Mr. Robert Hope Moncrieff, on the part of the Earl of Kinnoull, produced an extract of the licence of the pursuer, the Rev. Robert Young, as a preacher of the gospel, and testimonial in his favour by the presbytery of Dundee; which having been read, and the presbytery "considering that all the documents usually given in

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“ cases of this kind have already been laid on the table,  
“ along with the presentation by the Earl of Kinnoull  
“ to Mr. Robert Young, preacher of the gospel, to be  
“ minister of the church and parish of Auchterarder,”  
did so far sustain the presentation as to find themselves  
prepared to appoint a day for moderating in a call to  
the pursuer; and accordingly they appointed one of  
their number to preach in the church of Auchterarder  
on Sunday then next, being the 2d of November, and  
to intimate that the presentee would preach in the  
church of Auchterarder on Sunday the 16th, and again  
on Sunday the 23d of the same month. Intimation  
was likewise directed to be made that the presbytery  
would meet in the church of Auchterarder on Tuesday  
the 2d of December, to moderate in a call, in the usual  
way, to the pursuer, the Rev. Robert Young, to be  
minister of that parish. In the foresaid deliverance of  
the presbytery of Auchterarder Mr. Hope Moncrieff,  
on the part of the Earl of Kinnoull, acquiesced, and  
took instruments in the clerk’s hands; but in so far as  
the deliverance at all sustained the presentation, two of  
the members of the presbytery dissented, on the ground  
that by so doing the presbytery did seem to homologate  
and approve of patronage.

At a meeting of the presbytery which was held at  
Auchterarder on the 2d of December 1834, for the  
purpose of moderating in a call to the pursuer, there  
was produced and read a call, subscribed in his favour  
by three of the parishioners, to be minister of the said  
church and parish; whereupon the presbytery, in terms  
of the said interim act of assembly, afforded an oppor-  
tunity to the heads of families, members of the con-  
gregation and in communion with the church, by

themselves, or by an agent duly authorized, to state any special objections or dissents to the settlement of the pursuer, of whatever nature such objections might be; but no special objections were given in. In terms of the said interim act the presbytery then proceeded to afford an opportunity to the male heads of families, whose names were alleged to stand on a roll, “to give in dissents on the call and settlement of Mr. Robert Young as minister of the parish. The following heads of families (287 in number), whose names stand on the roll, did then appear before the presbytery, and did personally deliver their dissent or disapproval of the presentee:” and the presbytery thereupon found that “dissents have been lodged by an apparent majority of the persons on the roll inspected by the presbytery,” and they adjourned consideration of the case until their next meeting, to be held at Auchterarder on the 16th of December 1834; against which sentence a protest was taken for Mr. Young.

At another meeting of the presbytery, which was held at Auchterarder on the 16th of December 1834, in respect that none of the persons who had dissented from the settlement of Mr. Young appeared to withdraw their dissents, the presbytery again found “that there is a majority of the persons on the roll still dissenting.”

These proceedings having been submitted to the review of the superior church courts, viz., the synod of Perth and Stirling and the general assembly, and a remit having been made to the presbytery to proceed in terms of “the interim act of the then last general assembly,” at a meeting of the presbytery held at Auchterarder on the 7th of July 1835, the presbytery,

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by their deliverance and sentence, did “ reject the  
“ pursuer, Mr. Robert Young, the presentee to Auch-  
“ terarder, so far as regards the particular presentation  
“ now on their table and the occasion of this vacancy  
“ in the parish of Auchterarder, and do forthwith  
“ direct their clerk to give notice of this their deter-  
“ mination to the patron, the presentee, and the elders  
“ of Auchterarder.”

No special objections were stated against the presentee’s qualification or settlement; the presbytery nevertheless did not take him upon trials, and pronounce judgment on his qualifications as presentee foresaid; but refused to do so, and to admit and receive him as minister of the said church and parish.

Thereafter a summons of declarator was brought in the Court of Session by the Earl of Kinnoull, as patron, and Mr. Young, as the presentee of the parish of Auchterarder, which summons (as amended) libelled on the statutes 1567, c. 7.; 1592, c. 116. and 117.; 1690, c. 23.; 10 Anne c. 12. (1712); and set forth the above proceedings, and refusal of the presbytery to induct the presentee. It then proceeded: — “ That the foresaid judgments or  
“ deliverances of the said presbytery, of date 2d De-  
“ cember 1834 and 7th July 1835, were ultra vires  
“ illegal and unwarrantable, in so far as that though  
“ by the laws and statutes before libelled the presby-  
“ tery were bound and astricted to make trial of the  
“ qualifications of the pursuer, Robert Young, as  
“ presentee to the church and parish of Auchterarder,  
“ and were not entitled to delegate to or devolve that  
“ duty on third parties, or to denude and abandon  
“ their right and duty as a church court, to judge of

“ and decide upon the qualifications and fitness of the  
 “ presentee for the pastoral office and charge; and  
 “ after examination by said presbytery, if the pur-  
 “ suer, the said Robert Young, as presentee foresaid,  
 “ was found to be duly qualified, the said presbytery  
 “ were bound and astricted as aforesaid to have ad-  
 “ mitted and inducted him into the office of minister  
 “ of the church and parish of Auchterarder; neverthe-  
 “ less, though the pursuer, the said Robert Young, is  
 “ duly qualified as a licentiate of the church of Scot-  
 “ land and presentee foresaid, as well as in all other  
 “ respects, to be received and admitted minister of  
 “ the church and parish of Auchterarder, and though  
 “ no objections have been stated against his qualifi-  
 “ cations, the presbytery not only refused, and con-  
 “ tinued to refuse, to take the pursuer upon trials,  
 “ and to pronounce judgment on his qualifications  
 “ as presentee, or to admit and receive him as  
 “ minister of the church and parish of Auchterarder,  
 “ but have by their sentence rejected him as presentee  
 “ to the said church and parish without trial, with-  
 “ out taking cognizance of his qualifications as pre-  
 “ sentee, and expressly on the ground that they  
 “ cannot and ought not to do so in respect of a veto  
 “ of the parishioners. In all which respects the said  
 “ presbytery, and the individual members thereof, have  
 “ exceeded the powers conferred on them by law, and  
 “ acted illegally, in violation of their duty and of the  
 “ laws and statutes libelled, and that to the serious  
 “ prejudice of the patrimonial rights of the pursuers:  
 “ and although the pursuers, as patron and presentee  
 “ foresaid, have often desired and required the said  
 “ presbytery and the present individual members

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“ thereof to discharge their duty in terms of law  
“ and the statutes libelled, by proceeding with the  
“ trials, admission, and final settlement of the pursuer,  
“ the said Robert Young, as minister of the church  
“ and parish of Auchterarder, yet they illegally,  
“ contumaciously, and in violation of their duty, and  
“ to the serious injury and prejudice of the patri-  
“ monial rights of the pursuers, refused and continue  
“ to refuse so to do.”

The principal conclusion was, “ Therefore it ought  
“ and should be found and declared, by decree of the  
“ Lords of our Council and Session, that the pursuer,  
“ the said Robert Young, has been legally, validly,  
“ and effectually presented to the church and parish  
“ of Auchterarder.: That the presbytery of Auch-  
“ terarder, and the individual members thereof, as the  
“ only legal and competent court to that effect by law  
“ constituted, were bound and astricted to make trial  
“ of the qualifications of the pursuer, and are still  
“ bound so to do ; and if in their judgment, after due  
“ trial and examination, the pursuer is found qualified,  
“ the said presbytery are bound and astricted to receive  
“ and admit the pursuer as minister of the church and  
“ parish of Auchterarder according to law: That the  
“ rejection of the pursuer by the said presbytery as  
“ presentee foresaid, without making trial of his qualifi-  
“ cations in competent and legal form, and without  
“ any objections having been stated to his qualifica-  
“ tions, or against his admission as minister of the  
“ church and parish of Auchterarder, and expressly on  
“ the ground that the said presbytery cannot and ought  
“ not to do so in respect of a veto of the parishioners,  
“ was illegal, and injurious to the patrimonial rights of

“ the pursuer, and contrary to the provisions of the  
“ statutes and laws libelled.”

The summons also contained other conclusions, the first of which was directed against the presbytery and the collector of the ministers widows fund, for decree ordaining them not to molest the said Robert Young in the possession and enjoyment of the stipend, manse, and glebe, and whole other emoluments belonging and pertaining to the said church and parish.

The next conclusion was directed against the heritors, for decree against them to pay their respective shares of the stipend to the said Robert Young during his life, and to perform and fulfil all the other obligations incumbent upon them, as heritors, to him, as legally, validly, and effectually presented to the said church and parish, or otherwise to declare that the Earl of Kinnoùll had legally and validly and effectually exercised his right as patron ; and that the said presbytery of Auchterarder, and the individual members thereof, had illegally and in violation of their duty and of the several laws and statutes before libelled, refused to make trial of the qualifications of the said presentee, but had illegally and in violation of their duty and of the laws and statutes libelled as aforesaid, rejected the said Robert Young as presentee ; and therefore that the pursuer, the Earl of Kinnoùll, had right to and was entitled to receive and retain the whole stipend and emoluments of and pertaining to the said church and parish of Auchterarder from the date of citation hereto, and in all time coming during the life of the said Robert Young ; and it being so found and declared, the presbytery and collector of the widows fund, and all others, should be ordained to desist from molesting the pursuer, the said Thomas Ro-

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bert Earl of Kinnoull, in the possession and use in time coming, during the life of the said Robert Young, of the stipend, manse, glebe, and other emoluments belonging and pertaining to the said church and parish, and that the heritors of the parish should be accordingly ordained to pay their respective shares of stipend to Lord Kinnoull during the life of Mr. Young.

The presbytery in their defences admitted Lord Kinnoull's right of patronage and the validity of the presentation, but objected to the jurisdiction of the civil court to take cognizance of and decide on proceedings of a church court, which, according to the enactments of the superior church judicatory as established by law, and by virtue of which the presbytery had acted, were warrantable and regular.

It was agreed that the discussion should be confined to the first or principal declaratory conclusion. A record was made up and closed.

The question at issue was raised by the following statement in the condescendence for the pursuers:—  
Art. XI.—“That the foresaid sentence” (that is to say, the sentence of the presbytery of 7th July 1835,) “whereby the presbytery rejected the Rev. Robert Young, pursuer, as presentee to the church and parish of Auchterarder, proceeded exclusively on the ground of the veto or dissents exercised by the alleged majority of heads of families or parishioners of Auchterarder.”

The answer made to that statement by the presbytery was, Ans. XI.—“Admitted.”

The Lord Ordinary reported the cause on Cases, and by order of the Lords of the First Division a hearing in presence took place before the whole

Court, and their Lordships, having taken time to consider, delivered their opinions seriatim at great length.

Thereafter, upon hearing counsel for the parties and before pronouncing judgment, the Court, 8th March 1838, allowed the following minutes to be lodged:—

“ MINUTE for the Reverend the Presbytery of  
“ Auchterarder.

“ Mr. Solicitor General for the presbytery of Auch-  
“ terarder, of consent of the Dean of the Faculty, for  
“ the pursuers, craved the Court to allow the following  
“ plea in defence to be added to the record:—

“ The pursuers are barred by acquiescence from  
“ objecting to the proceedings of the presbytery of  
“ Auchterarder and pleading that the same were  
“ illegal. (Signed) “ *And. Rutherford.*

“ Edinburgh, 8th March 1838.—The Lords, having  
“ heard the above minute of consent of parties, allow  
“ the above plea in defence to be added to the record.  
“ (Signed 10th March.)

(Signed) “ *C. Hope, I.P.D.*”

“ MINUTE in answer for the Pursuers.

“ Before the Court proceeded to give judgment and  
“ pronounce their interlocutor the Dean of Faculty,  
“ on the part of the pursuers, stated that he did not  
“ and never had objected to the Court entertaining  
“ and considering any plea raised by the defenders in  
“ argument, either as to the alleged personal objection  
“ to the action founded on acquiescence stated in the  
“ proceedings of the presbytery under the veto act,  
“ or as to the alleged objection to the sufficiency of  
“ the summons. (Signed) *John Hope.*”

The following interlocutor was thereupon pronounced:

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—“ Edinburgh, 8th March 1838.—The Lords of the  
“ First Division having considered the Cases for the  
“ Earl of Kinnoull and the Reverend Robert Young,  
“ and for the presbytery of Auchterarder, with the  
“ record and productions, and additional plea in de-  
“ fence admitted to the record, and heard counsel for  
“ the said parties at great length in presence of the  
“ Judges of the Second Division and Lords Ordinary,  
“ and having heard the opinions of the said judges,  
“ they, in terms of the opinions of the majority of the  
“ judges, repel the objections to the jurisdiction of the  
“ Court and to the competency of the action, as di-  
“ rected against the presbytery: Further, repel the  
“ plea in defence of acquiescence: Find, that the Earl  
“ of Kinnoull has legally, validly, and effectually exer-  
“ cised his right as patron of the church and parish of  
“ Auchterarder, by presenting the pursuer, the said  
“ Robert Young, to the said church and parish: Find,  
“ that the defenders, the presbytery of Auchterarder,  
“ did refuse, and continue to refuse, to take trial of the  
“ qualifications of the said Robert Young, and have  
“ rejected him as presentee to the said church and  
“ parish on the sole ground (as they admit on the  
“ record) that a majority of the male heads of families,  
“ communicants in the said parish, have dissented,  
“ without any reason assigned, from his admission as  
“ minister: Find, that the said presbytery in so doing  
“ have acted to the hurt and prejudice of the said  
“ pursuers, illegally and in violation of their duty, and  
“ contrary to the provisions of certain statutes libelled  
“ on, and in particular contrary to the provisions of  
“ the statute of 10 Anne, c. 12, intituled, An act to  
“ restore patrons to their ancient rights of presenting

“ ministers to the churches vacant in that part of Great  
 “ Britain called Scotland: In so far repel the defences  
 “ stated on the part of the presbytery, and decern and  
 “ declare accordingly, and allow the above decree to  
 “ go out and be extracted as an interim decree; and,  
 “ with these findings and declarations, remit the pro-  
 “ cess to the Lord Ordinary, to proceed further therein  
 “ as he shall see just. (Signed 10th March.)

(Signed) *C. Hope, I.P.D.*”

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The presbytery appealed.

*Appellants.* — Two questions had to be considered:  
 (1.) whether the general assembly were competent to  
 pass, cum effectu, the interim act of 2d June 1834? and  
 (2.) whether, supposing that such interim act was  
 alleged to be ultra vires of the general assembly, the  
 Court of Session had power to entertain the question  
 of its legality? Now, all that related to the call, trial,  
 induction, or collation of ministers was matter purely of  
 ecclesiastical regulation, and cognizable only by the  
 ecclesiastical courts. The acts of the different assemblies  
 from 1560 downwards proved that all such matters as  
 now sanctioned by the laws and daily practice of Scotland  
 were so determined on by the assembly in exercise of its  
 strictly ecclesiastical powers. The propriety or wisdom  
 of the different acts of assembly did not come into  
 question; the proper inquiry being, whether the as-  
 sembly had the right. Now, the usage or actual exer-  
 cise of power afforded the strongest confirmation of its  
 legality. The constitution of the kirk of Scotland, as  
 sanctioned and approved by acts of parliament, afforded  
 no trace of any authority in the civil court to overrule

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and control their proceedings in matters ecclesiastical, excepting during three short periods, which confirm the general rule.

With regard to the respective powers of the ecclesiastical Court and the Court of Session, it seemed to have been assumed that the Court of Session had an immemorial right to interfere in all matters affecting the rights of individuals; but this could not be, as that Court was established and its powers defined by act of parliament, which confined its proceedings to civil actions, and gave no jurisdiction in matters ecclesiastical. It could not be shown that ecclesiastical jurisdiction had been given by any subsequent statute. Besides the Court of Session or Supreme Civil Court, Scotland had also its Court of Justiciary or Supreme Criminal Judicatory, as well as its Church Courts, consisting of the General Assembly of the Kirk, and its subordinate tribunals, so that there were three separate coexistent though independent jurisdictions. The kirk, as reformed, succeeded to the whole jurisdiction exercised by the pope and bishops; and that was now vested in the proper Church Courts. The Commissary Court, now merged in the Court of Session, took cognizance of certain cases which might be considered partly civil and partly ecclesiastical; but no argument could be raised from that fact.

The recognition of the ecclesiastical jurisdiction, exercised by its proper courts, was proved by abundant statutory authority; also by the text writers, excepting Bankton<sup>1</sup>, (the value of whose authority had been

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<sup>1</sup> *Lord Brougham*, when moving judgment, stated that the next time an opinion was brought forward questioning the authority of Bankton, his lordship would inquire into the grounds of that opinion.

commented on by Lord Moncreiff in his opinion below.) The opinions of Forbes and Erskine were confirmed by decisions, and had been fortified by the actual exercise of legislative powers by the general assembly, — the inferior church judicatories being bound to give obedience to laws and usages sanctioned by the general assembly. The decisions of the Court of Session, corrective of excess in the exercise of statutory powers by inferior courts, were not applicable, particularly where a party had not followed out his regular course of appeal through such inferior judicatories.

And even although the act of assembly complained of might be *ultra vires*, still, as was shown by the authorities, well explained by Lord Cockburn below, the Court of Session had no power to direct an inquiry by civil process into the legality or illegality of the act, for it is a civil court merely, possessing only civil jurisdiction, as given by statute; and where it possessed jurisdiction in certain ecclesiastical matters it was only where such jurisdiction was given by statute.

Did the question here involve matter of civil or ecclesiastical jurisdiction? The call and ordination of a minister to discharge the duties of the cure of a parish could not be considered otherwise than as ecclesiastical matter. There was no such thing in Scotland as *ministerium vacuum*; for there a minister is licensed, and when ordained is set apart to a particular cure. Then the call is no mere matter of form. No minister could be admitted unless there had been a moderation of the call, which was, therefore, a necessary as well as a substantial part of the ecclesiastical procedure in the settlement of a minister. Upon the record as between these parties there was no question

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upon which the Court of Session could pronounce a valid decision. Viewing it as a question of the fitness of the minister presented, that Court had no power; it was not enough to say that it related to the acceptableness of a minister, and not to his fitness, as if it were not true that although acceptableness might not be fitness, still his unacceptableness was clearly unfitness, and therefore raised an inquiry as to his being qualified or fit, or not, for the cure of this particular parish. There was no instance of interference by the Court of Session, unless the right of the patron or stipend was affected. To synods there had been numerous and repeated appeals in ecclesiastical matters, and touching settlements, and also to the general assembly both by reference and appeal. In this case the appellant, Mr. Young, had taken that course, although he afterwards thought proper to depart from that which was the legitimate mode, of having the authority of the general assembly, and the regularity of the proceedings of the presbytery enquired into and determined.

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*Respondents.*—They now complained of a civil injury sustained through the refusal to admit a presentee duly licensed, and not on the score of qualification, as hitherto understood, but on the sole pretext of a veto or dissent, which went to a complete denial of the right of the patron. The important question then was, whether the patron and presentee had any remedy for the latter having been so illegally prevented from being admitted to the benefice. The appellants do not say there is any remedy; they allow that the present mode adopted was the proper remedy, or there was none; but said, the Court of Session had no jurisdiction,

and therefore the presentee had no redress. Suppose there had been a wrong, there must be a remedy ; and to ascertain whether there was jurisdiction in the Court where the remedy was sought, the wrong—the illegality of the veto act—must be assumed. *Injuria et damnum* must be shown, and then the right of action arises ; but there must be both.

Generally, the sound and obvious view was that up to the year 1834 it was not pretended that there was any law entitling presbyteries to refuse to take on trial presentees who, if qualified, were entitled to be ordained and inducted into the cure of the parish. Had the law before 1834 sanctioned exclusion on the score of dissent, there would have been no necessity for, and there would in fact have been no ecclesiastical legislation attempted on the subject. And the necessity of such legislation through the want of any such pre-existing right of dissent without reason, was evident from the notorious fact that the framers of the scheme did not at first agree as to the class of persons in whom such right of dissent, without reason assigned, should be placed ; so that it must have been not in its administrative capacity as an ecclesiastical court, but as a legislative body, that the assembly acted in 1834 ; and it now sought as a court to interpret and enforce the law, not as sanctioned by the legislature and explained by the judicatories of the land, whether civil or ecclesiastical, but the law as confessedly made or altered by the assembly itself. Thus there was no conflict, and could be none betwixt the two courts, considered strictly as courts ; and no conflict of decisions, so long as both courts confined their proceedings within proper judicial bounds.

The stat. 1592, c., 16, establishing presbytery, gives

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collation on presentations to the presbytery, “ providing  
“ the said presbyteries be bound and astricted to receive  
“ and admit quhatsumever qualified minister presented  
“ be his Majesty or laick patrons:” And by the  
10th Queen Anne, c. 12, (1711,) it was again enacted  
and declared, on restoring patronage (which the stat.  
1690, c. 23, had suspended,) “ That the presbytery of  
“ the respective bounds shall and is hereby obliged to  
“ receive and admit in the same manner such qualified  
“ person or persons, minister or ministers, as shall be  
“ presented by the respective patrons:” And the duty  
thus imposed upon presbyteries by the legislature has  
never been discharged by any act of the legislature, and  
cannot be repudiated, destroyed, or abandoned by the  
kirk of Scotland, or any right of peremptory rejection  
of the presentee given by the church to a third party,  
to the effect both of excluding the duty imposed on the  
church courts and of the defeating the patron’s rights.

The interim act of the general assembly 1834 in the  
principle of it necessarily raises and disposes of questions  
of civil right, the determination of which belonged to  
and was within the jurisdiction and competence of the  
civil court; for the veto or right of peremptory rejec-  
tion thereby conferred on the male heads of families in  
a parish was altogether distinct and separate from a call  
by the congregation, and unauthorized either by the  
nature of a call, or by any of the enactments of the  
church in regard to calls; and accordingly in this case  
the moderation of the call was over before the dissents  
or veto were given or asked for.

A call was never, during any period in the history  
of the kirk of Scotland prior to 1690, in which the right  
of patronage was recognized by law, admitted or acted  
upon as a means of controlling the right of patronage,

or as any part of or necessary to the title or appointment of the presentee, and to his right to be taken on trials, and (if found on trial to be qualified) to be inducted. The call, in its origin, object, and principle, was a mode of appointment or nomination when patronage was not in force or secured by law. After the restoration of patronage by the statute of Queen Anne the call continued to be acted upon as a mode of election in some cases in which the patrons did not choose to exercise their right of presentation at all; sometimes also as a mode of appearing to elect the presentee of the patron, in the hope of preserving a kind of protest against the act of parliament; but it was known and acknowledged that a call was not a form applicable to the case of presentation by a patron, or which could in that case have any effect against the title of the presentee, and his right to be taken on trials. And it came also to be resorted to for a considerable time by parties in the church, in order to thwart the right of presentation by an admitted perversion of the true object of a call.

A call by the congregation, in the sense of warranting peremptory rejection by the male heads of families without reasons assigned, is inconsistent with the rights of lay patronage, as part and parcel of the law of the established kirk of Scotland; and it had, by a series of adjudged cases in the Supreme Ecclesiastical Court, been determined that a call is of the nature of an invitation, which it is desirable the congregation should give for the encouragement of their pastor, and which in practice they are asked to give, but which is not part of ordinary vocation, (that is, of election or of title,) as defined in the book of discipline, nor anywise

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essential to a presentee's induction and settlement as minister of a parish.

Whether the right of veto or of peremptory rejection, which is given to the male heads of families by the interim act of the general assembly of 1834 and relative regulations, be civil or ecclesiastical, it is wholly beyond the power of the church to confer on the members of congregation, or on any section of them, such power of rejection. The right of nomination to the office of minister of a church and parish is by law vested in the patron, subject to no approval or rejection by the people or congregation, but solely to the power of collation in the church courts, to try and adjudge the qualifications of the presentee.

Assuming that the general assembly had power as a legislative body to make regulations as to the qualifications of presentees, they were not entitled, consistently with the statutes founded on by the respondents, to enact and require that the presentee should be acceptable to the people, as the condition of his being taken upon trials and inducted to the office of minister of a particular church and parish, acceptableness not being a quality in the presentee at all, either absolutely and with reference to the duties of a minister in general, or relatively as regards the discharge of those duties in the particular parish to which he is presented. Acceptableness per se is not a matter within the province of collation, though the collators may inquire whether the want of it has arisen from a good and sufficient cause. If they give to it any other effect, they delegate to the male heads of families the office which was delegated to themselves, they substitute the choice of the male heads of families for the choice of the patron, and

to the exclusion of others just as capable to judge as the male heads of families thus arbitrarily selected.

The exercise of the right of nomination to the office of minister of a church and parish in Scotland, as well as to the benefice, is reserved and secured by statutes to lay patrons as a condition on the establishment of the national church of Scotland. And when the church courts *jure devoluto* nominate or call an individual to the office, it is by the exercise of the right of presentation which was in the patron, but which he had failed to exercise, and which in consequence is transferred to the church by a statutory devolution; and the right is then exercised by a deed of presentation flowing from the right of patronage as much as when it is exercised by a lay patron.

The power to give collation upon presentations, that is to say, of examining and admitting ministers to parishes, which is vested in the kirk of Scotland as a national establishment, is statutory in its origin, and defined and limited by statute; and but for the enactments of civil statutes the presentation would have filled the office, the act of ordination alone remaining to the church, but without any power of rejection of an unqualified person. The state conferred the power and imposed the duty of collation on the church, as a check upon the exercise of the right to present to the office, and as the only check consistent with the fair and free exercise of the right of patronage.

The power conferred and the duty imposed on the judicatories of the church by the statutes to judge of the qualifications of presentees, and to decide on objections stated to their qualifications, was one of the leading principles of presbytery; and the power and duty could

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not, consistently with the statute law, either be wholly abandoned by the church courts, or devolved by them in whole or in part, on the congregation, or on any section of them, or on any other body or class of persons; and any claim of right to legislate on any matters, civil or ecclesiastical, which had been the subject of statutory enactment or provision, or to interfere with and affect the provisions of statutes, is inadmissible in point of law.

The church of Scotland established at the reformation was an entirely new ecclesiastical establishment. The state abolished the former established church, and all its powers, authority, and jurisdiction, and then by degrees, and by enacting special statutes to that effect, it formed and adopted another establishment. These statutes are, in Scotland, the sole origin and foundation of the national church as an establishment. The national church received from these statutes certain powers within which it must be confined, while at the same time certain duties were imposed in regard to the right of presentation. Those duties were again confirmed and imposed by the act of Queen Anne, and the established church cannot refuse to discharge them without its presbyteries committing a civil wrong, which is cognizable by the Supreme Civil Court. The church was limited, restrained, and confined as to its own powers and functions in regard to all the matters which formed the subject of statutory enactment: Hence the position recently broached on the part of some of the presbyteries of the church of Scotland,—that it is in truth the old church of Scotland, (that is, the popish church,) only reformed from its errors,—is as inconsistent with statute as it is absurd and extravagant, when the juris-

diction of the pope and the nature of presbytery are considered and compared.

A claim for an inherent power of legislation by an established church so as to destroy, restrain, or impair any civil rights, is inconsistent with any sound constitutional principle applicable to the connexion between the state and established church, and most dangerous to the rights and true liberties of the people of Scotland. And when any such claim is brought forward, it is the duty and province of the Supreme Civil Court to decide on the validity of such pretensions, and to enforce civil rights, and at the same time to restrain all bodies in the country within the limits assigned by law, so as to preserve the civil rights of others: this is clear upon the authorities. There was none to show that the church had the supreme legislative power; but on the contrary, there was authority that if the church courts exceeded their powers they were amenable to the law of the land. Where secular rights are concerned the Court of Session would interfere.

If the analogy of the law of England be resorted to, it would be found that that law was entirely adverse to the pleas of the appellants.

The arguments of counsel having been concluded (23d March 1839),—

LORD CHANCELLOR.—My Lords, the great importance of the question which you have now to determine, and the extent of matter which is necessary to be considered before you can safely come to an adjudication in this case, will, I am sure, induce your Lordships to postpone the consideration of it for such a length of time as may be necessary for that purpose; but at the

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same time this is a case which for obvious reasons ought not to remain undecided beyond the period which may be absolutely necessary for the purpose of a due consideration of it. I would therefore suggest to your Lordships to postpone the consideration of the case for the present; but to resume the consideration of it at as early a day after the recess as may be consistent with your duly considering it.

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LORD BROUGHAM.—My Lords, I entirely agree with my noble and learned and much esteemed friend in recommending your Lordships to postpone your decision in this case, for the purpose of the necessary consideration of it in all its bearings, regard being had to its extreme importance; and, my Lords, at the same time I agree, as well for the peace of the church as of the people, we ought not to adjourn so indefinitely the consideration of it as to run the least risk of the decision of this cause not being finally given before the meeting of the General Assembly of the Church of Scotland.

My Lords, that being the opinion of my noble and learned friend and myself, I shall not at all enter into the merits of the question at present, farther than to say that I regard the question as one of very great importance, and that I do not see, in any view I can take of the case, any conflict whatever between the rights of patrons on the one hand, and of the church on the other, or between the church as an ecclesiastical or spiritual body on the one hand, and the flocks on the other,—hardly any conflict between the temporal and the spiritual courts on either side; but that I regard the interests, the views, and the peace of the whole community, the church and the laity, the courts spiritual and temporal, as all bound up together, and that in the

decision to which your Lordships may come you will not be giving the balance to one or the other of the conflicting parties, but adjusting it for the common interests and behoof of the whole.

My Lords, it greatly increases the difficulty of this case that not only is there some conflict of authority, — that not only is there very great discrepancy of opinion among some of the most learned and most able judges, who have dealt with the question on either side in the Court below; but that we are in this position; I say it particularly with reference to what last fell from the very able and learned counsel who has just addressed your Lordships in his most able, singularly able<sup>3</sup> reply, where he alluded to a legislative measure; and something was said upon that also in the Court below, as well as on the other side of the bar by the counsel for the respondent. Now, my Lords, as the peace of the church and of the community is first of all to be considered, I am of this clear opinion, as at present advised, that it will be much better consulted by a judicial determination of the case than by a legislative measure,—that it will be much better and safer dealt with by having a declaration from the high authority of this highest court of law, of what the law is and what it always has been, and what the rights of all parties are under the law as it is and always has been established in Scotland, than by interposing with the strong hand of the supreme legislative power, and by an act of that supreme power making new a law to regulate the conflicting or supposed conflicting rights of the parties. If there is any disposition on any part to fall out with the ultimate decision I am quite sure

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of one thing, that that disposition will be far more likely to be shown to fall out with an act of parliament, with an interposition, as it were, of a legislative nature, than with a judicial declaration of your Lordships, calmly considered, on the case, as if it were a question of science; without regard to conflicting interests, where indeed there is no conflict; without regard to conflicting passions and feelings, of which I am afraid there is considerable, than if it were left to an act of parliament, armed as parliament unquestionably is with supreme authority. My Lords, for this reason, then, I concur with my noble and learned friend and the rest of your Lordships, whose assistance I crave in considering the case. I shall be most happy to hear from them, as I know my noble and learned friend also will, what impression the arguments (to which they have given most exemplary attention, as good Scotchmen as well as judges of this High Court,) have made upon their minds, when we apply our minds to the case in a judicial point of view for the sake of coming to this, as I think, only satisfactory determination of it.

My Lords, it is quite unnecessary to state,—what it will be satisfactory to the people of Scotland to know, and it is for that reason I state it,—that never was a case of importance argued with greater resources and learning and ability than the case we have heard argued at your Lordships bar.

I suppose that the General Assembly meet on the 13th of May.

*Mr. Whigham.*—The 15th, my Lord.

LORD BROUGHAM.—Then we must give judgment before the 15th; and if I cannot be here I shall write

mine and send it to my noble and learned friend. Whether I am present or not I shall consider it my duty to write my judgment.

Judgment deferred.

LORD BROUGHAM.—My Lords, in rising to state the opinion which I have formed upon this case, I own that I approach the question with very considerable anxiety, —an anxiety occasioned by its vast importance, increased by my knowledge of the deep and universal interest which it excites all over the kingdom of Scotland, and consummated by the very considerable difference of opinion which has prevailed among the learned judges who have decided it in the Court below, —a decision pronounced by very little more than a bare majority of the Court, preceded by very elaborate argument at the bar, accompanied also with very elaborate argument from the bench, and dissented from by no less than five of those learned persons who are among the most distinguished of the Scottish judges.

A circumstance occurs which might at first sight seem rather to relieve me from some part of this anxiety, but which, nevertheless, is in itself a source of considerable uneasiness — a circumstance common to myself and to my noble and learned friend, who is about to give his opinion upon this case. After an unremitting attention for five days to the able and learned arguments on both sides of the bar, I deemed it my duty equally to examine the reasons adduced in the ample discussion which the case received from the Scottish bench, having access to their opinions and their arguments in a shape which it were to be wished we had in all cases of any importance, and the want of

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which it has often been my lot here to complain of, namely, the statement of their own reasoning, I may venture to say so far corrected by themselves as to be given in their own words. These reasons from those thirteen learned judges occupy a volume of nearly five hundred pages closely printed. It may therefore be safely assumed, that there is no one part of this question which has not been visited by all the light which their learning and capacity were fitted to throw upon it; and that we have every thing before us that passed below, as well as all that could be urged before your Lordships here, to enable us to steer our way through the various difficulties, or supposed difficulties of this subject.

Now it does so happen that in a case which has undergone so much discussion below, which has given rise to so great divisions among the judges below, which has been argued on either side at such length both at the bar and on the bench, both in Scotland and here, it does so happen that I have been with the utmost diligence seeking for difficulties, and found them not; that I have been, with all the power which I could bring to bear upon the investigation, wholly unable, and am to this hour unable to discover wherein the very great difficulty consists; and that I have come to my conclusion without any sort of doubt whatsoever resting upon that conclusion, or upon the grounds whereupon it is formed.

Now although this at first sight, as I have already said, may seem to relieve me from the anxiety natural to the position of one who is to decide upon an appeal such as this; yet in another view it rather increases that uneasiness, by making me dread lest matters which have

occurred to others, have been the source of their doubts, and the cause of their divisions, should have escaped me, and lest I may fall into error in exercising the function I am now called upon to perform. But it is a great satisfaction for me to know, and it bears me up completely in the position I am to occupy, that my noble and learned friend and myself have arrived at the same conclusion without any communication whatever upon this subject. From the time when the argument began, during the course of the argument, at the close of the argument, and during the interval that has since the argument elapsed, we have never had the least communication on the subject in any way, direct or indirect, till the last time of your Lordships sitting here, when we agreed to give judgment this morning; and upon that communication we both were found to have arrived at precisely the same conclusion; and I rather think (but my noble and learned friend will be better able to tell you than I am) that we entertain as little hesitation in our judgment the one as the other, being both of us unable to account for the question of law now at issue having been made the subject of such long and pertinacious contest.

My Lords, I say all this without the slightest disrespect to that most learned and venerable tribunal which has judged upon it below; because I know full well that it is of the nature of men, and the more so the more learned, and subtle, and able they are, that in proportion as a case coming before them is of great importance, and occupies the minds of the people by whom they are surrounded,—it is of the nature of men, and even of judges in such circumstances sometimes, rather to overdo the matter; and perhaps it is the safest

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side upon which to err, because at all events it betokens their attention bestowed upon the subject, and it precludes the possibility of a hasty or unwary decision.

And now, before proceeding to state the grounds upon which, in my opinion, there can be no doubt whatever that the Court below have come to a right conclusion, and that their judgment should be affirmed here by your Lordships, I will take notice of a topic which we have heard more than once, and in more shapes than one urged at the bar. It was adverted to below; it was adverted to even in the judgments that have been pronounced; and I cannot withdraw from taking notice of it here. In reference to the great anxiety which this case excites in Scotland, and to the possible consequences of an affirmance of the judgment, much has been said of the public feeling in two forms, the feeling of the flock and the feeling of the pastor. With respect to the flock, I have no reason whatever to doubt, I am not permitted to doubt, that they will render a respectful obedience to the law of the land: but if I have no reason to doubt of this respecting the laity, how much less dare I question it with respect to the ministers of the gospel? To menace a tribunal with any disrespectful reception of its lawful decrees from the laity of the land is hardly conceivable; but to menace it with any disrespectful reception of a sentence pronounced by the judges of the land, to menace such lawless conduct on the part of the clergy, of the christian clergy of a christian church, the church of Scotland, whose head is Christ Himself, is not only indecorous, but it is preposterous, it is monstrous: I will not believe it till I see the fact,—a fact which I hope I shall not live to see, and which I hope no one

else will live to see, of the church of Scotland refusing to yield a willing as well as a respectful obedience to the lawful decision of the highest court of judicature in the realm, the court whose office it is to pronounce the law of that realm. It is for me to add, that if it were as certain the other way, still the law must take its course. If it were just as clear that the judgment we are about to give would be resisted, as I know it to be demonstrably certain that it will be cheerfully obeyed, still it is the office of your Lordships to pronounce your opinion upon the question of law brought before you ; and you would betray your duty most grossly if you were to suffer yourselves to be diverted from pursuing the course of your duty by any fear of other persons still more scandalously betraying their duty both as ministers and as subjects, and still more flagrantly violating the law.

I will now proceed to state the reason upon which I have come to a conclusion in favour of the judgment under appeal. They are short and satisfactory to my mind. They consist in reference to the statute law of the country, and they leave upon my mind no doubt whatever, unless we are to allow niceties drawn from antiquarian lore, subtleties gathered from disputed points of church history, refinements borrowed from the controversies among theologians of past ages and metaphysical distinctions and arguments ab inconvenienti, and misconceived notions with respect to the bounds and limits of jurisdictions to pervert the plain intendment of statute law, that intendment which is to be gathered from the words of the legislature, which is confirmed by the reason of the thing, which is established above all by the manifest purpose of the enact-

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ment, as declared by the law-givers themselves, and which is ultimately clenched, as it were, and made fixed and sure by comparison with other branches, other principles, and other provisions of the law itself.

Now, my Lords, when I go at all, after what I have said, into the historical matter belonging to, or rather, perhaps, brought into and made to encumber this case, and much of which is more curious than useful in the argument, your Lordships will presently perceive it is with a view of helping out the construction to which I am coming, and for no other purpose. I shall, therefore, for a moment look to what was the original interposition of the people in question of presentment and induction into benefices, and then I find that at no time, even when the rights of patronage were the least known, and therefore the worst secured, at no time did the people's share in the operation bear the least resemblance to what is contended for in the present case.

But, first of all, it is certainly convenient and satisfactory to find that we have no dispute whatever here relating to the facts: Lord Kinnoull's undoubted right to the advowson, or the patronage of the living, is clear; his having presented Mr. Robert Young to that living is clear. The presentment having by the presbytery been received within due time is admitted; it having been sustained, as they are pleased to call it, is admitted also. What effect that sustentation has had, or what use or purpose it has served, is another question. The refusal afterwards of the presbytery to ordain and induct Mr. Young to the living is admitted; and, in the sixth place, the ground of that refusal (and this is most important) is distinctly admitted; it forms the whole subject matter of the controversy, and I shall now call

your attention to the statement of it upon the record in the eleventh article of the condescence, and the answer of the presbytery. The allegation in the condescence is this :—“ The aforesaid sentence, whereby  
 “ the presbytery rejected Mr. Robert Young as presentee  
 “ to the church of the parish of Auchterarder, proceeded  
 “ exclusively on the ground of the veto,”—a new word introduced, I apprehend, into the Scottish law; but a translation of it is given in the same sentence,—“ on  
 “ the ground of the veto, or dissent,”—a most important word,—“ or dissent exercised by the alleged  
 “ majority of heads of families or parishioners of Auch-  
 “ terarder.” Such is the allegation. The answer is,  
 “ admitted.” Thus, therefore, it is clear that there is raised before your Lordships the question, Have the majority, or the alleged majority (an allegation not traversed) of the heads of families, of any families, the right to exercise a veto or dissent (I prefer the English translation to the Latin original, a dissent)? and is the presbytery bound by that dissent, unaccompanied with any reasons, and not followed by any inquiry on their part into the validity of the causes of dissent, to reject the patron’s presentee? In other words, Is the patron’s right of presenting subject to the acceptance or refusal, that is, the choice of the congregātion? That is the question, and the important question raised before your Lordships; that is to say, is or is not, by the law of Scotland, the right of patronage in the patron, or is it in the patron conjointly and concurrently with and shared by the parish as well as the patron? That is the question raised by force of the word “dissent;” for it is a mere refusal of assent; it is a choice negative exercised by one party after a choice affirmative exer-

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cised by the other, neither party being bound to assign any reason other than his mere will.

My Lords, I come, therefore, to observe upon what has at different times been the right of the parish or the congregation, even in times when the right of the patron was most feeble and worst ascertained. Let us see what right have they in point of fact, and by practice or usage enjoyed.

Now it is to be observed that before endowments were numerous, when there were very few patrons to present, when all that the church consisted of was a number of congregations, and when the provision for the parson or the priest was feeble as the church itself, when he was paid accidentally, by casual offerings, by various fees from time to time increased by clerical encroachments, but when there was no provision regularly made by formal and substantial endowment, it is clear that the right of patronage could hardly be known; and as the priest must be chosen by somebody, it appears that he was then chosen, not by the congregation who were to be his scholars, not his patrons, but he was chosen by the clergy, by the clerical portion of the church. For your Lordships will find that there was a canon in the year 428 referred to by one of the learned judges, which shows that the election was in the clergy, though with the assent of the congregation. "Plebis,"<sup>1</sup> says the canon, "non est eligere, sed est electioni consentire." That is, all the function of the people. The clergy chose, the people assented; and this in 493 was extended to bishops; for it is then laid down by another canon, "in electione episcopi populus debet adesse;" just as in the enthronement of the king, which has been

<sup>1</sup> Van Espen. II. t. 9. c. 9.

originally the actual choice of soldiers of their imperator or emperor. in ruder ages, beyond the period of authentic history. Long after that election had been disused, there continued the remnant of it, which we have at coronations up to this hour, by asking the people's assent as a form. The people may here be said to be adesse, for they are called upon to give their assent, though the coronation, the enthronement, the allegiance, and the prerogative would have been just the same if they refused as if they gave their assent, and would have been just the same if their assent had never been asked.

Then, in a work which is deemed a great authority among the fathers, I mean Cyprian's letter to the Spanish people, we find it written that no one should "be ordained but in the presence of the people." Now, why? The reason is given, and it throws light upon the call; for I take the call to be a sort of remnant of this popular presence. The nature of the call is exceedingly ill defined, and its history is admitted on all hands to be very obscure, as far as it ever existed in any thing like a substantive shape, (except at one period, when patronage was avowedly abolished by law;) it is now put down by law, as I shall show in a further part of my argument. But its nature seems to be illustrated by the reason which Cyprian assigns for the presence of the people at ordinations:—"No one should be ordained," (it is rather an advice or a recommendation than a law, or a construction put upon a law,) "no one should be ordained but in the presence of the people, to the end that the demerits of the bad may be disclosed and the merits of the good proclaimed." An opportunity was to be given for showing whether the life and conversation were good

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or bad ; because that tended to inform the conscience of the bishop, who was to ordain the clerk, and that tends, in presbyterian government, to inform the conscience of the presbytery, who are to judge, as I shall presently show, and only to judge of the candidate's qualifications, the life and conversation being one of those clerical qualifications. It was for the purpose of informing the party who was to decide, that he might inquire, and upon inquiry might determine.

Then there is in 493 a rescript of Gelasius, which states that the right of rejection does not exist at all in people ; for it expressly says, " if their objections are " groundless," which implies giving a reason, and implies no veto, no dissent ; dissent is a mere refusal. But this must have been grounded upon reasons ; because he says that those reasons are to be submitted to the clergy, and if groundless the clergy are to remove them by admonition, and thereby to compel an assent. Does not that clearly show, that if the reasons, in the opinion of the clergy, were groundless, the clergy were to proceed as if there had been no dissent ; and to deem a dissent founded upon bad reasons, or upon no reasons at all, as of no force at all ?

Then in the year 886 Pope Stephen says, referring distinctly to the same subject, " docendus est populus, non sequendus ;" <sup>1</sup> a very pontifical doctrine, no doubt, and one which by most pontiffs was very amply and very accurately practised, together with another principle as religiously acted upon, namely, that the flock were to be fleeced as well as taught ; that, however, belongs to the papal and, God knows, not at all to the presbyterian church.

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<sup>1</sup> 1 Dec. Dist. 63.

Now, what says Bœhmer, in a book which is of great authority,—authority in foreign countries as well as among the canonists of our own; I mean his *Jus Parochiale*? It is cited by one of the learned judges.<sup>1</sup> He says<sup>2</sup>, “*patrono votum decisivum in electione tribuatur.*” Now see the difference between the *patronus* and the *populus*:—“*Populo. negativum, ut possint dissentire.*” But how? Not as the Auchterarder people have done, and as the presbytery have allowed them to do, merely to dissent without reason, and with nobody to judge of the reason:—“*Non tamen aliter quam si justas dissensus causas allegare queant.*” They must not only dissent and give their reasons; but their dissent must be grounded upon such just reasons as they “*allegare queant,*” that is, as they are able truly to allege. Then the question is, who is to decide upon the justice of those reasons? and that question is best answered by coming to the point now in contest between the parties. How has the Scotch law determined that those reasons shall be examined and decided upon? We are thus led to what is certainly the very pinch of this case, and which, in the view I take of it, makes decisively against the appellants; for I now come to the statute law of Scotland, upon which the whole controversy must ultimately depend. Let us first go to the original act, regulating the presbyterian scheme, the act 1592, chapter 116. After providing for the exercise of the judicial and administrative functions of the various church judicatories in Scotland, it concludes in these words:—“*Ordains all presentations to benefices to be direct to the particular presbyteries in all time coming,*

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<sup>1</sup> Lord Corehouse.

<sup>2</sup> *Jus Paroch.* iii. 1. 18; *Jus Eccles.* prot iii. sec. 77. & 78.

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“ with full power to give collation thereupon, and to put  
“ order to all matters and causes ecclesiastical within their  
“ bounds according to the discipline of the kirk, pro-  
“ viding the foresaid presbyteries be bound and astricted  
“ to receive and admit quhat-somever qualified minister  
“ presented by his Majesty or laick patrons.” So that  
they were bound and astricted by the force of this sta-  
tute to admit, and if they did not admit they broke the  
law; they acted illegally, and were liable to the conse-  
quences, civil and other, of disobeying the clear and  
positive order of a statute to receive and admit whoever  
was presented by a lay patron, if duly qualified; they  
were only to judge of his qualification, and if qualified  
they were bound and astricted, that is, they were ordered  
by the law, to admit him. It was at their peril, quoad  
civilem effectum, and also quoad alios effectus, that they  
refused to obey the positive mandate of the King and  
the estates of parliament.

At different times doubts were entertained whether  
the law ought to be continued, and some fluctuations  
existed even in the practice under it in one or other  
of the troublous periods of Scotch church history.  
Nevertheless it was not till the year 1690 that the legis-  
lature itself made any even apparent alteration of the  
statute, there having been an act passed immediately  
upon the revolution, the act of 1690, chapter 5, which  
revives, renews, and confirms the act of 1592, with the  
one exception of that part of it that I have just read  
relating to patronages, and states that this matter is  
hereafter to be taken into consideration; and in  
performance of that promise, and in compliance, as it  
were, with that legislative notice, came in the same year  
the 23d chapter, which it is most material, therefore, that  
I should now bring under the view of your Lordships.

It is entitled “An act concerning patronages,” and it undoubtedly introduced, for the first time, a total change in the law of patronage. It abolished the right of patrons, and indeed radically extirpated patronage; it professed to do no less. It did not proceed, as some would have done, by a side wind, professing to do one thing and doing another, but it honestly, openly, and manfully avowed, in a spirit worthy of men the legitimate successors of the covenanters, and who had just brought about the revolution of 1688 in Scotland,—it avowed that nothing less was intended than to root out patronage from the land. This famous statute, therefore, begins by pronouncing the doom of patronage; and it gives the cause of the doom, namely, the crimes of the offenders:—“Our sovereign Lord and Lady, &c., “considering that the power of presenting ministers to “vacant churches of late exercised by patrons hath “been greatly abused, and is inconvenient to be con- “tinued in this realm.” The sentence has thus gone forth against patrons, and whatever is done after this preamble must be taken to be in execution of this judgment for the offence, namely, the abuse and inconvenience ascribed to the right of patronage; the sentence is neither more nor less than utterly abolishing that right for that cause. Now this is most effectually done; but it is material to consider how it is done, and what is substituted in place of it; because one part of the argument, and the greater part of it, is a falling back from the act of 1711 (the 10th of Anne) upon the act of 1690, in a way and by a process of reasoning which I marvel at,—the more I read the more I wonder at, and upon which I shall presently have to say somewhat to your Lordships. The act proceeds, “that in

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“ case of the vacancy of any particular church, and for  
“ supplying the same with a minister, the heritors of  
“ the said parish, (being protestants,) and the elders of  
“ the said parish are to name and propose the person  
“ to the whole congregation, to be either approven  
“ or disapproven by them.” The process therefore is  
clear; it is not the people, it is not the congregation,  
who are to call; but it is a very select portion; it may  
be five people, it may be four people, there may be but  
one heritor and three elders, and these are constituted a  
kind of corporate body; for what purpose? for the  
purpose of presenting to the people.

Then the presentation is hereby taken from the  
patrons, because they have abused it, and because it was  
found inconvenient; and it is transferred to this new  
body, the heritors and elders, who are to present to the  
congregation. If the congregation disapprove, the dis-  
approvers are to do what? to exercise a veto? to give  
their dissent, as the second article of the condescence  
states and the answer to it admits, and as the presby-  
teries state to be their sole reason for not admitting  
Mr. Robert Young? No such thing; the “disapprovers”  
are “to give in their reasons;” just as the canon of 428,  
just as the canon of 493, just as the rescript of 493, and  
as Pope Stephen’s rescript of 886, and as Boëhmer’s au-  
thority with respect to these old times states to have been  
the church law even then. Now what is to be done upon  
the reasons, and why are they to give them? “To  
“ the effect the affair may be cognosced upon by the  
“ presbytery of the bounds, at whose judgment and  
“ by whose determination the calling and entry of a  
“ particular minister is to be ordered and concluded.”

Now I pray your Lordships to stop here, and to form

a clear idea, (for it is most important to the subsequent part of my argument,)—to form a clear idea of what the scheme is of presentment and admission which is laid down by this important statute. Patronage was to be abolished. It had sinned in two ways: first, by its abuse, and secondly, by its inconvenience; therefore it was to be extinguished, and another process of election to be substituted in its room. Then what is this process? The heritor or heritors and elders are to present to the congregation, and the congregation are either to say that they approve, or that they disapprove. If they disapprove, they are to give their reasons; those reasons are to be decided upon, not, certainly, by the heritors and elders, but by the presbytery of the bounds, and by the presbytery of the bounds cognoscing, that is to say, judicially examining, the truth and sufficiency of those reasons. Here, as in all cases of judicial examination, two things may happen: the presbytery may either demur, as it were, and deny the relevancy of the grounds stated by the congregation; they may say, if all these things are true they are no objection to the admission; or the presbytery may go to issue upon the fact. They may say it is true; that if the statement of facts be well grounded, it forms a sufficient cause for our rejection; but the fact is denied or is doubted. Inquire as to the fact. If upon both of those inquiries they find that the congregation is right, then, the reasons being well founded in fact and law, the presbytery are to reject the party presented. If either inquiry proves against the congregation, if either the facts amount, in the judgment of the presbytery, to no disqualification, or if the statement of fact be found untrue, then the presbytery are to reject, not the can-

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didate, but the reasons of the congregation, and to admit and induct the presentee. So that here is a completely new form of proceeding instituted for the first time in Scotland; an abolition of the right of patronage, and a transfer of that right to the heritors and elders, who are to name and propose a person to the whole congregation, who, if they disapprove, shall submit their reasons to the judgment and determination of the presbytery; and all those parties combining, the operation is completed one way or another: either the presentee of the heritors and Kirk Session is rejected, or their presentee is admitted, and obtains possession of the cure.

My Lords, keeping the provision of the act of 1690 steadily in view, let us see what next took place. If this had continued the law of the land, if this statute had been left unrepealed, no man could have said that Lord Kinnoull, or any other patron, had the right of presentation. It was abolished; it was avowed to be abolished. The reason of the abolition was given; a transfer was made, and the party was indicated to whom the transfer, as the substitute of the patron, was effected by the act. But if this is true, another thing is equally true, that nothing like the present arrangement, laid down by the general assembly and followed by the presbytery, would have arisen under that law. This argument is something wholly different: it is no presentment to the congregation by the heritors and Kirk Session; it is no refusal upon reasons given in by the congregation; it is no cognoscing and adjudication by the presbytery; but it is a totally different proceeding, invented for the first time in the year of grace 1834, and which at the revolution of 1690 was no more

dreamt of than it was in the reign of James the Sixth, in the year 1592. It is a totally different process, not in the slightest degree resembling the other, so that if we are driven back in the argument from the statute of Anne, to which I am now coming, and are to fall back upon the statute of William and Mary, we are then no doubt driven away from the right of patronage, and the act of Anne is repealed, (though only by our misconstruction of it, and not by the legislature.) But we do not fall back upon the present proceeding of the Auchterarder presbytery, or anything like it; we fall back upon a totally different state of things, namely, patronages transferred from the patron to the heritors and Kirk Session, and reasons to be given for dissent by the congregation, and those reasons to be adjudicated upon after being cognosced by the presbytery; which is a thing as different from what has been done upon the present occasion as can well be imagined. Therefore let us see now what was done, and why it was done, by the act of Anne in the year 1711: I must here say, that, with all the respect and reverence which I habitually feel for the authors of the revolution both in England and Scotland, if they had never done anything wiser, or anything more just or more considerate, than they did in passing the act of 1690, chapter 23, I should not have thought them entitled to all the veneration with which we are wont almost instinctively to mention their names. I cannot conceive anything more strikingly different from the conduct of the Somerses, the Godolphins, and the other great men who brought about the revolution in this country, whose conduct in all particulars, civil and ecclesiastical, was marked by the most careful, and delicate, and cautious dealing with all

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existing constitutional positive rights, all vested interests. I can conceive nothing more widely different from the spirit that presided over all the proceedings of those great men than this act of the Scotch estates in parliament assembled; for upon a vague and general allegation of abuse and inconvenience, it takes away the rights of the lay patrons; it gives them no opportunity of defending themselves against the one charge or arguing against the other; and it then admits, in express terms, that they have a valuable right of property, because it professes to give them a compensation: 600 merks Scots were given, equal to about 33*l.* sterling. And be it observed, that this very hasty, rude, and ill-worded provision gave the same compensation for all advowsons, whatever might be the difference in their value. It was, therefore, a very great encroachment, very hastily and violently made, upon the rights of private property, the existence of which it admitted, while it gave nothing that could be called equivalent in return for what it confiscated. But after twenty-one years of this new scheme, then comes the statute of Anne in 1711, and its reasons are given in the preamble:—"Whereas by  
 " the ancient laws and constitutions of that part of  
 " Great Britain called Scotland the presenting of  
 " ministers to vacant churches did of right belong to  
 " the patrons, until by the act of 1690 the presen-  
 " tations were taken from the patrons and given to the  
 " heritors and elders of the respective parishes; and in  
 " place of the right of presentation the heritors and  
 " life-renters of every parish were to pay to the respec-  
 " tive patrons a small and inconsiderable sum of money:  
 " and whereas by the fifteenth act of the fifth session,  
 " and by the thirteenth act of the sixth session, the one

“ entitled ‘ An act for encouraging of preachers at  
 “ ‘ vacant churches be-Northforth,’ and the other  
 “ entitled ‘ An act in favour of preachers be-North-  
 “ ‘ forth,’ there are several burthens imposed upon  
 “ vacant stipends, to the prejudice of the patron’s right  
 “ of disposing thereof: and whereas that way of calling  
 “ ministers has proved inconvenient.” Here they  
 adopt a very opposite mode of reasoning ab incon-  
 venienti, which, although no argument in construing a  
 statute or expounding a law, is an admirable reason for  
 making a law, or for repealing one already made, and  
 for altering a practice tried by experience, especially  
 as that practice was only twenty-one years old, “ and  
 “ has not only occasioned great heats and divisions  
 “ amongst those who by the aforesaid act were entitled  
 “ and authorized to call ministers, but likewise has been  
 “ a great hardship upon the patrons whose predecessors  
 “ had founded and endowed those churches, and who  
 “ have not received payment or satisfaction for their right  
 “ of patronage from the heritors or life-renters, nor have  
 “ granted renunciation of their rights on that account.”  
 For these reasons (and stronger can hardly be con-  
 ceived), first, because an uncompensated violation of  
 private property had been committed,—an interference  
 with a valuable estate without compensation; secondly,  
 because great inconvenience had been occasioned by  
 causing heats and animosities in the exercise of the new  
 right in the new hands, to which it had been transferred  
 from the lawful owners: for these very sufficient reasons  
 the act proceeds immediately to “ repeal and make void”  
 the said act of 1690, c.23. concerning patronage.

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been enacted at all. Then, in order that there might be no doubt when that act was repealed, or what the law existing before 1690 was, a declaratory clause follows:—"that in all time coming the right of all and  
" every patron or patrons to the presentation of minis-  
" ters to churches and benefices, and the disposing of  
" the vacant stipends for pious uses within the parish  
" be restored, settled, and confirmed to them, the  
" aforesaid acts or any custom to the contrary in  
" anywise notwithstanding; and that from and after  
" the first day of May 1712 it shall be lawful for her  
" Majesty, her heirs and successors, and for every  
" other person or persons who have right to any  
" patronage, to present a qualified minister or ministers  
" to any church or churches whereof they are patrons  
" which shall at any time after the said first day of  
" May happen to be vacant; and the presbytery of the  
" respective bounds shall and is hereby obliged to  
" receive and admit in the same manner such qualified  
" person or persons, minister or ministers as shall be  
" presented by the respective patrons, as the persons  
" or ministers presented before the making of this act  
" ought to have been admitted."

Now, if the act had stood without this last proviso as to the manner of inducting, no doubt whatever could have existed in any man's mind upon the state of the law which is to regulate this question; for you would then have had the act of 1690 abrogated altogether; you would have had the right of the heritors and elders to present to the people, and the people to dissent upon reason, and the presbytery to cognosce those reasons, and adjudicate thereupon, entirely repealed, as much as if it had never been bestowed upon the parties. It only existed for twenty-one years, and this act would have

repealed it at the end of the twenty-one years. You would then have had a declaration, or a statutory enactment, in 1711, that all patrons had a right to present, and that all qualified persons by them so presented, that is to say, all persons who had the due qualification, without any other condition whatever, should at once be invested with the living. That would have been the clear, undeniable, unquestionable law of the land, had not these words which I have last read been adjoined in the form of a proviso or a regulation. This argument, then, will turn upon the force and effect of those words; and therefore two points are raised upon this act, and upon those two I am now about to give my opinion, with the reasons of that opinion. The first question is, what was meant by “qualified person?” and the other question is, how far this repeal of the former act and the revival of patronage is qualified or restricted, or in any manner of way modified, by the reference therein made to the manner of inducting persons observed before the making of the act. These are the two points material to be considered, which are raised upon the construction of this statute; and I address myself to them in their order.

First, with respect to qualification. I am somewhat surprised to find, in the very able and learned arguments from the bench below, an attempt to show that “qualification” is of such extensive meaning, that within its scope may be brought the whole of the matter at present in dispute, namely, the acceptableness and reception of the party presented by the congregation, as finding favour in their sight. Much ingenuity is displayed by several of those learned judges, for some of whom I have the greatest respect, whose subtlety I know to be unbounded, and the fertility of whose ima-

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gination in dealing with questions I know to have no limits. That subtlety, and ingenuity, and fancy I think are shown in endeavouring to give this widely comprehensive sense to the term "qualification." It was said Dr. Parr might have been a very able divine in England, and a most learned man in the church, and yet very unfit to teach the parish of Auchterarder. Such eminent men will do in one place,—in Glasgow or Edinburgh; but they will be thrown away entirely when they are sent to waste their gifts in the desert air of some Scotch mountainous or insular parish. It is justly said, indeed, that a man is not fit to teach them who does not speak their language. But such a man cannot be called a qualified person. Language is one essential part of qualification; it belongs to literature, though it is the simple portion of letters. If a man knew Greek and Hebrew, and did not know the mother tongue he was to preach in, I should say he was minus *sufficiens in literatura*, and so not a qualified person. But we have here no question of literary qualification; the question alleged to come under the larger sense of the word is that of acceptable or not acceptable to the flock; and to bring this within the meaning of "qualified" is the attempt of these expounders of the act. A man, say they, may be of such rude and stern manners, he may be so disagreeable in his habits of life, or he may be so much above his flock in his manners, and so entirely disqualified for associating with them, that they will receive no edification from his ministration. My Lords, if it amount to anything affecting his morals, his life, and conversation, that comes, no doubt, within the meaning of "qualified;" but if it is merely that they do not like him as well as they might, that they prefer another to him, that they

do not fancy him so much as it is to be wished they did, the law has affixed to the word "qualified" no such meaning as that. It is quite clear that it is a violent strain upon the law to impute to it such a meaning.

But I do not rest my position upon argument alone; I am going to show your Lordships that no such meaning can possibly by the law of Scotland be given to the word "qualified." It is a technical word in this question; it is not the word "qualified" used in its general sense, as you talk of a man's qualities, of his capacity, of his abilities, of his merits, which are all general phrases, and none of them technical and defined. The word "qualified" is as much a known word of the law, and has as much a technical sense imposed upon it by the statutes, by the law authorities, by the opinions of commentators, by the dicta of judges, as the word "qualification" has when used to express the right to kill game, or when used to express a right to vote in the election of a member of parliament. It is perfectly technical, and it is an understood technical expression.

I now go to the most venerable of all authorities in the law of Scotland because the most ancient, the Regiam Majestatem; and I am the more induced to resort thereto, that it is brought from a period when the right of patronage was weaker than it has been since, when the rights of advowsons were not understood as thoroughly as they have subsequently been, and before the legislature had ever exercised its discretion upon the subject, or made any enactment touching those rights. I the more go to the Regiam Majestatem for this further reason, that it is of high authority in the English law. At one time it was doubted among legal

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antiquaries whether it was a Scotch or an English book, and it was said, with the usual national feeling of our Scotch fellow subjects, that it was a Scotch work originally, and had been transferred and adopted by an English lawyer; but I believe all men now admit that it was originally an English book,—that the original work is our Bracton, whose book was adopted in Scotland. This circumstance shows that the law of the two countries was nearly if not precisely the same in those remote ages, how widely soever they may differ now.

The Regiam Majestatem, buke 1. c. 2. s. 3., has these important words:—"Ane laick patron sould be ware that quhen ane kirk or vicarage sall happen to vaik," (that is, to be vacant,) "that he present thereto ane worthie man qualified." How? by being acceptable to the people from his eloquence, or from his manner of demeaning himself in society? No such thing,— "qualified in literature, life, and manners" (that is, morals), "within foure months after that he knows the kirk to be vacant, that be the longer delay of the presentation he prejudge nocht himselfe." The law is assumed as clear, and the only object of this passage is to prescribe the time beyond which the patron's right may lapse. To prevent this it says, let him take care to present within four months. Now what does he do? He is to present a qualified person. How is he to be qualified? In literature, life, and manners. All the qualification, then, imposed upon him which there is the necessity of looking to is this, that the party presented has sufficient literature, a pure life, and godly manners.

The same is the doctrine laid down in all the most venerable commentators; and I do not now quote Bankton, for two reasons; first, because he is much

more modern; and secondly, because a most learned judge, for whom I have the most constant and inviolable respect, even when I most differ from him, I mean Lord Moncreiff, throws a doubt upon the authority of Bankton, as if his opinion were of no great weight generally, which I own surprised me. It was new to me; I always understood that his authority had risen of late years very much in our courts; such was the language at the bar during the time of Lord Eldon, during the time of my noble and learned friend who succeeded him, and during my own time. But, however, Lord Moncreiff is a very high authority; and what he has said will lead me, as often as Bankton is quoted, to reconsider this matter. But his Lordship also says he is peculiarly of less authority upon a question of this nature, because it is well known that he had taken a strong part upon the church patronage question. Therefore I do not quote Bankton at all. But Balfour<sup>1</sup> I cite; and in his Practicks he lays it down thus: “Ane  
 “ laique patron of ony kirk or benefice vaikand sould  
 “ present thairto ane qualifyit and habil persoune of  
 “ sufficient literature, honest in life, of gude maneris.”  
 That exactly corresponds with the words in the Regiam Majestatem, which says, “qualified in literature, life,  
 “ and manners.”

Therefore I take it to be clearly established by these authorities, and I know of nothing which does not confirm it, in any of the dicta of judges, or the decision either of the ecclesiastical or the municipal courts, that “qualification” is a technical word, meaning suffi-

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<sup>1</sup> Balfour's Practicks, p. 501; “Anent advocatioun and patronage of kirkes.”

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ciency in literature and honest life, as Balfour has it, and of good manners, meaning thereby good morals; and no one is more ready to admit at once than I am, that upon cognoscing this matter, as the statute of 1690 expresses it, if objection to the literature, to the life, to the morals, be made, the presbytery, the Kirk Court, with an appeal to the synod and an ultimate appeal to the assembly, are the judges of his qualifications in those respects. But I also venture to assert it as a thing equally clear, that his being acceptable or not upon other grounds not even stated by the parish,—their saying they do not like him, they have an aversion to him, they prefer any other to him, he is the man in all the world they do not wish to have among them,—may be stating a thing very much to be lamented, may be a thing very fit to be submitted for the consideration of the patron, may prove it to be exceedingly unfortunate that a man the object of such prejudice, however groundless, should be forced upon the people as their pastor; but is nothing like a defect in the person's qualifications, and is nothing of which the law will take any kind of cognizance. I would, however, add in passing, that I cannot admit at all even the strongest prejudice universally entertained against a presentee to be decisive that the patron was wrong and the people right. I cannot assume that because he is even unanimously rejected by the people at the time of his presentation, he might not afterwards turn out a very fit pastor for them; because we know of instances in which if that had been held a sufficient objection, some of the greatest ornaments of the church of Scotland never would have filled the pulpit for one single hour after their nomination; and if I mention the truly venerable

name of Dr. Reid, one of the most eminent philosophers that any country in any age ever produced, I at once recall to the recollection of such of your Lordships as are connected with Scotland, a remarkable instance of what I am now stating. He never would have been minister of the parish of New Machar in the county of Aberdeen, if the strongest and unanimous objection of the people had been reckoned decisive. He was settled there by main force,—I believe by the military, and against the strongly-expressed united will of the people; and yet he became, before many months had passed by, one of the best beloved ministers that ever officiated at the altars of his country. But be that as it may, and suppose we admit it to be deniable that a harmonious settlement should always take place, this is a totally different consideration from the question of right. The law is not so; the word “qualified” does not mean that,—it does not comprise the qualification of popular favour. The word “qualified” means something else; it means a qualification in literature, life, and morals, to be judged of by the presbytery; and no one talks of interfering with that right of so judging by them.

Now we will just refer for a moment to some stress that has been put by the learned judges, as well as by others, upon the word “qualification,” from a desire to extend its scope over other things as well as learning and life. The two books of discipline are well known to your Lordships,—Knox’s book, first in 1560, and the second book in 1578. Now these authorities, as they have been strangely called, undoubtedly assert an election by the people in so many words; they do not merely touch a right of rejection; they do not confine themselves to veto; they do not mention assent or dis-

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sent with or without reason; but they go a great deal further. What does Knox say in his book? Election is here asserted in plain terms:—"It pertaineth to  
" the people to every such congregation to elect  
" their minister." That is not contended for now; that is claiming for the people a right not merely to reject or to accept, but to choose originally,—to present as patrons to the presbytery. That is the doctrine of this book, but that never was received for law in Scotland; and the first book of discipline is of no legal authority at all. The second book of discipline in like manner says: "The liberty of election of persons called  
" to ecclesiastical functions, and observed without inter-  
" ruption so long as the kirk was not corrupted by  
" antichrist, we desire to be restored, so that men be  
" not intruded upon any congregation, either by the  
" prince or any other inferior person, without lawful  
" election and the assent of the people over whom the  
" parson is placed, as the practice of the apostolic and  
" primitive kirk and good order craves." Now, if I were called to a conflict with the book of discipline upon any point of church discipline, or upon any article of theology, I should, no doubt, feel great anxiety and much distrust of my own opinion; but I do not feel the same anxiety and the same distrust if I conflict with it upon a matter of historical fact,—if I go to issue with it upon a gross violation of historical truth, which I think I am justified in asserting after what I have already read to your Lordships from the history of the church and from the statutory records themselves. Can any man breathing say that an election by the people of their pastor was the practice in all times until antichrist corrupted the church,—until the

time when antichrist entered to despoil the vineyard of the Lord, as this book states? No date is given, no period assigned for this trespass, this breaking and entering the vineyard, so that the statement is much less easily refuted by the generality: *Dolus versatur in generalibus*. Hence I know not that it is an honest statement of facts; it is probably more zealous than honest, but at all events it is more zealous than true. But can any man point out the time when it ever was the practice to have a free election of the pastor? because this is not merely an assent about which something might be said; it is not a call, whatever that may mean; but it is an assertion that the people had at all times the right of choosing their own minister (and it says nothing whatever of the patron, any more than if there had never been such a thing as a patron in existence) until antichrist entered the vineyard. Now, I aver that this is not true; it is not correct in point of fact; it is the very reverse of the known admitted fact.

I will next advert to the act of 1567<sup>1</sup>, which throws some light upon the subject. Considerably before the time when the second book of discipline denies that patronage ever existed,—before popery came in, the presentation of lay patrons is expressly reserved to the just and ancient patrons in so many words. Now it must be admitted that this enactment was after the first book of discipline in 1560. But the book of discipline in 1578, twelve years after the act of parliament which I am about to read, mis-states the fact in the face of that act of parliament, as grossly as a fact was ever mis-

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represented for any purpose. The act of 1567 says,  
“ the presentation of laic patronages always reserved  
“ to the just and auncient patrones.” But the book of  
discipline in 1578 says that in point of fact the just  
and ancient patrons had no existence, for that until  
antichrist took the field it was the people who elected,  
and not the just and ancient patrons at all. The act  
proceeds to say:—“ And that the patron present ane  
“ qualified person, within six months (after it may come  
“ to his knowledge of the decease of him who bruiked  
“ the benefice of before,) to the superintendent of thay  
“ parts where the benefice lies, or others having com-  
“ mission of the kirk to that effect, otherwise the kirk  
“ to have power to dispone the same to ane qualified  
“ person for that time; providing that in case the patron  
“ present ane person qualified to his understanding, and  
“ failing of ane, ane other within the said six months,  
“ and the said superintendent or commissioner of the  
“ kirk refuses to receive and admit the person presented  
“ by the patron as said is, it shall be lesum to the  
“ patron to appeal to the superintendent and ministers  
“ of that province where the benefice lies, and desire  
“ the person presented to be admitted; which if they  
“ refuse, to appeal to the general assembly of this hail  
“ realm, by whom the cause being decided shall take  
“ end as they decern and declare.”

Now it is inferred from this that the matter becomes  
a question of exclusive ecclesiastical cognizance, and  
that the decision of the general assembly, the highest  
church court, is to be final and conclusive upon it by  
force of the words “ take end as they decern.” To be  
sure the matter is to take end as they decern; but  
upon what are they to decern, and what is to take end?

The question of qualified or not qualified; if the presbytery and assembly refuse to admit a qualified person, not denying his qualification; if there is a competition of two qualified persons; if A., claiming the right of advowson, presents one, and B., claiming also the right of advowson, presents another, and the church courts take the wrong one, and nobody contend that this is a question for the final adjudication of the general assembly, it is for the final adjudication of the civil courts of the realm, according to the uniform and uninterrupted current of all the decisions; for I may observe in passing, that though those decisions are not fruitful of instruction for the present question, though no one of them is to be found which disposes of the arguments, though in no one case to which they relate has the present question ever been raised, yet they are very fruitful with reference to other questions, and are very important as showing the bounds of the civil and ecclesiastical jurisdictions of Scotland. They are numerous and they are clear touching the decision of questions as to who has the right of advowson where there is a competition of presenters; and in that case it is not the church court that decides the right, any more than it is the convocation in England that decides the right; it is the civil or municipal court, not the court christian,—the temporal court here, the court of the King by *quare impedit* or *quare non admisit*, or an assize of *darrein presentment*; not the spiritual court of the Bishop. The statute of 1567 undoubtedly gives an exclusive jurisdiction upon the question of qualification to the presbytery coming in place of the superintendent or bishop, or assembly's commissioner; and it may go by appeal from the presbytery or the

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superintendent to the general assembly of the whole kirk, whose jurisdiction is exclusive upon the point. That their sentence has this virtue and force on such questions no doubt whatever exists; for I have explicitly stated that no one denies the cognizance of the courts ecclesiastical upon qualification.

Having disposed, therefore, of the first of the two points which arise upon the statute of Anne, the foundation of the whole question before us, and having shown that the term "qualified" used in that statute does not mean general acceptableness to the congregation (which would be vesting the choice in the congregation, and not in the patron), contrary to the express words of the act, I now come to the second point raised, and by which it is attempted to show that the statute leaves the mode of presentment and induction precisely where it stood before, that is to say, in the interval between the year 1690 and the year 1711. If the argument does not confine itself to those twenty-one years it is nought, it proves absolutely nothing; for if it goes back to the period before 1690 it goes to the state of things under the act in 1592, which says that the presbytery are bound and astricted to receive whatever qualified person the patron shall present. Then those of the learned judges who so construe the statute of Anne hold its meaning to be this: that, desiring to repeal the act of 1690 altogether, because it had been found unjust and inconvenient, and intending to set up in its stead the old established patrimonial rights of the lay patrons, the legislature in its wisdom left things precisely as they were, while the act repealed was in existence; for that is the argument. I confess my astonishment at it; I confess my utter inability to

comprehend what it can mean, or how to their acute minds it ever could have occurred.

What, I ask, does the statute of Anne effect, according to this argument? It reasons in the preamble against the act of 1690, and it leaves the act in force. It professes to repeal the act of 1690, and the whole tenor of the contents of that statute of Anne does repeal that act; and not satisfied with repealing the act of 1690, it sets up patronage by express declaratory words; and yet by a clause at the end it abrogates its own repeal, and sets up the act which it professes to abrogate: that is the argument. It says there shall be no longer any rights enjoyed such as are given by the act of 1690, and then it sets up those rights in full force. It says that the patron's rights shall be restored, and then it destroys that altogether. It says, revive patronage; and the better to revive patronage, it utterly extinguishes it. It says, we are not satisfied with abrogating the rights of the heritors and kirk session and with restoring the right of the patron, but we tell you in affirmative words as well that he has the full right,—that he has not lost that right by the statute we have repealed; and then, to the astonishment of the reader, and of the patron, I should apprehend, who finds himself so dealt with,—to the astonishment of all, it proceeds to tell the patron, you were just where you were before we began our work; for with one hand we set up your right, and with another we pull it down; with the right hand we made the show of giving you back your right, and with the left we take it away for ever. Now, that is the argument upon which this extraordinary construction of the act of 1711 is based. That your Lordships may see that I am not giving an

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incorrect description of it, I remind you of these words:  
 “ Whereas the presenting of ministers did of right  
 “ belong to the patrons : and whereas the act of 1690  
 “ took it from them and gave it to the heritors and  
 “ elders : and whereas this act has proved inconvenient :  
 “ and whereas it is necessary that it should be re-  
 “ pealed ; it is hereby repealed, and the right of all  
 “ and every patron is restored, settled, and confirmed ;  
 “ provided nevertheless, that such qualified persons  
 “ as shall be presented shall be admitted, as the persons  
 “ or ministers presented before the making of this act  
 “ ought to have been admitted.”

No doubt this proviso has some meaning ; every word in every statute must have a meaning given to it ; and who can doubt what the meaning is here ? All the ordinary forms and modes of proceeding shall be followed, which are understood to be a presentment by the patron to the presbytery moderating in the call of the presentee ; the presbytery receiving objections, and considering them as to qualifications, and admitting, modo solito, the person so by them found qualified, who has by the patron been so presented.

That is what the concluding proviso means. Whether it was necessary or not is another question ; for though a legislature is never supposed to use words without a meaning, it is always allowed the privilege of using words not absolutely necessary. But to say that it means that the candidate shall be inducted exactly as if this act of 1690 never had been repealed, is to attribute to the legislature not only great infirmity of purpose, but the grossest blundering that can possibly be imagined ; for it would leave the law precisely where it stood before the repeal of the act, the abrogation of

which is the sole object of the legislature; it would leave in the last section, by way of proviso, that which is repealed in the first section by way of positive enactment. Moreover, to prove that this construction set up for the appellant is wrong, let me observe that unless it has the very effect which I ascribe to it, nothing whatever is gained by it for the argument it is used to aid. The force and effect of those words at the end, "in the same manner," &c., is to revive the former practice under the act of 1690, and undo all the former had done. They have no force or effect at all; they do not help the argument at all; those words either revive or enlarge the act of 1690, or they do not. Therefore I say in the next place, which is decisive of the first question, suppose you make the appellants a present of their argument, suppose you say that this is the force and effect of these final words; suppose you say that the proviso does not revive the act of 1690, which the enactment had first repealed; suppose you say that it brings back things to the state in which they were during the twenty-one years which elapsed from the year 1690, just see how little way you get in your present contention. This is the reason why I have been entreating your Lordships to attend minutely to what that act of 1690 really did; for, as it was a repealed act, it was not worth commenting upon, or worth noticing at all for its own sake; but it was because the consideration of its substance clenches the argument against the construction put upon the statute of 1711 that I began my argument by fixing that in your Lordships minds. The argument is, that the last words of the act of 1711 revived the state of things in respect of presentment and induction, and placed the presentment and induction upon precisely the footing upon which

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they were immediately before the passing of the act, and ever must be so.

Now what is meant by "before the making of this act?" It cannot, according to this argument, be before the year 1690, because every body admits that then the old rights of patronage were in force, and that the former statute expressly orders the presbytery to admit every qualified person presented by the patron. Then the argument I am grappling with must needs refer to the state of things during the twenty-one years that elapsed between 1690 and 1711; it must mean this or nothing; it must mean to set up the presentment of the patron to the presbytery, the sustentation by the presbytery of that presentment, the dissent of the congregation without reasons against the presentee signified to the presbytery, holding themselves bound by that dissent, and therefore, and for no other reason, rejecting the patron's presentee. That is the argument. But is that the state of things during the last twenty-one years by the act of 1690? It is as utterly different as any one thing can be different from any other, for the act of 1690 does not prescribe any presentment by the patron to the presbytery; it prescribes a presentment by the heritors and kirk session to the congregation. The act of 1690 does not prescribe a dissent or an assent by the congregation without reasons; it prescribes a statement by the congregation of reasons for or against the presentee. The act of 1690 does not prescribe an absolute binding of the presbytery by the assent or dissent of the people; it prescribes a cognoscing by the presbytery, and an adjudicating by the presbytery upon cognoscing, that is to say, upon examining, those reasons. Consequently two things more completely different than the state of matters as

it existed between 1690 and 1711 and that which is now contended for by the presbytery against Mr. Young as the relative position of the parties under the proviso cannot possibly be imagined. My Lords, I hold this to be quite conclusive, I hold this to be demonstrative, that there is no foundation whatever for the construction sought to be put upon the act of 1711. It is equally clear that this argument might be admitted, without benefit to the appellants or damage to the respondents, to its full force. I think it is very absurd, I think it is grossly indecorous towards the legislature, I think it is mocking the legislature to suppose that they did so great an absurdity as to say that they meant to repeal an act, and yet to keep that act in force. But still I will admit, for argument sake, that the construction is both decorous and well grounded, that the act of 1711 left the matter of presentment and induction precisely upon the footing upon which it stood immediately before 1711. The appellants cannot require a larger concession than this. Then what follows? Not the advancement of their argument by one hair's breadth; for what men did before 1711 and after 1690 is not what the appellants have done, is not what they pretend to do, is not what they contend for the right of doing. Therefore it appears to me perfectly evident that this construction of the act of Anne is wholly groundless; that the act of Queen Anne repealed the act of 1690, restored the right of patronage, and left that right of patronage precisely as it stood before the act of 1690; but that if this construction were ever so well grounded, it is wholly beside the present question.

But it is said to be a very strained and fanciful construction to import into the act of Queen Anne those words, "as matters stood before 1690." My Lords,

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I am not importing those words or any others; but the meaning of the statute of Anne, so plain that he who runs may read, is to abrogate the act of 1690, and therefore to leave things as they stood before 1690. The act of Anne says, "let the statute of 1690 be entirely out of the field; let it be abolished altogether." Then it equally says (for this is implied), "let matters be as they were before that repealed act passed." When you repeal an act in one year which was passed twenty-one years before, of necessity and by the abrogation you restore things to the state in which they were twenty-one years before. If there comes at the end of an act of parliament a clause about which some doubt is sought to be raised, are not you to adopt one or other construction of that clause, according as it makes out or does not make out,—according as it helps or frustrates, the plain and obvious meaning of the whole statute itself? That is an ordinary and simple principle of construction, not only of all acts of parliament, but of all instruments, all wills, all deeds, and all writings whatever; far from being fanciful, it is the plain rule of common sense; far from being strained, it is the only natural course.

These, therefore, are the grounds upon which I have come to the conclusion that the judgment must be affirmed. I wish I could have stated them more shortly. If I had had time to digest my judgment, and, as I usually do, reduce it into writing, I should have spared your time; but it was a choice of evils; because I must either give my judgment at greater length and with less compression than I could have wished, or I must delay giving it; a thing on all accounts to be avoided if possible.

Now, my Lords, although these views satisfy my own

mind, yet, in consideration of the importance of the question, and by way of confirming the view I have taken of the construction of the statute, I think it may be advantageous that we should just look at the subject in different lights, that we see it from various points of view, for the purpose of observing whether this consideration of it in those various lights and seen from different quarters may not aid the decision to which by other means we have arrived. First, it is admitted on all hands that neither the general assembly nor any consistorial court has any vocation to adjudicate on merely civil rights; that is granted on all hands. It is allowed by every reasoner on these subjects that if a question arises, whether it has the patronage of a certain parish or church, this is for the courts civil, and not for the courts spiritual. It is admitted fully, without any hesitation whatever, that the ecclesiastical courts are confined to spiritual matters, and that the temporal courts have exclusive jurisdiction over civil matters. Consequently it is certain that if this were a proceeding, or if the grounds whereupon it is sought to be rested were arguments, that affected the rights of the patron, the claim of the presbytery could not be sustained; nor could the general assembly, which passed the act of 1834, deal with those civil rights. Now, let us see whether they have dealt with those rights; let us see whether that is not the effect of the act of 1834 passed by the general assembly, acted upon by the presbytery, maintained in argument as the title of the appellants; for though I have not mentioned that act of assembly, yet I have argued all along with reference to it in considering the argument of the presbytery; and if I have defeated that argument I have defeated the right of the

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general assembly, subject to an observation as to the question of jurisdiction hereafter to be made. Now it being admitted that the assembly has no jurisdiction to judge of civil rights, I apprehend that we shall have the same admission, that if the church court has no power as a judicature to interfere with the civil rights of patrons in any one case, still less can it have any power as a legislature by one sweeping provision to abrogate all those rights in all cases. But let us see whether the assembly does not interfere directly, and almost avowedly, with the rights of patrons by the act of 1834.

What they say is this: the patron has a right to present; we sustain that right; but the people have a right to dissent, and to reject the presentee. Now, what is the people's dissent? It is saying, without a reason assigned, that they do not like this man; it is saying that they prefer another; it is saying that they prefer any other; it is saying that they will not have him. What does that mean? Under what general expression would you convey the different meanings which all these particular and detailed forms of expression comprehend? I should think choice, election. Refusal to choose—refusal to elect is at least one half of choice and one half of election; because election consists in selection and in choice affirmatively; it consists negatively in rejection of all others, in refusing to choose all others but its elect. If I select A. I reject B., C., D., &c.; if I reject A. I exercise a negative power of choice; I exercise the right of choosing some other person than A., or of saying to the patron, Z., he shall not choose A.: that is quite certain. I may cover it over by whatever circumlocution I please; I may say

that he is not acceptable to me. A person being acceptable to me is the reason why I choose him; a person not being acceptable to me is the reason why I reject him. But because I say he is not acceptable I do not deny that I exercise choice; I exercise the negative choice of saying either, I prefer another to him, and that is one reason; or, I prefer every other to him, and that is another reason. Does not this interfere with a man's right of choice? It is taking half of it away from him; it is saying, you, the patron, have the right of choice, but upon one condition, namely, that you choose the person that I, the congregation, wish; it is saying, I admit I have no right whatever of choice, the whole choice is vested in you, the patron, but upon this one condition, that you choose the person that I would have chosen if I had been to begin: that is the meaning of it. You shall choose whomever you please: that is the meaning of choice. Whoever you please to choose is the man: that is the meaning of choosing. Well, say the congregation—the presbytery—the general assembly, whoever you choose shall be the man, upon this only trifling condition, that you must choose no other person except the man we choose. Who is the chooser there? I think the second person is the chooser rather than the first. If I were to choose, if I may so speak, between the position of the patron and the position of the congregation, I would much rather be the congregation than the patron as regards the choice of A. or the choice of B., because the patron may choose A., B., C., and go on to the end of time, and the congregation will always reject him, till he happens to hit upon X., the particular person they choose.

Now, this illustrates the nonsense of saying that the

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kirk courts seek not to interfere with the rights of the patron. My Lords, I cannot help casting my eye back to the former times of the Scottish church, and endeavouring to figure to myself the contempt, the scorn, the indignation with which such a man as my most venerable relative who once led that general assembly, one of the greatest men that Scotland ever produced, one of the greatest historians, one of the greatest statesmen, one of the most accomplished orators, which any age of this or any other country has ever seen, — what would Dr. Robertson have said to such pretences so couched and so covered, when he led for so many years the general assembly, when he took that well known part on the question of patronage which was supposed to have settled it for ever; that very part which the presbytery and the general assembly of our day have not taken, and in the face of which they have done all these things. It is not difficult to conceive what reception his manly practical understanding would have given to the doctrine of 1834: “ We do not interfere with the right  
“ of patrons; they may choose whom they please; but  
“ we tell both parties, both patrons and people, that if  
“ any body is chosen by the former whom the latter  
“ dislikes the choice shall go for nothing.” His manly and practical understanding, aye, and the honest nature of his venerable colleague Dr. Erskine, who differed from him *toto cœlo* upon the question of church patronage, (though their difference never threw any shade across the intercourse of the two friends in private life,) how would his honest mind have received the subterfuge upon which the distinction of the present change is sought to be raised—the paltry subterfuge, that the rights of the patron are preserved, but the veto of the

parish let in? Aye, or another light of the church, a man of as honest a nature, as sound and sagacious an understanding, as ever flourished in any sphere, a great leader of the general assembly, though not of Dr. Robertson's party, I mean my venerable friend the late Sir Harry Moncrieff; what would he have said? I doubt whether any man could have dared to use such arguments as have been invented at the present time if he had been living. I doubt whether such subtleties would ever have been vented in his presence; but I know, if they had, how swiftly they would have been blown away out of the general assembly, and out of whatever kirk court, be it presbytery, or synod, or consistory, or council, that had ever suffered them to flutter about within the dark aisles of its sanctuaries for the fraction of a second of time; for if there was ever a man who despised such subtleties and sophistries it was that man; if ever there was a man who knew and practised the true rule of honest morals as well as sound judgment and good policy, it was that man,—I mean the rule of never trying to do indirectly what you dare not do openly and manfully and avowedly, and never to seek to escape from or to shelter yourself from the natural and just consequences of your own proceedings by mysterious generalities, and vague phrases, and shadowy distinctions, which, as they never for a moment do deceive yourself who practise them, never can much longer deceive any one else.

Then, my Lords, it is said (to make it still more absurd) that the congregation have a right to say, we do not choose this man; we prefer any other to him; we like him less than any other man that can be mentioned, and therefore we will not have him: and this

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decision of the congregation is to bind the presbytery. But observe all the while, the congregation themselves are not bound by it; for, a few moments after they have said that they prefer any other man to A., you present B. to them, who is another man than A., and they may refuse him as they did A. You may present twenty people after A., but they are not bound to take any one of them. That is exactly the state of the argument. The patron says, I choose A.; he has a right to say so; the presbytery sustains his right; the general assembly sustains his right; he is not called upon to say why he prefers A., if he chooses A. and A. is a qualified person; the choice is in him to select a qualified person. Oh! but, say they, the people shall be called in; and the people say, we do not choose A., and without giving any reason. Now, I say no two things are so impossible to exist together in the same world as the absolute right to choose, on the part of one person, without a reason, and the absolute right to refuse, on the part of another person, without a reason, unless you mean to say that they have a joint choice, and that has been said for the first time in the history of the Scottish church, and in the history of the Scottish courts and the history of Scottish jurisprudence, ecclesiastical and civil, by the act of the assembly of 1834, and by the presbytery acting upon that act of the assembly in this instance.

But then it is said that they would not exercise this veto, as it is called (or right of dissent, as it is translated by way of making it more fatal to the argument which rests upon it,) capriciously; they would do it conscientiously, and they would not refuse a man without reasons. My Lords, I do not much understand, and do not at all ap-

prove of a confidence sought to be reposed in persons whom you vest with the power of acting without a reason, and do not call to give any reason at all, and yet are to confide in their always acting correctly, always exercising it conscientiously; the patron is also to exercise his choice conscientiously; the law does not assume, it does not protect him in the capricious or wanton exercise of what is a kind of public trust. It is a right of private property, but it is to a certain degree a trust for the benefit of the church; and I am sure that if a patron either in England or Scotland were to present a party to the bishop here, or to the presbytery there, whatever his motive might be, if it were a bad one, he would be slow to avow it. He would not say, I presented this man because he is a pot companion, or because he is the nephew or the brother of a mistress or a complying husband. These are all bad motives; he would not avow them if he acted on them; they might influence him, but he would not say so. Now, will the people avow that they refuse a man because he is too strict in his doctrine, which makes him the better pastor; because he is a man of a high moral sense of duty, and will not overlook scandalous crimes in his parishioners; because he is one who will preach the word faithfully and be instant for righteousness in season, and out of season, as his duty to his master prescribes, and as his master and his apostles have enjoined? No congregation will say, because that is a man likely to preach against notorious enormities practised by us the parishioners, and refuse us access to the sacraments of the church if we are of impure life, because he catechises us and insists upon our attention to our spiritual concerns in the performance of his ministry, we do not like

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him. No congregation will openly avow such motives, but they may be motives which influence them all the while; and the act of the general assembly allows the fullest scope to such motives, because it does not require any reason whatever to be given, and the reason, if it were given, is not required to be cognosced and judged upon by the presbytery; consequently they place things upon a very different footing from the act of 1690. The act of 1690 had some sense, it had some consistency, it made some provision for the right government and right filling of the church; for it said, if any man has any reason to propound against the presentee let him state that reason to the presbytery, and let the presbytery judge of the sufficiency thereof, or of the truth of the facts upon which it is grounded. But not so the act of 1834; it says, whoever is presented shall undergo the ordeal, not of examination by the presbytery, but of gossip among the people; and if the people choose to say they will not have him, though the reasons as the bottom of their refusal may be the very things in all the world which make him the fittest minister for the parish, he shall be rejected simply and finally, and rejected only because the people say, we will not have him. That is the act of 1834, and therein lies its material difference even from the repealed act of 1690, which our ancestors one hundred and twenty years ago thought so urgent, so inconvenient, and so mischievous, that they utterly and absolutely repealed it.

*Dolus versatur in generalibus* is a maxim of the civil law adopted by all our courts, frequently referred to by the judges, no where more frequently than in the Scotch courts, and one which I have oftentimes heard cited both in the general assembly and in the civil courts.

When a quare impedit was once brought in England, where the right of the patron is precisely the same as in Scotland, for he must present a qualified person, and the bishop is to judge of his qualification for the sacred office, that is to say, his literature, his life, and conversation, and his orthodoxy, which comes within literature; nay, according to the calvinistic creed, may come both within literature and life in Scotland,—I am alluding to Specot's case<sup>1</sup> in 5 Coke's Reports, a leading authority here as to the limits of the bishop's power. When Specot was presented by the patron and refused by the ordinary, it was held not to be sufficient for the bishop to return generally that he was non idoneus; but if he had answered minus sufficiens in literatura, that, it was held, would be sufficient; and as the court have no organs to say whether he is or not, the bishop shall decide it, because literature is matter of clerical qualification and clerical competence. It is remarkable that the judges assign for a reason why the general return non idoneus wanted validity, "quod dolosus versatur in universalibus." If they will not allow the bishop or the presbytery merely to say non idoneus, without specifying in what, much less will they allow it to be said, "We will not have you;" they must say why; and then the judges add, "for if it were otherwise the patron's rights might be prejudiced." So that holding the patron's rights might be prejudiced by a general answer, they require a specification.

This I throw out in answer to what may seem an objection, though it was not much relied upon at the bar, to the course of my present argument. It may be said, if the presbytery had only said "We refuse him," without saying why, nobody could have touched their

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<sup>1</sup> 5 Rep. 57 (b), 58 (a).

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decision. In the first place, my Lords, I do not deny that if such had been the return of the presbytery, just as the bishop's return was to the *quare impedit* in Specot's case, it would have made our proceeding a good deal more difficult. The case of the respondent would then have rested upon different ground; it would not have been the same case, and would not have been tangible by the same arguments by which this case is touched. But I say, in the next place, that a general refusal without assigning any reason would not be legal and valid on the part of the presbytery, any more than the bishop's refusal was valid who in Specot's case merely said "*non idoneus*." He must point out some *non idoneitas*, of the relevancy of which we, and not he, are entitled to judge; some qualification or want of qualification of which he has exclusive cognizance. But I am not called upon to dispose of that point, because it is not before us. The presbytery have not sheltered themselves under a general refusal; they have come so far to particulars that they have said, we refuse him though a regularly presented person—though a perfectly qualified person; and we reject him because the majority of heads of families in the parish dissent without giving any reason, and we are bound by their dissent. That is their return, and that is a totally different case from the one now put. I understand the act of the general assembly to specify a majority of male heads of families; is it not so, Mr. Attorney?

*Mr. Attorney General.*—Yes, my Lord, these are the terms.

LORD BROUGHAM.—I think the Lord President refers to that in his plain, distinct, and highly judicial view of the case. "The male heads of families;"—what is the meaning of that? The men are to decide, it

seems. Shall nothing be said of women in the matter of salvation and in the administration of the church to which they belong? We are living under the christian and not under the mahomedan law. But it is “the male heads of families.” Now, suppose there are three or four single women—pious women—in communion with the church, and three or four widows, these may even constitute a majority of the whole communicants; are they to have no interference,—never to be consulted at all? Oh! no; the general assembly says they must take whatever the males of the parish choose to impose upon them for their edification. But “heads of families.” Why not lodgers? Why not a respectable and well-informed journeyman? Why not a respectable scholar, more learned than all the parish together? Is he to have no voice quoad sacra, though perhaps a communicant more regular at the altar than any one? No; “the male heads of families,” says the general assembly,—“heads of families.” Now all this exclusion of females and of lodgers may be right or it may be wrong, but it is not self-evident why; it is not of necessity right, it does not follow from the nature of church discipline; it does not follow as a necessary consequence from the nature of the case at all; it is an arbitrary, it is a gratuitous, it may be a capricious selection of a judicature by the general assembly. And that leads me to my next observation.

If the general assembly have a power to impose the will of this kind of majority upon the whole parish, have they not equally the power to make a totally different arrangement altogether? Can any one earthly reason be propounded which justifies the present criterion adopted by the assembly, the majority of heads of fami-

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lies in communion with the church, which would not just as well, and for the exactly same reasons, and precisely on the same grounds, have justified a totally different scheme of induction altogether. Suppose it had been enacted thus:—provided that he shall be acceptable to the majority of the synod?—that is a very important body; or, provided he shall be acceptable to and chosen by, or not rejected by, a commissioner whom the assembly shall appoint for that purpose to superintend, as they have done in former times; because I read to your Lordships out of the Book of Discipline, and I read to you out of an act, that at one time the superintendence and control was given to commissioners appointed by the kirk to regulate the presentment and induction of ministers. They might have done that; or I will tell you what they might have done, and for aught I know it is the next thing they will do, if you allow them to do what is now attempted. They might have said, provided he be agreeable to the presbytery of the bounds; who could object to that? Is it impossible they should do that? My Lords, it is so far from being impossible that they have done it already. There was an act in 1576 made by the general assembly, by which it was provided that none seek preferment without the advice of the presbytery: that was for a season the law of the kirk, and the assembly may now revive it. The legislature may make that law now which out of the kirk courts was the law before; but has the general assembly any right to do so? Has the church judicature and the general assembly, which by the common law of the land and by statutory enactment is limited to ecclesiastical concerns, a right to do that? for the statutory enactment of the year 1592 is revived in all particulars by the act of

1690, c. 5., except as to patronage, and that is disposed of by the subsequent act of 1690, c. 23., which is repealed by the 10th of Queen Anne; but the other is not repealed; the act of 1592 is to all intents and purposes revived, and among other intents and purposes to that of defining, chalking out, and limiting the bounds and the formations of the ecclesiastical jurisdiction. By all these rules, by the common law, by the parliamentary constitution of the country, by statute enactment, by the act of 1592, by the act of 1711, it is the province of the general assembly and the inferior church courts to take cognizance of church matters and to make regulations touching ecclesiastical concerns, and ecclesiastical concerns alone; and they are excluded, they are barred and shut out, from any cognizance of civil patrimonial rights, and not only of civil patrimonial rights directly, but of those things which indirectly affect civil patrimonial rights. They cannot do per nefas what they cannot do per fas; they cannot do indirectly what they cannot directly; they have a right to make rules as to qualification, and they have a right to make rules as to who shall judge and how they shall judge upon qualification, because qualification is admitted upon all hands to be a matter of ecclesiastical cognizance. But they have no right to make a rule as to who shall be chosen and how he shall be chosen when the patron presents him; they have no right to transfer from the patron either the whole or the half, and in this case they have transferred by far the larger half of the choice and selection of the presentee. But one thing is perfectly clear, that no grounds in reason which the general assembly can advance for its right to make the act of 1834 giving a veto to the congregation can be conceived

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to exist which would not give them precisely as complete a power and as undeniable a right to give a veto to the presbytery of the bounds, that is to say, to repeal the act of Anne, and to revive the act, long since repealed, of 1576, which alone and for the first time assumed the choice of the presbytery.

It is now fit that I should advert to one topic which certainly at first did seem to impose some difficulty upon those who maintained the judgment of the Court below. There is a great difference, it was said, between the location or admission of a minister in Scotland and the admission of a clerk by the ordinary in England, inasmuch as in England the person having the advowson presents his clerk, a person already ordained, to the bishop; whereas in Scotland the presentee is ordained and inducted unco contextu by the presbytery, that presbytery being beyond all doubt the only judge of ordination, with which the municipal court has no right whatever to interfere. Ordination, it was said, is thus mixed up with the induction, and cannot be severed from it. But in the first place we must look to the case before us; the severance here at least is complete. The presbytery do not refuse to ordain; nothing of the kind; they do not say he is not qualified; there is no objection whatever to ordaining him; but they say, though we have no objection to ordain him we do not choose to induct him into the parish of Auchterarder, because the people dissent from receiving him; and this is our only reason. I think that is a sufficient answer to this objection, and I believe I threw it out in the course of the argument.

But there is another answer:—If a person being a probationer is brought before the presbytery for induc-

tion into a benefice, he is then ordained as well as inducted, that being the first benefice to which he is appointed. But whatever argument and whatever law applies to the case of the first benefice in respect of the present controversy, must be equally applicable to the second benefice, that is, to the case of transportation, as it is called, from one benefice to another. Now, in this case of transportation to a second benefice the argument is sifted entirely from the difficulty with which it is sought to be mixed up as to the first benefice, because the first benefice is accompanied with ordination, and the second benefice is accompanied with no ordination at all. The presentee is already *e clero Domini*—already ordained, and therefore the only question, in the second instance, that can arise is with respect to inducting him into the parish of A., whereas formerly he was settled in the parish of B. Consequently in this instance the presbytery can never say, we refuse to ordain him (which is matter of ecclesiastical, not of civil, cognizance) because he has already been ordained; and the only question is, shall he be inducted into the parish of B., having been already settled in the parish of A.; and that question is only of civil cognizance. No man is absurd enough to contend that the congregation should be consulted only in cases of transportation, and not of original settlement; nothing so wild has ever been urged as the proposition that the assembly has the power to make this act as to second settlements, though not as to first inductions. The two cases stand upon the self-same grounds, and the same arguments apply to both. I think those two answers,—either of them, but citing both together, are sufficient to repel the objection which I have now been considering.

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Another argument was used, which I cannot altogether pass over, as many of the learned judges go very mainly upon it. It was said, is a call of no avail? does it mean nothing? Have all the people of Scotland,—all the lawyers and all the divines of the church courts, been hallucinating for so many years, when they have held a call to be necessary as part of the induction, and that the moderating in a call is the proper function of the presbytery? I by no means say that a call is nothing; but I only say it is not every thing; I deny that it is decisive; I refuse it the virtue which others ascribe to it. In the first place, it is admitted on all hands that nothing can well be conceived more obscure and involved in more doubt than the whole history of calls in Scotland. At one time there was a call most effectually, namely, during the interval between 1690 and the year 1711, because during that period the kirk session and the heritors presented to the congregation, and if the congregation did not call the presentee no further step could take place; only it is to be observed that was a call of a very peculiar nature, and wholly different from the one now contended for. The power to refuse or give a call was of a very limited kind, for the people could not refuse giving the call unless they assigned reasons, and the presbytery were to judge of those reasons. But was there ever any period in the history of Scotland in which it was held, either practically or by law, that the congregation was by a majority of voices to call a person, and that if they did not by such majority call him, nothing could be done in his favour? I know very well that there are two authorities in favour of it. The first Book of Discipline in 1560, and the second Book of Discipline in 1578; for

the first says the people have the power of electing: it says in so many words, "it pertaineth to people to elect their pastors;" and the second says that that "has always been the practice of the kirk till antichrist intruded into it." But that is not the law now; it was not the fact at any time; I have shown your Lordships that it is a very gross mis-statement of the historical fact; and that it never was the law of the church is clearly admitted by the very fact of the general assembly having had to invent this new mode of proceeding, namely, to call upon the majority of the male heads of families in communion with the church to accept or reject him. The majority being substituted for the former practice of any two or three persons is most material, and shows a complete change from a mere formality to a substantial choice.

But whatever was at any one time the force or validity of the call, the statute of Anne does away with it altogether, unless in a modified way and to the very limited extent, that of somewhat more and not much more than a mere ceremony, to which extent only it has been limited ever since that time. The best proof of this is, first of all, this act of 1834, making, for the first time, a majority necessary, and pointing out of whom that majority shall consist; and in the second place, the avowed fact on all hands that the call might have been made by any two or three people in a parish of two thousand, and that if the presbytery chose to moderate in that call, it was just as valid a proceeding as if it had been made by the majority or by the whole parish. Now, does not that give one a very great misgiving as to the substantial meaning of the call,—as to whether it really means anything or nothing? It can be got rid of by almost any form.

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I suppose that the mere presentment may be a call; there is no law which points out who shall give the call.

Why may not the patron, in respect of his advowson, be held to belong to the parish, even if he be not a heritor or an inhabitant? Why may not the patron's connection with the parish in respect of that advowson be held to be sufficient for the purpose of giving a call? I know there is no authority against me; I know there is no answer to these questions by any dicta of judges or any authority of text writers.

But what authority is there in favour of a call? No doubt there is the act of assembly of 1782, to which reference is made by Lord Moncreiff; and there is the decision of that venerable body in 1790, highly disapproving of the settlement of a presentee who had no call. For aught I know it may be a great informality; but observe, they did not rescind the settlement on that account. But if he had got in without a presentation, or if he had got in without the presbytery inducting him, or if he had never been ordained, would they have allowed him to continue? No such thing; they would have ousted him from the church, and they would have had another man appointed, according to the laws and formalities of the church. When it is said that the call is a very substantial ceremony, and that it is proved to exist in right and in law, and to be necessary, by the Stirlingshire case in 1790, I think you only prove the reverse by the quotation of that case, inasmuch as it was one where there had been no call of a presentee in any manner of way, where the presentee never had a call from any single person in the parish, and there was no moderation in the call by the presbytery; nevertheless he was held to be validly inducted, and to have a

good right to a settlement, even by those who were censuring the illegality, saying all the while *fieri non debuit; factum valet*. In other words a form had been omitted which ought to have been observed, but the omission was immaterial. Thus a call is shown to be as immaterial a part of a valid settlement, as it is immaterial to a valid marriage by banns, that the parties shall have resided in the parish before proclamation. That is a directory, not an imperative part, under Lord Hardwicke's marriage act. It is a very material direction; it goes to the main purpose of the statute; here it is not a necessary condition precedent; the marriage is valid without it.

My Lords, this throws great light on the subject, and mainly strengthens instead of negating my argument, for it shows that a call is held by the church court itself to be rather a matter of convenience and a useful form,—if you will an important form, than of the very essence or substance. What then is the call? It is a remnant of the old, obsolete, and repealed right of election. Whether it comes from the period which elapsed from the Revolution to the 10th of Anne, while the act of 1690 was in force, or whether it comes from some mistake of the authority of the two Books of Discipline in the 16th century I need not stop to inquire. The nature of the thing clearly enough appears from the way it has been dealt with. This serves to demonstrate that it has not been held a condition precedent of a valid induction, but that the induction may be valid without that condition being fulfilled; nothing can more clearly indicate its being a mere ceremony or form. I suppose it is convenient and useful that there should be a presentation in form of the person to the congregation as well as to the presbytery. The pres-

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bytery are to judge of his qualifications without appeal, except to the church court, but the congregation is to be brought acquainted with their future pastor; and as the presbytery are to judge of his life and conversation, as well as his literature, it is convenient and useful that the people should have an opportunity of coming forward with any objections which they may have to him in these important particulars. But that is wholly different from the right of veto or dissent or refusal without any cause shown.

Now I will take an analogous instance: Mr. Attorney General very properly alluded to the coronation. It is a decent and convenient solemnity to present the sovereign to the people, and the people are supposed to take part in the choice; a part, however, so immaterial that if they were all with one voice to reject, the coronation would be just as good, would go on exactly in the same way, and the rejection or recalcitration of the assembled people would have no more weight than the recalcitration of the champion's horse in Westminster Hall during the festival attending the great solemnity. It is an obsolete right, which has not within the time of known history ever been exercised by any people.

But I will state another instance which is very analogous, the publication of banns. Now both in Scotland and in England a regular marriage requires the publication of banns; in Scotland a marriage may take place by mere words of consent, without any church ceremony whatever, and it is supposed that in England the law was so before the marriage act. But a regular marriage can only be made by publication of banns, and whoever in Scotland does it without is liable to church censure. Now, when the banns are published in England, the object is to ascer-

tain by this publicity that there is no lawful impediment, such as consanguinity within the limited degrees, or prior marriage, or refusal of consent by parents or guardians. I have taken pains to inquire, both from bishops and priests, what would be the consequence in their practice if upon publication a person were to interpose and forbid the banns, or afterwards to forbid the marriage, which may be done at the altar when the marriage is about to be solemnized. The answer they have all given is, I should suspend the solemnity till I made inquiry. But suppose the person forbidding should say, I give no reason, but I only forbid the banns; or suppose he gave another reason, that he was the rival of the husband, or that she was a rival of the lady; a very good reason for the party not wishing the marriage to take place, but no legal objection to the marriage. The answer is, that he would not be attended to at all. The marriage would go on just as well as if the dead silence prevailed through the church which generally attends those interesting solemnities. Thus, then, it is a very convenient thing that banns should be published, because it gives publicity to the intended contract; it gives parties an opportunity of coming forward. If there has been a prior marriage, it gives the public an opportunity of saying, Do not commit bigamy. If there is consanguinity, it gives the party an opportunity of saying, Do not allow incest. If there is an infant about to be married, it gives the parent or guardian an opportunity of saying that his consent has not been given; but though the law requires that the parent's or guardian's consent shall be necessary where the marriage is by licence, there is no such accompanying necessity where it is by banns; and it is

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a very great inconsistency in the law, for, though the legislature meant, no doubt, to prevent marriage without consent, yet if the banns are published, and the priest chooses to marry in spite of the parents and the guardians, their refusal or opposition signifies nothing, and the marriage is just as valid as if they had consented.

Then I am for the publication of banns. It would not be a regular marriage without it. It would not be a valid marriage in England without it, unless by licence, which is accepted by law. It would not in Scotland be a marriage free from the church censure without it; and therefore I am for it, and therefore we are all for it, and therefore we think it is a useful and a convenient part of the ceremony, because it gives opportunities for objections being made by giving publicity to the intended contract. But then the consent or silence is not a necessary part of the marriage; nay, the banns call on persons to object, and if they do object the marriage proceeds just as if they had held their peace. Furthermore the last publication tells all the world that if they do not then object they must for ever after hold their peace, and yet a person present, and saying not a word, may come forward the day after and set aside the marriage by proving a lawful impediment. Precisely so it is with respect to the call. I have attended to its history as well as I could, but I cannot find,—and I see that some of the learned judges who have given great attention to the subject have come to the same conclusion,—I cannot find that either before or after the statute of Anne, unless between 1690 and 1711, the call has been held to be a necessary part of the induction, or a condition precedent to a valid settlement. At all events I am perfectly certain that if such force and

effect is given to the call as to make it an essential part of the proceeding, and much more, if the general assembly, acting upon this supposition, can carry into effect any assumed intention of the law so as to make a specific provision against an induction ever taking place without the consent of the majority of the male heads of families, then the statute of Anne is abrogated, and the rights of patrons are utterly extinguished.

It only now remains that I should say something respecting the question of jurisdiction; but I have no doubt whatever upon that. It is asked, "How can the Court of Session interfere in a matter of ecclesiastical cognizance?" Prove to me your position, that this is a matter of ecclesiastical cognizance, by which I mean of exclusive consistorial cognizance; prove to me that this is a question of qualification like the question of *sufficiens* or *minus sufficiens* in *literatura*, and then I say that the Court of Session will be excluded, just as the Court of King's Bench was in *Specot's* case upon a *quare impedit*, but which Court did not deem itself to be excluded (and the Common Bench agreed with them) where the return to the *quare impedit* by the bishop was *non idoneus*. They would not have been excluded even if the bishop had said *schismaticus inveteratus*, much less if he had said merely *nolo inducere*, as the presbytery has here done; but we have here no such question as one of qualification. We have a question of election and nothing else, a veto or dissent set up by the ecclesiastical court; and which, if they had done so in England, would have been ground of prohibition, as an interference with the jurisdiction of the municipal courts in matters temporal; and therefore this argument fails altogether.

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But it is said, the Court of Session may give the civil rights,—the right of stipend, and can do nothing more; yet, it is admitted all the while that the court has no power to give those civil rights, to bestow the temporalities of the church on the pastor, unless he is inducted, so that the non induction was as complete a bar to the civil court giving him the temporalities as if the civil court had been told, you shall not adjudicate upon the matter at all.

Then it is said, you have no means of carrying into effect the decree of the Court of Session, albeit supported by the authority of the House of Lords, which is a decision of parliament in its judicial character, upon the subject. In other words, although you say the presbytery have acted wrong, although you say that their reason for rejecting is of no avail whatever, although you say that the law is contrary to what they have supposed it to be, and although you say, deciding upon the petitory part as well as the declaratory part of the summons (which, however, you are not called upon to do), let the presbytery induct immediately, for it has no grounds for refusing, still it is affirmed that the presbytery may persist in refusing and must prevail.

My Lords, it is indecent to suppose any such case; you might as well suppose that Doctors Commons would refuse to attend to a prohibition from the Court of King's Bench; you might as well suppose that the Court of Session when you remit a cause with orders to alter the judgment would refuse to alter it. Conflict of laws and of courts is by no means unknown here. We have, unfortunately, upon the question of marriage had a conflict dividing the courts of the two countries for upwards of twenty-five years, in which the Court of

Session have held one law, and in which your Lordships and all our English judges have unanimously held another law. The Court of Session in Scotland has held and still hold two persons to be married whom your Lordships hold not to be married. But has the Court of Session ever yet, when a case, which had been adjudicated by them according to their view of the law, has come up to you, and you reversed according to your opposite view of the law,—has the Court of Session ever then continued the conflict, which would then have become not a conflict of law, but a conflict of persons, a conflict of courts, a conflict in which the weaker would assuredly have gone to the wall? The Court of Session never for one instant thought of refusing to obey your orders upon this matter, whereupon they entertained an opinion conflicting with your own. For this reason alone, and it is enough, I have no doubt whatever, that the presbytery, when your judgment is given declaring their law to be wrong, declaring the patron's right to have been valid, will even upon the declaratory part of the judgment do that which is right.

And then may come this question: what is the Court of Session to do upon the petitory part of the summons, supposing that shall be insisted upon? Enough for me to-day to observe that this is not now before us; but suppose it were I should have no fear whatever in dealing with it. I should at once make an order upon the presbytery to admit A. if duly qualified, and to disregard the dissent of the congregation. And, my Lords, why do I say so, and with such confidence? Because I look to the cases; and as these are all to the same effect, there is only one with which I shall trouble your Lordships. None of them bear upon the main question now before

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us, but they effectually raise the inquiry, collaterally instituted, How are the court's orders to be enforced? They are all cases of conflicting rights of advowson, they are all cases where there was no question whatever between the presbytery and the courts, and the only question was as to the right of A. to be presented. They are all cases, therefore, which fall without the scope of the main argument here before us, and throw no light upon that. But upon this collateral question they do throw light; and I refer to the case which a most learned judge, Lord Gillies, has justly called a too well known case, for it was attended with unpleasant circumstances, — the case of Lord Dundas v. the Zetland Presbytery, in the year 1795. Now, what was the conclusion of the libel there?—"That it should be found and declared that the pursuer had a right to the patronage, that he exercised his right as patron within the time prescribed by law, and that the presentation to Mr. Nicolson is valid and effectual, and was offered to the moderator of the presbytery in due time." The conflict was this, that the presbytery had chosen one, and they ought to have chosen the other. The Court were called upon to declare "that the presbytery should be decerned and ordained by decree foresaid to give due obedience to the said presentation, and to proceed in the settlement of the said Nicolson," who was the conflicting, or, as they call him, the competing, presentee, "until the final end and conclusion; or, until the said Nicolson shall be settled in the said church and parish of Unst, it ought and should be found and declared by decree foresaid that the pursuer and the other heritors, life renters, and others liable in stipend to the minister

“ serving the cure of the said parish, are entitled to withhold and retain the said stipend,” and so forth. They then settled Nicolson, whose name, Lord Gillies says, appears as the minister next year instead of Gray, the competing one, whom they had before erroneously admitted and settled.

Now observe that the cause of this dispute was totally different from the present; it was because Nicolson was the proper man in competition with Gray; but that is perfectly immaterial to the present argument, touching the jurisdiction of the Court of Session. Whatever was the cause of dispute, the presbytery had acted wrong. The presbytery had refused to admit Nicolson; they had admitted Gray. What does the Court of Session say? Admit our man Nicolson, and oust your man Gray. Why was it not said in that case, as has been said here, this is nonsense, this is incompetent; you have mistaken your way; the Court of Session has no power; because, when the Court of Session declares that Nicolson has the right, the presbytery will continue to keep in Gray, and then what can you do? And so would arise in that case of Zetland every one of the arguments with which an attempt has been made to scare your Lordships from putting a proper construction upon the act of parliament, and from doing your duty in this appeal; namely, can you have letters of horning against a whole presbytery? Can you proceed against a whole body of clergymen? Can you bring an action of damages against a whole body of men? That is the argument with which we have been harassed and threatened at the bar if we here affirm the judgment of the court below. Why was not that argument used in the case I have just mentioned to

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scare the court below? It is good for nothing; but it would have been not more worthless there than it is here. And if the Court of Session had the power of saying there "Take Nicolson and oust Gray," have we not just the same power here of telling the presbytery "You have mistaken the law" (a perfectly innocent mistake, to which all men are liable); retrace your steps, and take the person presented by the patron, if he is qualified according to the ecclesiastical rules? Therefore, I hold that this argument on the jurisdiction is utterly absurd and untenable, and proves no impediment in our course towards a right conclusion.

These are the grounds upon which I hold that it is expedient and just, and therefore necessary, for your Lordships to affirm the judgment of the Court below. I find that I have gone at much greater length in point of time into this case than was at all desirable; but when I consider the great interest which it has excited, and, moreover, when I observe that I look upon it as so much more clear than many have considered it, who have dealt with it below, I do not regret that I have pursued this course.

My Lords, no person would lament more deeply than myself if the judgment which I am now about to move should give offence to that most venerable body, the general assembly, as representing the church of Scotland. I have the most profound veneration for that establishment, and it is hereditary in me as well as personal. I am myself sprung from some of the most venerable and most learned members of that establishment; sprung directly from them, as well as knit to them by collateral connexion. I cannot be indifferent to its welfare or deaf to its claims, or in the slightest degree prepared to

treat it with any other than the most affectionate reverence.

My Lords, I am not the only person engaged in this discussion before your Lordships house who is connected with the church of Scotland, and who is imbued, I know, with those joint feelings towards it. The learned Attorney General is himself descended from a most venerable pastor of that establishment; and I know, because nothing could more clearly indicate it than the whole course of his argument, and all the observations which fell from him, that he is most scrupulously and delicately averse to any thing which could betoken the slightest want of respect for it, as much so as I am myself. I say this the rather because I have been not a little astonished, in my correspondence with Scotland, to find that something which fell from him had been so grossly misrepresented or misunderstood as to make it fit that I should authoritatively, and as a witness present during the whole argument, contradict it, as utterly unfounded in point of fact. Nothing could be more perfectly respectful and affectionate towards that body than the whole of the argument on the Attorney General's part throughout.

My Lords, I join with him in the deepest sorrow, that anything in this House should pass, to which he has contributed by his argument, and to which I am contributing more effectually by my judgment, with the tendency of perpetuating the discord now prevailing in Scotland. That it should ever have begun all must sincerely deplore, but that it should continue is a matter of still greater affliction to every friend of his country. I have declared my inviolable respect for the kirk and general assembly, but any want of respect that I could

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show towards them, any irreverence—any mockery of them, any slander that I could bring against them, any attempt to revile them, or to hold them up to hatred and to scorn, would be a mere jest compared to the attempts that are made by some who take an opposite view of the case, and who, without meaning, God knows, any more than I do, any the least disrespect, think they are taking the best means for establishing their privileges by holding out indications that the assembly will pursue its own course; that the assembly will disregard the authority of the law; that an assembly of christian ministers will be parties to the fomenting of discords; that the last thing the ministers of peace are minded to promote is the peace of the church of Christ committed to their care; and that the only thing they now think of is the victory of them, the churchmen, the pastors of Christ's flock, over the judges, over the supreme judges of the land, and over the law of the land itself; a victory to be won by setting up acts of their own, which they have no title to pass, against queen, lords, and commons,—the statute law of the realm.

My Lords, I defend the assembly against the arguments and the threats of their advocates. I protest on the part of the assembly as a body of christian men, of whom the bulk are christian ministers, against the imputation thus thrown out against them by this course of defending them, and I say that my hopes of them, my confident expectations of what will be their conduct, are wholly the reverse of those prospects thus held out; that it was an injudicious line of argument on their behalf, an argument which I am morally certain would be repudiated and spurned by the assembly itself. My Lords, that assembly will do its duty, will show its

veneration for the established authority of the law, will rest satisfied with having entered its protest and indicated upon its records its own opinions; but will, with its inferior judicature the presbytery, render a willing and respectful obedience to the law of the land as pronounced by the Court of Session and as affirmed by your Lordships. With these views, my Lords, and upon these grounds I am humbly to move your Lordships, that the interlocutor appealed from be affirmed.

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LORD CHANCELLOR.—My Lords, it is impossible for me to conclude to-day the observations which I think it my duty to present to your Lordships in this case, and therefore, with your Lordships concurrence, I shall adjourn the further consideration of this case till half past two to-morrow.

LORD BROUGHAM.—My Lords, I entirely agree with my noble and learned friend. I know that my noble and learned friend means to enter into this case at large, and therefore I entirely agree with him that it will be most satisfactory to postpone it until to-morrow.

LORD CHANCELLOR.—My Lords, it was stated to your Lordships yesterday by my noble and learned friend, that the opinion we had formed upon this case had been arrived at by us without any communication with each other. My Lords, that statement required no confirmation from me; I only refer to it for the purpose of explaining the grounds upon which I propose to follow a course in this case which I should be induced

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to abstain from in any other. When I asked my noble and learned friend within a few days what opinion he had formed upon this case, I certainly was not without a very confident expectation of the answer I should receive, not from any thing which had passed between us, but because in examining the case myself it appeared to me difficult, if not impossible, to suppose that my noble and learned friend could have come to any conclusion other than that at which I had arrived myself.

My Lords, in this case, as in all others of importance, I have thought it the better course to reduce to writing the opinion I have formed, and the reasons upon which it was founded; a course which I am well aware that my noble and learned friend approves, inasmuch as I believe no judge before his time delivered so many written judgments; a course which is productive of the greatest benefit, which the profession have particularly experienced from the judgments of my noble and learned friend; and a practice which I am happy to say has been pretty generally adopted in all the courts of Westminster Hall. My Lords, following this course, I have, after considering all the documents upon the subject, and all the authorities referred to, committed to writing the opinion I have formed, with the reasons upon which it is founded. My Lords, that was accomplished long before I had any communication with my noble and learned friend upon the subject.

Now, in listening to what fell from my noble and learned friend yesterday, I found that very many of the grounds upon which the opinion which I have formed would rest have been anticipated by what was stated yesterday. Under ordinary circumstances I should have

thought that a very sufficient reason for abstaining from a repetition of that which had been so much more ably expressed by my noble and learned friend. But in this case I consider it to be rather a ground for exactly the opposite course of proceeding, because it cannot but be satisfactory to those who take an interest in this matter, and who of course will anxiously consider all that falls from your Lordships upon this question, to see what have been the workings of the minds which have been applied to it without any communication with each other; and if there should be found to be a similarity of reasoning and a community of view of particular parts of this case operating upon the mind of my noble and learned friend and of myself, no doubt it will have some effect in leading those who may consider the judgment of your Lordships, to be satisfied at least, that there probably is some foundation for those conclusions to which we have both arrived separately, and apart from each other.

It has seldom happened that your Lordships have been called upon to adjudicate upon a case of more importance than that now under your consideration. It affects the manner in which ministers are to be appointed to a very large proportion of all the parochial benefices in Scotland, and believing, as I do, that the interests and well being of the people now and hereafter depend much upon the due execution of the most important duties of parish priests, I feel deeply the responsibility which attaches to all those who are called upon to decide upon the manner of their appointment; for although no opinion as to policy ought to influence our judgment, which ought to be founded upon grounds of law only, yet the importance of the judgment to be

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pronounced, and the evil consequences of any error, impose upon us all the sacred duties of exercising every means within our reach of coming to a safe and satisfactory conclusion.

With these feelings I have addressed myself to the consideration of this case. It naturally divides itself into two questions.

First, whether the proceeding of the presbytery of Auchterarder, founded upon the act of the general assembly of the 31st of May 1834, was legal, or an invasion of the rights of the pursuer. And, secondly, whether the interlocutor of the Court of Session appealed from was within its jurisdiction, and such as, under the circumstances of the case, ought to have been pronounced.

In considering the first of these questions, much of the difficulty which has been felt would, I think, be removed if any precise meaning could be affixed to certain terms which have been necessarily introduced into the argument on either side. Both parties agree that the right of presenting the minister belongs to the lay patron, and that the right of judging and of deciding upon his qualification for his office belongs to the church; for such indeed is the substance of the legislative enactments upon the subject. Both these rights must be exercised in the settlement of the minister, but the boundary between these rights,—what belongs to the one and what to the other, is the real question in dispute.

The pursuers allege that the right of presentation entitles the presentee to be admitted into the benefice, unless the church shall, upon examination and trial of the presentee, find him not qualified.

The defenders, on the other side, contend, that to the church belongs the right of deciding upon the whole matter of admission, including every consideration which may affect the propriety or impropriety of the presentees becoming ministers of the parish.

What is the extent of the patron's right to present, and what the jurisdiction of the church in judging the qualifications of the presentee? That is the real question: if the acts, upon the true construction of which the whole contest ought to rest, reserve the right to the one and the jurisdiction to the other? Which being so, it necessarily follows that that only can be a true construction of the acts and a proper definition of those terms which preserves this right and this jurisdiction. The boundary between the two must be so fixed that the one must not be permitted to encroach upon, still less to destroy, the other.

If it were safe to refer to the law and practice of England in ascertaining the meaning of those terms, whatever doubt may exist would be speedily solved. It is the undoubted right of the patron here to present, and to insist upon the admission to the benefice of any qualified person, and the jurisdiction of the bishop is confined to deciding upon the qualification, or rather disqualification, of the presentee. But I have felt desirous of avoiding as far as possible any reference to the law and practice of this country, and choose to discuss and decide upon the law and practice and authorities of Scotland alone, even as to the meaning of the terms used; and I think there is not only in the statutes themselves, but in authorities of an earlier date, conclusive proof of the sense in which these terms were understood from the earliest periods, and of the meaning

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which ought to be attributed to them in putting a construction upon the statutes.

That the right of patronage, as it existed before the reformation, though no doubt subject to the jurisdiction of the church as to the qualification of the presentee, was not subject to any limit or restriction from the people or congregation, has not been disputed.

In 1565 the general assembly, in a message to the queen, expressed their opinion as to the meaning of those terms—patronage of the patron, and trial and examination by the church. They say, “ Our mind is  
“ not that Her Majesty or any other patron should be  
“ deprived of their just patronages, but we mean when-  
“ soever Her Majesty or any other patron do present  
“ any person to a benefice, that the person presented  
“ should be tried and examined by the judgment of  
“ learned men of the church, such as are the present  
“ superintendents; and as the presentation unto the  
“ benefice appertains unto the patron, so the collation  
“ by law and reason belongs unto the church, and the  
“ church should not be defrauded from the collation, no  
“ more than the patrons of their presentation; for other-  
“ wise, if it be lawful to the patrons to present whom  
“ they please without trial or examination, what can  
“ abide in the church of God but mere ignorance !”

Balfour<sup>1</sup>, who writes in 1566, says, “ Ane laique patron  
“ of ony kirk or benefice vaikand sould present thairto  
“ ane qualifyit and habil persoun of sufficient literature,  
“ honest in life, and of gude maneris.” At this time, then, all the church asked as against the patron was a right to judge of the qualification of the presentee; that is, of his literature, good life, and manners.

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<sup>1</sup> Page 501.

When, therefore, the act of 1567, c.7., ordained that the examination and admission of ministers should be in the power of the kirk then publicly professed within the realm, the presentation of lay patrons always reserved to the just and ancient patrons, and directed that the patron should present one qualified person within six months, otherwise that the kirk should have power to dispoise the same to one qualified person for the time, it is clear that the presentation so secured to the lay patron was to be subject only to the trial and examination of the church as to the qualification of the presentee, that is, as to his literature, life, and manners; and that the appeal given by that act to the patron against the refusal of the superintendent to receive and admit the presentee applied only to what had been before the subject of trial and examination, that is, his qualification as to literature, life, and manners.

If such was the extent of the right of patronage, and such the limit of the jurisdiction of the church in the trial and examination of the presentee under the statute of 1567, cap. 7., there will not be much difficulty in tracing those rights and duties through the subsequent statutes.

By the statute 1592, cap. 116., it is ordained “ that  
 “ all presentation to benefices be directed to the par-  
 “ ticular presbyteries, with full power to give collation  
 “ thereupon, and to put order to all matters and causes  
 “ ecclesiastical within their bounds according to the  
 “ discipline of the kirk; provided the foresaid pres-  
 “ byteries be bound and astricted to receive and  
 “ admit quhat-sumever qualified minister presented be  
 “ His Majesty or laick patrones.”

By another statute of the same year 1592, cap. 117., it is ordained, that upon deprivation of a minister the

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patron shall present another qualified to the kirk within six months, and that if he fail so to do, the right of presentation shall devolve to the presbytery, to the effect that they may dispose of the same, and give collation to such qualified person as they shall think expedient. Provided that in case the presbytery refuse to admit any qualified minister presented to them by the patron, it shall be lawful for the patron to retain the whole fruits of the benefice in his own hands.

There is no allusion in any of these statutes to any authority intervening in the settlement of a minister between the presentation by the patron and the admission by the presbytery of a qualified person, which qualifications were clearly personal ; and of which, indeed, the church was to judge, but was bound and astricted to receive and admit any person presented who should be qualified.

There is no allusion in any of these statutes to any election by the parishioners, or to any reference to them for approval or disapproval. The early reformers had struggled for some such power, and in the first Book of Discipline, composed in 1560, and therefore before the act of 1567, and the second Book of Discipline, composed in 1578, and therefore before the two last acts, it is expressly claimed ; but the legislature decides against it, and secures to the patron the right of presenting the minister, and to the church the power of rejecting him, but only upon the ground of his not being qualified. Such were the terms and conditions upon which the presbyterian church government was established, and received the sanction of the legislature ; but it appears that these terms and conditions were unwillingly submitted to, for, so early after these acts as the year 1596,

the assembly enacted and attempted to establish that none should seek presentation to benefices without advice of the presbytery, and that if any should do the contrary they should be repelled ; and this was approved and re-enacted by the assembly in 1638.

When, therefore, the legislature, notwithstanding this feeling and these attempts on the part of the church, declared that the presbyteries were bound and astricted to receive and admit whatsoever qualified person was presented by the lay patrons, there can be no doubt of the object of the enactment, or of the construction to be put upon the terms used.

The act 1690, cap. 23., which for a time destroyed patronage, recognizes the efficacy with which it had been exercised, and recites that the power of presenting ministers to vacant churches of late exercised by patrons had been greatly abused, and annuls and makes void the said power theretofore exercised by any patron of presenting ministers to any vacant kirk. And to the effect the calling and entering ministers in all time coming may be orderly and regularly performed, it enacts, that the heritors and elders shall propose a person to the congregation, to be approved or disapproved by them. If they disapprove, they are to give their reasons, to the effect the affair may be cognosed by the presbytery, at whose judgment and by whose determination the calling and entry of the minister are to be ordered and concluded. And it enacts, that if application be not made by the elders and heritors to the presbytery, for the call and choice of a minister within six months, the presbytery may proceed to provide the said parish, and plant a minister tanquam jure devoluto ; and it provides a certain compensation to

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the patron for the right of presentation thereby taken away.

The act of Anne, c. 12., 1711, is entitled "An act to restore the patrons to their ancient rights of presenting ministers to the churches vacant." It recites, that by the ancient laws and constitution of Scotland the presenting of ministers to vacant churches did of right belong to the patrons, until by the act of 1698 the presentation was taken from the patrons and given to the heritors and elders; and that that way of calling ministers had proved inconvenient, and had occasioned great heats amongst those who by that act were authorized to call ministers, and had been a great hardship upon the patrons. It then repeals the act of 1690, so far as it relates to the presentation of ministers by heritors and others therein mentioned, and enacts, that in all time coming the right of all and every patron and patrons to the presentation of ministers to churches and benefices be restored and confirmed to them, any act or statute to the contrary notwithstanding; and that it should be lawful for any person who had right of patronage for any church to present a qualified minister, and that the presbytery shall and is hereby obliged to receive and admit such qualified person as the person or minister presented before the making of that act ought to have been admitted.

Such are the legislative provisions upon the subject in contest in this cause,—the right claimed by the pursuers, and the power or duty claimed by the defenders, to belong to them, and to be regulated by the enactments now in force, so far as such enactments support such rights or regulate such powers and duties. Other authorities and other regulations may be resorted to, as

operative in matters not included in these enactments, but can be of no effect as to any matter within them.

What then is the true construction of such of these enactments as are now in force, resorting to the history of the time only for the purpose of explaining the expressions used in those statutes? In my opinion clearly this: that the patron's right to present was absolute, but to be exercised only in favour of a qualified person, of which the presbytery were to judge. If such was the right of the patrons under their statutable title, and such the power and duty of the presbytery, it is only necessary to inquire whether the act of 1834 has or has not interfered with their right; and whether the presbytery, in the course they have pursued, have or have not assumed a power beyond that which is given to them by the statutes.

In making this inquiry, it must be assumed that the presbytery were armed with all the authority which the general assembly could give to them. But if the general assembly had no power to pass the act of 1834, or to authorize the presbytery to follow its directions, the presbytery can derive no protection from it. The question, therefore, is as to the validity and efficacy of the act of 1834, but which properly arises between the patron and the presbytery. There appears, therefore, to be no ground for the objection raised, that the contest is with the general assembly, who are not represented in this cause.

What, then, was the act of the presbytery of which the patron complains? It appears from their proceedings as printed, that the presentation was duly made, and the form being, as I understand, the usual and old accustomed form, is not immaterial. The patron nominates

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and presents-the minister to be minister of the parish, grants to him the glebe and stipend, requires the presbytery to take trial of his qualification, literature, life, and conversation, and having found him fit and qualified for the functions of the ministry of the said church, to admit and receive him thereto, and give him his act of ordination and admission.

This form of presentation appears to me correctly to describe the rights of the patron and the duties of the presbytery as prescribed by the statutes.

This presentation with all the usual papers being laid before the presbytery, they in so far sustained the presentation as to find themselves prepared to appoint a day for moderating in a call to the presentee, and accordingly they appoint a day for that purpose. On the day appointed a call was produced, and signed in the usual manner. The presbytery then gave opportunity for the male heads of families, whose names stood on the roll, to give special objections, or dissents to the admission of the presentee. No special objections were given in, but it appears that a majority of the heads of families whose names appear on the roll dissented.

It was then moved that the presentee's call, being signed only by three persons, was insufficient; upon which a counter-motion was made, that the presbytery refuse to act in terms of the motion, it being incompetent in that stage of the business. Which last motion was carried; not an unimportant circumstance with reference to the argument, that in rejecting the presentee the presbytery were only adjudicating upon the sufficiency of the call.

At a subsequent meeting of the presbytery it was moved and seconded, that in conformity with the sen-

tence of the general assembly 1835, and the interim act of the general assembly of 1834, the presbytery do now reject the presentee, which the presbytery agreed to be determined in terms thereof.

It appears, therefore, that there never was any adjudication upon the call, but that the presbytery rejected the presentee, because a majority of heads of families whose names appeared upon the roll dissented. It is also clear that such rejection was not in consequence of any adjudication of the presbytery upon the qualification of the presentee; such adjudication can only be made upon the trial; but according to the form adopted the call must be sustained before the trials are proceeded with; and by the article 8. of the act of 1834 the presbytery was to proceed to the trials only in the case of the dissents not being those of a majority of persons on the roll.

Now, if it was the right of the patron under the statutes to present a qualified person, and if the presbytery were obliged to receive and admit such qualified person, which are the words of the statute of Anne, what possible right could the presbytery have to reject a person duly presented without any trial of his qualification, because a majority of the heads of families dissented? There is no such restriction upon the right of patronage and presentation in the statute, but, on the contrary, the right is unfettered and unlimited, except as to the person presented being qualified. Looking, therefore, to the statutes, as giving, or rather as securing and defining, the rights of the patron, it does not appear to me to be a matter of doubt that the presbytery in rejecting the presentee have acted in opposition to the provisions of those statutes, and in violation of the

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rights of the patron, which those statutes intended to secure. If the question had been as to the construction of those statutes simply, it does not appear to me to be possible that any serious doubt could have been entertained; and it may, therefore, be thought that I have unnecessarily occupied so much time in considering this part of the subject. I have been induced to do so from a conviction that a due understanding of the construction of these statutes must lead to an easy solution of the several collateral questions which have been fully discussed in the several stages of this cause, and which have given rise to the difficulties which have been thought to belong to the question between the parties.

In considering these collateral questions I have therefore assumed that, according to the true construction of the statutes, there is thereby reserved to the patron the right of presenting a qualified person, and to the presbytery the right of trying his qualifications and the power of rejecting him if found not to be qualified.

If such be the construction of the statutes, of what purpose can it be to consider the supposed legislative power of the general assembly? For it cannot be contended that there can exist in the general assembly any legislative power to repeal, control, or interfere with enactments of the legislature. So that, even if the subject matter were found to be within the general legislative power of the general assembly, it would be powerless as to such subject matter so far as it is regulated by statute. It would therefore be beyond the powers of the general assembly to interfere with the right of the patron, as secured by statute, by adding to the powers of the presbytery.

But this legislative power claimed for the general assembly is confined to ecclesiastical matters, and it is insisted that the matter to which the act of 1834 applies is ecclesiastical. Now, although it is clear that if it were so the legislative power of the general assembly would be controlled by the statute, it is worth considering whether the matter in question can be considered as ecclesiastical. It is clear that there is nothing ecclesiastical in the right of presentation; that is a purely civil right; the adjudication upon the qualification of the presentee may be a matter ecclesiastical. But it is the right of presentation, and not the power of adjudication, which is affected by the act of 1834; not the power of adjudication, because that is to be exercised upon the examination and trials which, according to the proceedings of the presbytery in this case, following the directions of the act of 1834, have never been entered upon; but certainly the right of presentation, because, if that right consists in selecting the minister and calling upon the presbytery to admit him if found qualified, and for that purpose to examine and try him, it is a direct interference with that right to say we will not examine the minister presented, and though qualified we will not admit him if any other person or persons, be they who they may, object to him. Is it no infringement of a right to give to others a veto upon the exercise of it? As an argument in favour of the proposition that what the presbytery have done is matter exclusively of ecclesiastical cognizance, it has been contended that the ordination of a minister is part of the proceedings for settling him in the parish, and that the civil courts can, therefore, have no jurisdiction over any part of such proceedings. It is true that the ordi-

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nation in general takes place upon the settlement of the minister, but it seems quite clear that the two are altogether distinct. The ordaining may, and often does, take place without any preferment, as when a minister is ordained for the purpose of becoming a missionary; so a minister may be and often is settled in a parish without ordination, as when, having been ordained, and settled in one parish, he is transferred to and settled in another. Indeed the offices of ordaining the minister and of settling him in the parish are performed by different authorities; the first by members of the church only, the latter by the presbytery at large. But how can the interlocutor complained of interfere with the office of ordination, that takes place after the presentee has been put upon his trials, and found qualified, and no valid objection made? The discretion and duty confided to those who are to confer orders remain unaffected by the taking the presentee upon trials; which is all that the interlocutor declares that the presbytery ought to have done.

But this consideration opens another objection to the act of 1834, as it enables the majority dissenting to interfere as well with the province of the church in ordaining the minister as with the right of the patron to present him. That the act of 1834 does in its operation interfere with the right of presentation is obvious; but it is contended that it does so indirectly only, and merely through the exercise of the ecclesiastical power of adjudication upon the qualifications; of which it is said that being acceptable to the parishioners is one, and that being objectionable to a majority of the heads of families is a disqualification.

I have already observed that the presbytery are de-

prived of this argument by the proceedings adopted. They rejected the presentee before the time arrived for adjudication upon his qualifications. But if it be clear, as it certainly is, that the qualifications referred to in the statute are personal qualifications, "literature, life, and manners," there can be no ground for contending that the dissent of the majority of the heads of families is a disqualification within the meaning of the statutes. It cannot be so in substance, and it has not been so treated in form. How can the dissent of any person be a disqualification of the presentee, more than the want of a previous consent of the presbytery as attempted in 1596? If the presbytery have the power of imposing this obstruction to the exercise of the right of presentation, it is clear that there can be no limit but their own will to the obstruction which may be afterwards added; it can exist only at their discretion; they will have the power of appropriating it to themselves, or of giving it to others in defiance of the statutable title of the patron.

Another ground upon which the act of 1834 has been justified, and which is recited in it as the foundation of it, is, that it is a fundamental law of the church of Scotland that no person shall be intruded in any congregation contrary to the will of the people; and that the act is only an arrangement to carry that principle into effect. Whether that is or ever was a law of the church of Scotland is perfectly immaterial, if the statutes contain enactments and confer rights inconsistent with any such principle, or with the execution of any such law. The absolute right of patronage, subject only to the rejection of the presentee by the adjudication of the presbytery for want of qualification, which is secured by

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the statute, is inconsistent with the exercise of any volition by the inhabitants, however expressed. The second Book of Discipline, cap. 12., p. 9., says, “ that  
“ the liberty of election, so that none be intruded upon  
“ any congregation by the prince or any inferior per-  
“ son without the assent of the people, cannot stand  
“ with patronage and presentation.” Therefore the reformers of those days sought to destroy patronage, but the legislature rejected the proposition and confirmed the law of patronage; and now it is contended that the power of rejection does not interfere with the civil rights of patronage and presentation. But how stands the evidence as to this being a fundamental law of the church of Scotland? It certainly is unfortunate for the argument in support of this supposed law that the 17th article of the act of 1834 is directly at variance with it, as it gives to the presbytery acting *jure devoluto* the power of appointing a minister without any reference to the wishes of the congregation. I am now inquiring what evidence there is of the principle of non-intrusion having been the law of the church; that it never was the law of the land sufficiently appears from the statutes I have referred to.

In the message of the general assembly to the Queen in 1565, there is no allusion to any such principle. The first Book of Discipline proposed that if upon open audience the minister be found unobjectionable in doctrine, life, and utterance, the congregation are unreasonable if they reject him, and that they should be compelled by the censure of the church to receive him; and this is not a violent intrusion.

In 1649, when the church enjoyed the patronage, they did not give the congregation the right of dis-

senting, but only of stating objections, of which the presbytery were to judge, which was the principle of the act of 1690, c. 23. No doubt many attempts have been made to destroy patronage and to introduce the principle of election in various forms; the attempts have failed. So far as the principle of non-intrusion is inconsistent with the rights of patronage secured by statute it could not be the law of the church; and in the instances referred to the principle has rather been to admit the congregation to state objections than to give them an arbitrary power of rejection.

Connected with this supposed law of non-intrusion is another of the arguments in favour of the act of 1834; that it is a regulation of the call, and that as the call is a matter ecclesiastical the church had the power to regulate it. To this the first and obvious answer is, that whether the provisions of the act of 1834 be or be not connected with the call, and whether the call be or be not part of the ecclesiastical function of admission, the general assembly had no right to make, and the presbytery, therefore, had no right to follow, any regulation inconsistent with the right of the patron as secured by the statutes. But it appears to me that there is no ground for connecting these regulations with the call; and that the call itself, whatever may be its origin or meaning, cannot be so used as to interfere with the right of patronage. The call is, in form, merely an invitation and request by the inhabitants subscribing it to the presentee to take upon himself the spiritual charge of the parish, promising to him all due respect, encouragement, and obedience. It is a request not to decline the office to which he has been presented; it implies no power or authority on those

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who subscribe it; it does not profess to be the act of the inhabitants at large, or even a majority. The act of 1834 does not treat the regulation prescribed for enforcing the veto as part of the call, although it directs such regulation to be put in force at the time of moderating in the call. If the majority disapprove, the presentee is to be rejected, but without reference to the call; and so the presbytery have acted, and their acts have been approved by the assembly: for it not only appears that the presentee was rejected without any adjudication upon the call, but after it had been finally ascertained that a majority dissented. Upon a motion being made that the call was not good and sufficient, they refused to act in the terms of the motion, as being incompetent in that stage of the business, and their next act was to reject the presentee upon the ground of the dissents, without any reference to the call. And this is not only admitted to be so by the defenders, but is one of the arguments urged against the jurisdiction of the Court of Session, the call being, as it is said, a matter ecclesiastical, and there having been no adjudication upon the call. Under these circumstances there seems to be no ground for justifying what has taken place under the act of 1834 as a proceeding in moderating in the call. But if this were otherwise, can it be maintained that it can be used in such a manner as to prejudice a right secured by act of parliament; and above all, that it can be altered from a form in that respect innocuous, so as to produce that effect? Whether the call be considered matter ecclesiastical or not, it must be subject to the control of parliament, and must be accommodated to the provisions of its enactments. If it existed before the act of 1711 in a form to inter-

fere with patronage, it was so far restricted by that act. Considering, however, the arguments which have been urged in this case upon the subject of the call, it seems necessary to inquire in some degree as to its apparent origin and nature.

The term seems first to occur at periods when the early reformers were struggling for the election of ministers. The acts of 1567 and 1592 negatived this claim; but the struggle continued, and at different times subsequently it was attended with success; and in the act of 1690, by which patronage was for a time destroyed, the expression "calling and entering" ministers is used, the calling being apparently put in opposition to presenting; and in the act of 1711, by which patronage was restored, there is no longer any mention of "calling;" but the patron's right to present, and the presbytery's duty to receive and admit a qualified person so presented, are the only acts referred to as incident to filling the vacant churches. The act of 1649 uses the term "call" in the same sense as the act of 1690; it declares the title of a minister valid who upon the suit and calling of the congregation, after due examination of his literature and conversation, shall be admitted by the presbytery, though he have no presentation.

If, then, the call was what the reformers were desirous of substituting for patronage when the latter was finally established by the act of 1711, the call could only be continued as a form; and if before that time it was only to be substituted for the civil right of patronage, why was not the substituted right to be of the same character as the original? Why, if the patronage was a civil right, was the call to be a matter ecclesiastical?

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Both were the exercise of the right of selecting the individual and bringing him to the church for examination and admission. Till the person selected was so presented or called, and brought to the church, the ecclesiastical jurisdiction does not appear to have commenced. It is true that many instances have been produced of questions as to the validity of the call having been brought before the assembly from the decisions of the presbytery; and if in any of those cases the result had been that the patron had been deprived of the benefit of his right of presentation by a final judgment of the assembly that the call was insufficient, it would no doubt operate as a case in which the individual patron had acquiesced in the jurisdiction of the assembly. But if no such case can be produced, and if, on the contrary, the result of the appeal to the assembly has been either a settlement by arrangement, or a decision in favour of the patron against the prior proceedings of the presbytery, of which the case of Dunfermline, in 1752, is a remarkable instance, then the fact of no case upon this point having been brought before the civil tribunal is fully explained.

It appears, indeed, for many years after the act of 1711 the difficulties thrown in the way of the patrons were such that their rights were but sparingly enforced; but it is admitted that in all the latter times the decisions of the assembly have been in favour of the patrons; holding any call to be sufficient, and thereby treating it as a mere form. It is impossible too highly to praise the good sense of those distinguished members of the church, who, seeing that the law was against them, avoided giving offence to their less discreet brethren by preserving the form of the call, but at the

same time so dealt with it as not to let it interfere with the right of the patron, and thereby avoided a collision, in which it was certain that the church must have been defeated. I cannot, therefore, consider the proceedings which have been produced from the records of the assembly respecting calls as of any weight upon the present question. They cannot be of any weight except when they show acquiescence in the jurisdiction by the patron; for, as acts ascribing a jurisdiction to the assembly itself, they can only be classed with such proceedings as the assembly adopted in 1596, and 1638, and 1736; they attempted to establish rules as to patronage, in direct opposition to the provisions of existing statutes; and looking to the proceedings of the assembly itself down to the year 1834, they exhibit, indeed, in the earlier times a struggle against the right of the patrons as defined by statute, but afterwards a gradual acquiescence in those rights and submission to the law.

The second Book of Discipline had declared the obvious truth that patronage and election could not stand together. An effectual call is equally inconsistent with patronage; and the church therefore most properly treated any call as sufficient. I do not, however, think it necessary to express my opinion upon the origin or the effect of the call, except so far as the use of it may interfere with the rights of the patron as secured by statute. With such rights the call in its original form could not have been permitted to interfere; no new regulations inconsistent with those rights can be legal; they can give no authority, from being clothed with the name of a call, from which in form and substance they entirely differ.

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It has been suggested by the highest authority that the act of 1711, in enacting that the presbyteries shall receive and admit the persons presented by the lay patrons, in the same manner as the persons or ministers presented before the making of this act ought to have been admitted, intended to have preserved the form prescribed by the act of 1690, c. 23., for the purpose of enabling the congregation to state objections to the presentee for the consideration of the presbytery, and subject to being overruled by them. If that should be the right construction of the words in the statute of Anne, it would not affect the present question. That part of the provision of the act of 1690 would be consistent with what has been often contended for as a proper course, and what, in form at least, prevails upon ordination in England and in Scotland. It would, in effect, only add to the facilities of the presbytery in judging of the qualifications upon the trials; but it has no resemblance to the provisions of the act of 1834, which, instead of giving an opportunity to the inhabitants to state objections which the presbytery may disregard, enables a majority, by dissenting without any reasons stated, to deprive the presbytery of the power of adjudicating upon the qualifications of the presentee.

It is therefore unnecessary to express any opinion upon this point; but to guard against misapprehension, I will only say that there appear to me to be difficulties to be overcome before this construction of the statute of 1711 can be adopted, of which I have not been able to find any solution. It is sufficient for the present purpose to observe, that if that be the true construction of the act of 1711, the act of 1834 would be equally an invasion of the right of the patron. I cannot, therefore,

hesitate to declare my decided opinion that the proceedings of the presbytery founded upon the act of the assembly of 1834 amount to an illegal interference with the right of the patron as secured by statute, and that a wrong has thereby been sustained by the pursuer.

The next subject for consideration is the remedy for this wrong, and before I apply myself to the consideration of the objections which have been made to the proceedings of the Court of Session for this purpose, I must make some observations upon an argument of a more general nature urged on the behalf of the defenders; which, if well founded, would, in effect, give to the general assembly a legislative power uncontrollable even by parliament, and would exhibit a case, I will not say of wrong, as that would be a contradiction in terms, but of a serious deprivation of valuable civil private rights without the possibility of redress.

It is argued, that although the right of presentation belongs to the patron, yet that every thing connected with the admission of the minister after the presentation is by law subject to the jurisdiction and direction of the church; that the general assembly has legislative power to make what regulation it thinks fit upon that subject; and that no complaint can be made of any thing done by the presbytery relative to the admission of ministers, but to the superior ecclesiastical courts, that is, ultimately, to the assembly. The result would necessarily be, that the assembly in its legislative capacity might make laws destructive of the right of patronage, and, having sole jurisdiction over the execution of its own laws by the inferior jurisdictions, no means would exist of questioning the legality of its enactments. This is but a mode

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of describing pure despotism; if any such power had existed in the church, the struggle against patronage continued through so many years could not have been unsuccessful. Whatever parliament might have enacted, the general assembly had only to enact laws of its own inconsistent with the enactments of parliament, and itself to have enforced the execution of them. It could not have failed to have effectuated what it attempted in 1596 and 1638, by accepting the presentation, but enacting that the presbytery should not proceed to admit the presentee unless he had previously received the consent of the assembly. From a rejection by the presbytery upon this ground there would, according to the argument, be no appeal or means of redress but by application to the general assembly, who, supporting the act of the presbytery in the execution of their own enactment, would at once transfer the right of patronage from the lay patron to the presbytery.

However extravagant this proposition may appear to be, it is necessarily included in the argument for the defenders. If the presbytery may agree not to receive or to act upon a presentation, because a majority of heads of families dissent, why may they not do so because a majority do not assent at a meeting held for that purpose, which is election, or because a majority of the presbytery do not assent, which is in effect the usurpation attempted in 1596 and 1638? In all these cases the violation and destruction of private civil rights would be effectual, because the only remedy, according to the argument, would be by application to the authors of the wrong. Nothing can be farther from my wishes than to treat lightly the opinions which have been expressed by any of the very learned and able judges

who dissented from the judgment of the Court of Session, but it is impossible to do justice to the case without following out these opinions to what appear to me to be their inevitable results.

Those who contend that there is no remedy for the wrong which has been committed in any existing law, suggest that redress can be obtained only by application to parliament. But if the right be already established by statute, and if the wrong consist in a violation of the right so resting upon the authority of parliament, it is not easy to conceive in what manner parliament may be able hereafter with more success to secure the objects of its enactments; certainly not without a more direct and important interference with the powers legislative and judicial claimed by the assembly than the judgment of the Court of Session can be supposed to effect.

It is said, however, that the legislative power claimed for the assembly has itself the authority of parliament as its foundation, because the statute of 1567, c. 7., after giving, to the patron who presents a person qualified to his understanding to the superintendent of the kirk, an appeal to the superintendent of the province, and from him to the general assembly if the person presented be not received and admitted, declares that the cause, being decided by the court of assembly, shall take end as they discern and declare. That which is the subject matter of appeal is to take end by the decision of the general assembly. What that subject matter is appears from the earlier parts of the statute, namely, the examination of the person presented, qualified according to the understanding of the patron. As to his qualification and his subsequent admission, a duty is to be performed after taking the presentee upon his trials, and which can have

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no reference to a rejection of him, not for want of any qualifications, but by the dissent of an authority interposed to the prejudice of the patronage, which it was the object of that act to protect. It is not disputed that as to matter of qualification, which is submitted to the decision of the church, the judgment of the assembly upon appeal is final. It has also been suggested that the provisions in the act of 1592, that the presbytery are to "put order to all matters and causes ecclesiastical according to the discipline of the kirk," amounts to a direct committal of all ecclesiastical affairs, and amongst those every thing connected with the admission and collation of ministers, to the exclusive jurisdiction of the church courts. But in this suggestion the proviso which immediately follows is overlooked, which provides that "the aforesaid presbytery be bound and astricted to receive and admit quhat-sumever qualified minister presented by His Majesty or laick patrons;" by which it is clear that the presentation was not a matter ecclesiastical as to which the presbytery were to put order, but that they were to be bound to receive and admit a qualified person presented to them, whatever order they might put to any matters or causes ecclesiastical. This act, so far from authorizing the presbytery to make regulations interfering with the right of patronage, prohibits them from so doing.

It was urged that many acts of the church have been acquiesced in, in regulating the qualifications of ministers as to education, knowledge, and other matters, and this is true; but all these concern the personal qualifications of the presentee, to be judged of by the presbytery upon the trials, leaving the right of presenting a qualified person untouched. The statutes give to the patron the

right of presentation, and to the church the power and duty of adjudicating upon the qualification of the presentee. The act of 1834 introduces a new authority, which destroys both ; the dissenting majority, defeats the presentation of the patron, and prevents the adjudication of the presbytery. If, then, the civil right of presentation has been invaded by the proceedings of the presbytery founded upon the act of 1834, and if the statutes have not deprived the civil courts of the ordinary power of giving redress for invasion of civil rights, it will require strong authority to show that the Court of Session has not jurisdiction to take cognizance of this complaint, which is this : that the patron having by law and statutes a right to present a qualified person to the presbytery, who are by statute bound to receive and admit him, unless found upon examination by them not to be qualified, the presbytery have refused to receive and admit him without any examination or adjudication as to his qualifications ; that is, they have refused without any justifiable reason to give effect to the presentation. Now, I understand it to be admitted, that if the presbytery were simply to refuse to receive or to act upon a presentation, or if they were proceeding to present themselves *jure devoluto* before the proper time had arrived, the Court of Session would have jurisdiction to interfere. In all these cases there is the same injury inflicted by the same act, namely, the refusal to give effect to the presentation, and as the cases only differ as to the grounds of the refusal, which are in all assumed to be untenable, it seems extraordinary that there should be jurisdiction in some of the cases and not in all. It is extraordinary, certainly, when the long-protracted struggles are considered between the patron and the church, that

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so few cases are to be found in which the interposition of the Court of Session has been applied for, but such cases as have been produced appear to me to be very decisive upon the question of jurisdiction.

In the Auchtermuchty case<sup>1</sup>, in 1733, the presbytery had rejected a person presented by a lawful patron without examination, and were proceeding to admit another; this was affirmed upon appeal to the assembly. The rejected presentee applied to the Court of Session by advocacy, that the settlement should be stopped until the right was decided; the Court sisted the proceedings, but the presbytery having proceeded, a petition and complaint were presented against them, when certain of their number appeared at the bar and apologized. The presbytery admitted the person not presented, and the cause having proceeded, an interlocutor was pronounced, “finding that the presbytery, “refusing a presentation duly tendered in favour of a “qualified minister, against whom there lies no legal “objection, and admitting another person, the patron “has a right to retain the stipend, and, therefore, find-’ “ing the reasons of suspension relevant.”

Many of the arguments urged in this case were used in that; but the result was, that before the wrong minister was admitted, the Court of Session acted against the presbytery by sisting their proceedings; but after he was admitted the remedy applied was necessarily confined to the stipend. Under both circumstances the Court exercised its jurisdiction.

In the case of Dunse<sup>2</sup>, in 1749, the presbytery, disputing the patron's title, rejected his presentee without

<sup>1</sup> Mor. 9909.

<sup>2</sup> Mor. 9911.

any adjudication upon his qualification. The patron insisted in a process of declarator against the presbytery in the Court of Session, which by its interlocutor, declared that the pursuer had a sufficient right to present, and that the right had not fallen to the presbytery *tanquam jure devoluto*. This interlocutor was reversed in this House, but for want of parties only, and in terms, without any judgment upon the merits. It is said, that the court refused to interfere to prevent the presbytery settling any other person, because that was interfering with the power of ordination, and the internal policy of the church, with which the lords thought they had nothing to do. Whether this be correct seems doubtful, but the case is at all events an authority of the Court of Session in a process of declarator establishing the right of the patron to present against the presbytery.

In the case of Culross<sup>1</sup>, the presbytery rejected the patron's presentee, disputing his title, and settled another minister. The patron instituted proceedings for the stipend and succeeded, but the church being full the presbytery were not made parties, so that this case does not bear much upon the present.

In the case of Lanark<sup>2</sup>, in 1752, the Court of Session, finding that the presbytery had admitted the wrong person, adjudged the stipend to the patron of the rejected presentee. In that case also the presbytery were not parties.

But in both the Kiltarlity cases<sup>3</sup>, the presbytery were parties. The first was a case of suspension and inter-

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<sup>1</sup> Mor. 9951.

<sup>2</sup> Mor. 9954.

<sup>3</sup> 1 Sh. & B. 363., or 340 (new edit.), and 2 S. & D. 384., or 341 (new edit.)

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dict at the instance of certain parishioners to prohibit the settlement of a presentee. Two grounds of defence were pleaded: first, that it was incompetent by suspension and interdict to interfere with the proceedings of the presbytery in the settlement of a minister; and second, that the pursuer had no title to pursue. The court repelled the objection to the competency, as the question regarded the civil right of patronage, but decided in favour of the second defence.

In the second case of Kiltarlity the presbytery, having sustained a presentation, was held to be barred from objecting to it, and refusing to proceed to settle the presentee. This case also affords an answer to an argument much urged on behalf of the presbytery: that, as they had received the presentation, all that remained was purely ecclesiastical, whereas it appears from their proceedings that they avoided sustaining the presentation. They only in so far sustained it as to find themselves competent to appoint a day for moderating in the call; if they had sustained the presentation they would, according to the second Kiltarlity case, have been barred from refusing to proceed to settle the presentee. There has, therefore, been a refusal to sustain the presentation, which brings this case precisely within the others referred to, in which the presbyteries have been parties.

In the case of Lord Dundas<sup>1</sup> v. the Presbytery of Zetland and Gray, the presbytery rejected a presentation of the presentee of the patron, and settled another minister. The court decided in the terms of the declaratory conclusions, which were, that the presbytery

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<sup>1</sup> Mor. 9972.

which had illegally rejected the presentation should give due obedience to it, according to the rules of the church.

In the cases of the presbytery of Falkirk v. Lord Callander<sup>1</sup>, 8th December 1696, the Presbytery of Ayr v. Lord Dundonald<sup>1</sup>, the Presbytery of Paisley v. Erskine<sup>2</sup>, and the Presbytery of Strathbogie v. Sir Wm. Forbes<sup>3</sup>, those were all actions brought by presbyteries against patrons, to have it declared that the right of presentation had devolved to them *jure devoluto*. It is admitted that if the presbytery assumes the *jus devolutum* when the patron thinks it has not fallen, he has a remedy in the civil courts, and that in all cases of disputed patronage and of stipend the court has jurisdiction. From these authorities it is clear that the Court of Session has jurisdiction to adjudicate upon the right of patronage, and to correct any infringement of it as against another claiming adversely, and against the presbytery, whether claiming adversely *jure devoluto*, or simply rejecting without cause the presentee of the patron, as in the cases of Auchtermuchty, of Dunse, of Kiltarlity and Zetland, and the other cases referred to.

It is admitted that the court has jurisdiction as to the stipend after the admission of a minister by wrong. It would be strange if the jurisdiction could be exercised only after the evil had been completed, when the Court has jurisdiction to prevent it;—that it has jurisdiction when a wrong minister is admitted, but not when the right minister is rejected.

It appears to me for these reasons, that in this case a civil right has been violated by the presbytery, and that

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<sup>1</sup> Mor. 9961.

<sup>2</sup> Mor. 9966.

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the court has jurisdiction to take cognizance of the injury committed. It remains to be considered, whether there be any thing objectionable in the form of the proceedings, or in the interlocutor appealed from.

It was much relied upon in the court below, but not so much insisted upon here, that the act of 1834 had not been properly put in issue by the pursuer; the summons states and complains of that which is the real grievance to the pursuer, that which constitutes the injury to his right of patronage, namely, that the presbytery rejected his presentee without trial or taking cognizance of his qualifications, and expressly on the ground of the veto of the parishioners.

The act of 1834 constitutes no part of the pursuers case, and cannot justify the proceedings of the presbytery according to the case made in the summons; and if by law it does justify their proceedings, it is properly left to be brought forward by the defenders who rely upon it as consequential upon the case so stated. The summons prays a declaration of the plaintiff's right, and of the wrong which he alleges has been done to it, and certain specific relief as a remedy or compensation for such alleged wrong. It is not disputed that it is competent for the court upon a summons having petitory conclusions to confine its interlocutor to a declaration of right. That is what the interlocutor appealed from has done. The cases prove that when the presbytery has illegally rejected a presentee, the Court of Session exercises jurisdiction against the presbytery. What relief may ultimately be administered to the patron in that or in any other suit is not now the subject for consideration. If the court has jurisdiction over the subject matter, and over the parties defenders, it is clearly

according to its practice to declare by its interlocutor the right of the pursuers without proceeding to administer any remedy for the wrong it has sustained.

The result of the anxious consideration I have given to this case is the conviction, that the presbytery in the course they have pursued have violated and done wrong and injury to the patron's right of presentation, that the Court of Session have jurisdiction to take cognizance of that wrong, and that in the interlocutor they have pronounced there is no departure from the ordinary mode of exercising their jurisdiction, of which the defenders are entitled to complain.

In forming the opinions I have now expressed, I have confined myself to the questions of law which arise upon the pleadings between the parties. Such is the duty which I felt I had to perform as one of the judges of this the highest tribunal in the country. I have in doing this had no regard to the feelings which this controversy has excited in Scotland, and I have not permitted myself to consider the consequences which may follow from the judgment of this House, on whichever side it may be given. But having now discharged the duty of delivering my opinion upon the matter in contest, I may, before I conclude, be permitted to express the high respect I have always felt for the clergy of Scotland. Much as has been said in their praise, am satisfied that they deserve it all; and that the parochial duties are in general performed in a manner the most exemplary and beneficial for the inhabitants.

If there be any feeling in the church still remaining that the exercise of private patronage is detrimental to the well-being of the establishment, and that it tends

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to diminish its usefulness to the people, let it be remembered that the high character the clergy have attained, and the beneficial influence the church has exercised, have arisen, or at least been matured, under a system of lay patronage.

If your Lordships shall concur in the opinions I have expressed, and by your decision inform the clergy of Scotland what the law really is, I cannot doubt but that they will by their conduct and example inculcate the sacred principle of obedience to the law, of respect for the rights and interests of others, and of the sacrifice of private feelings to the performance of a public duty.

I again move your Lordships that the interlocutor appealed from be affirmed.

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LORD BROUGHAM.—In again calling your Lordships attention to this case, I have only to state the great satisfaction which I feel, in finding that my noble and learned friend's view of the subject, and the grounds of his opinion,—an opinion which we have separately come to together,—are precisely the same which had presented themselves to my mind after the anxious attention that I bestowed upon this case. But I should not have troubled your Lordships with one word at present, except from the circumstance of my not having taken the precaution, which my learned friend has most properly done, of committing to writing my argument in giving judgment. The reason is not that I have at all altered my opinion of the great expediency, and in important cases almost the necessity, of pursuing this course which my learned friend observes I always did when I filled the situation, which he now much more worthily fills, in

the Court of Chancery, and which I have done also here and at the Privy Council. My opinion is precisely the same as it always was, of the expediency of pursuing that course. My only reason for deviating from it in the present case is, that I had not time, and, therefore, in the choice of difficulties, I thought it better to state my opinion without writing, than to delay the judgment so long as would have been necessary to enable me to commit it to writing. My Lords, had I done so, I undoubtedly should not have omitted a part of the subject to which my noble and learned friend has very properly directed your attention in the close of his judgment, that is, to the question of pleading. It is fit that I should now say that that had not escaped me, though it did escape me yesterday. I quite agree with my noble and learned friend that the pleading is correct in this case, and that it was not at all necessary to plead the act of 1834 of the general assembly. The argument which would maintain the necessity of pleading the act of the general assembly, at least if there is any similarity in the rules of pleading in Scotland to our rules, would be a complete abandonment of the legislative power of the general assembly; for if they had any power to make laws, nothing like good pleading would require the pleading of those upon the record. But, however, upon another ground, I agree, that it is not at all necessary. I equally agree that the judgment of the Court below upon the declaratory part of the summons is right.

Judgment affirmed.

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*Appellant's Authorities.*—Thomson's edit. of Scots Acts, vol. ii. p. 534, stat. 1567, c. 3; Book of Kirk, MS. 468, Peterkin's edit. p. 115, 116 MS. 493, 494; stat. 1557, c. 36; Ersk. b. i. tit. iii. sec. 10; stat. 156

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c. 6; 1579, c. 68; 1567, c. 31; Ersk. b. i. tit. v. sec. 24; stat. 1567, c. 7; 1579, c. 69; 1581, c. 99; 1584, c. 129; 1592, c. 114; Book of Kirk, pp. 11. 12. 15; stat. 1592, c. 117; 1612, c. 1; 5 fol. Acts, 298; 6 fol. Acts, 364, 411; stat. 1662, c. 1; 1669, c. 1; 1690, c. 1, 2, 5, and 23; Treaty of Union, 1705; stat. 1706, c. 6; Forbes, Tithes, 49; Ersk. b. i. tit. v. sec. 16; (Dunse Case) 5 Bro. Supp. 768; Morren's Annals, 145, 152; Moncreiff v. Maxton, 15 Feb. 1735, Mor. 9909; (Culross) Cochrane v. Stoddart, 26th June 1751, Mor. 9951; (Lanark) Dick v. Carmichael, 29th Feb. 1752, Mor. 9954; Moncreiff's Life of Erskine, 533; Kiltarlity Case, 1 S. & D. 363; Peterkin's Compend. *passim*; Hill's Church Practice, 57, 2d edit. p. 65; Bell's Decis. (1794), p. 170; Gibson v. Barons of Exchequer.

*Respondent's Authorities.*—Stat. 1592, c. 116; 1690, c. 23; 10 Ann, c. 12; 2d Book of Discipline, c. 3. sec. 4, 6; Directory for Worship, 1645; Ord. of Min., Acts of Assembly, 1649, sec. 2; 5 Geo. 1. c. 29, sec. 9; Stair, b. iv. tit. iii. sec. 47; Bankton, b. ii. tit. viii. sec. 62; Ersk. b. i. tit. v. sec. 16; Dunlop on Patronage, ch. 8, sec. 283; Haddington, 31st July 1680, Mor. 9903; Lady Forbes, Feb. 1762, Mor. 9931; Lord Dundas v. Nicolson, 15th May 1795, Mor. 9972, and Bell's Cases, p. 169; Baillie and others, 28th Feb. 1822, 1 S. & B. 363, or new edit. 340; Presbytery of Inverness, 10th June 1823, 2 S. & D. 384, or new edit. 341; Presbytery of Falkirk, 8th Dec. 1696, Mor. 9961; Paisley, 10th Aug. 1770, Mor. 9966; Strathbogie, 2d Aug. 1776, Mor. 9972, App. voce Patronage, No. 2.—(*English.*) Specot's Case, 5 Coke Rep. 57 (b), 58 (a), qualified by Heale v. B. of Exeter, Shower's Cases in Parliament, 88; Albany v. B. of St. Asaph, Cro. El. 119; King v. B. of London, 13 East, 419; S. C. 15 East; King v. B. of London, 1 Wils. 11; King v. Mayor of Stratford on Avon, 1 Levinz, 191; 1 Bla. Com. 389 (Coleridge's edit.); Collifatt v. Newcomb, 2 Lord Raym. 1205; King v. Blower, temp. 1st Lord Mansfield, 2 Burr. 1045; 3 Bla. Com. 101, citing 2 Inst. 623; Rex v. Champion, 1 Sid. 14; Regina v. Bailiffs & Burgesses of Ipswich, 2 Lord Raym. 1233; Ashby v. White, 2 Lord Raym. 938; S. C. 14 How. St. Tri. 695; S. C. on Error in House of Lords, 2 Lord Raym. 958.

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