On clinical education : the introductory address to the clinical session, 1871-72, at the Queens Hospital.

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PASTORAL LETTER

OF THE

ARCHBISHOPS AND BISHOPS OF SCOTLAND

ASSEMBLED IN PLENARY COUNCIL

TO THE CLERGY AND LAITY OF THEIR JURISDICTION

AUGUST 1886

EDINBURGH
AT THE UNIVERSITY PRESS
T. & A. CONSTABLE, PRINTERS TO HER MAJESTY

WE, the ARCHBISHOPS AND BISHOPS OF SCOTLAND, in Plenary Council assembled, To our dearly beloved Brethren and Children in CHRIST, the CLERGY, Secular and Regular, and the FAITHFUL under our Jurisdiction, Health and Benediction in our LORD JESUS CHRIST.

FOR the last two weeks, beloved brethren, we have been engaged in holding the First Provincial and, in our case, Plenary Council of the restored Hierarchy of Scotland, and as the occasion is one that naturally commands attention and calls for notice, we cannot separate after our arduous and engrossing labours without addressing to you some words of fitting instruction and encouragement. And indeed we long to make you partakers of our joy and thankfulness that God has brought the work of the Council to so happy a termination, and filled us with a confident hope that His life-giving blessing, seconded by the devotion of our zealous Clergy, and the hearty co-operation of our faithful Laity, will develop abundant fruits from the seeds that have now been sown.

Great as are the difficulties with which the Church has to contend in carrying out her mission here at the present day, they are not greater than those which she successfully overcame in former ages. The fulness of the same Holy Spirit that descended on her at Pentecost for the conversion of the nations, and that brought Pict and Scot under the sweet yoke of Christ, is with her now. She possesses the same treasure of Divine truth to enlighten and elevate the mind, and the same abundance of Sacramental grace which enabled St. Ninian, St. Columba, and their successors to advance from victory to victory until Scotland was rescued from a state of barbarism and idolatry, and her wandering tribes were consolidated into a Christian State.

In the time of St. Margaret and her sons the Church in Scotland attained an influence for good greater, perhaps, than

she had exercised at any previous period of her history. The authority of the Apostolic See, which is the centre of unity and organisation, was materially strengthened. From the introduction of Christianity, indeed, it had always been exercised and acknowledged; but owing to the state of anarchy brought about by the merciless incursions of the Danes, and the difficulty of communicating with Rome, it had for some time been seriously weakened. Under the nursing care, however, of St. Margaret and her descendants, ecclesiastical order and discipline were gradually restored, and the results were soon apparent in an orderly and devout ministry, in the regularity and splendour of religious worship, and in the growing spirit of piety among the people. Churches worthy of the sublime service to which they were consecrated covered the land; religious houses rose, whose very ruins bear testimony, even till our own day, to the piety, the zeal, and the science of the renovated age. Gradually, however, there crept in a relaxation of discipline to the fatal injury of religion and morals. From time to time efforts were made, now in one diocese, now in another, to correct abuses and arrest the spread of erroneous doctrines. But partial and isolated efforts were ineffectual. Vice remained unrepressed, and the new doctrines continued to spread among the people, and make their way in university and cloister. They were preached successfully to needy and rapacious nobles, and at last, through domestic treason, aided by foreign troops and foreign gold, were imposed upon the country by force of arms. In the year 1559 a Plenary Council was held at Edinburgh, with a view to adopting effectual measures for averting the catastrophe which was evidently imminent. But, alas! it was too late. The cancer had eaten into the vitals of the country, and all the skill of the physicians could no longer avail.

In the year 1560 Catholic worship and the profession of the Catholic faith were made illegal by the Scottish Parliament. Those who adhered to the religion of the Saints who planted Christianity in Scotland, and of the renowned patriots who had fought for centuries the glorious battle of the nation's independence, were now offered the cruel choice of apostasy or imprisonment, confiscation of goods, and death. For more than

two hundred years was the Catholic Church proscribed under these terrible penalties. The power of the Catholic nobles was broken, and gradually they ceased to be the centres around which the faithful had hitherto enjoyed a partial but precarious immunity. Thousands of the people were driven by the action of the civil and ecclesiastical judicatories to the outward profession of a religion which in their hearts they rejected; and thus, in the course of a few generations, the professors of the old faith were but a remnant, scattered mostly in the wild and inaccessible parts of the Highlands and Islands, or timidly seeking to escape the eye of the persecutor in the obscurity of the larger towns. Most of all, the extinction of the Episcopate, the speedy removal by death or banishment of the priests who remained faithful, and the impossibility of educating candidates for the ministry in the country, but too well account for the state of hopeless desolation to which the Church was reduced. The cathedrals, the churches, the religious houses, all the monuments on the face of the land that could bring back to the people memories of their fathers' faith, were burnt or overthrown. The anguish of the faithful remnant could find adequate expression only in the words of inspiration: "The city of thy sanctuary is become a desert, Sion is made a desert. Jerusalem is made desolate. The house of our holiness and of our glory, where our fathers praised thee, is burnt with fire, and all our lovely things are turned into ruins" (Isa. lxiv. 10, 11).

But neither the severity nor the long duration of the persecution had power to extinguish the faith. A tempest had passed over the land, and in its fury laid prostrate the oak; but its roots, deep down in the soil, could not be torn up. The living sap was there, waiting till the destructive energy of the elements should have spent itself, to break forth in trunk, and leaf, and spreading branch, with renewed vigour and promise of endurance. God visited his people in His great mercy and brought them better times, that they might build up again His temples and restore His fallen altars. Help, too, in the great work of restoration was brought by the willing hands of men who, like their brethren here, had passed through dark centuries of suffering and sacrifice for the faith. These came, "poor certainly in this world, but rich in faith." And what marvel-

lous work has not been accomplished by their devotion to the faith, in spite of the poverty which oppressed them! Churches have been multiplied, many of them not unworthy to be compared with the glorious temples of former days. Schools have been established in every parish, able to maintain a foremost place in the educational movement of the time. Religious houses, too, are again adorning the Church amongst us, in which men and women seek the perfection of the Christian life, devoting themselves to those works of holiness and charity which their respective rules appoint. The words of Isaias seem to have found their fulfilment amongst us: "Arise, and be enlightened, O Jerusalem, for thy light is come, and the glory of the Lord is risen upon thee. For behold darkness shall cover the earth, and a mist the people; but the Lord shall arise upon thee, and His glory shall be seen upon thee. *And the children of strangers shall build up thy walls,* and their kings shall minister to thee; for in My wrath have I struck thee, and in My reconciliation have I had mercy upon thee" (lx. 1, 2, 10).

Having happily passed through a momentous crisis, the Church now directs her anxious thought to the changed conditions under which her efforts for the accomplishment of her sublime mission have henceforth to be made. If her influence on the world was in a former age lessened, and her energy spent without result in isolated or desultory efforts, it is her aim now to consolidate her forces, and give unity to her action. The numbers of her ministers, although as yet too small for the work that has to be done, still are sufficient to justify us in adopting such measures as have seemed to us most advisable, in order that the organisation of the ministry may be brought into complete harmony with the spirit and general legislation of the Catholic Church. We earnestly hope that in these our labours we shall find the spirit of marvellous generosity which our faithful people have always displayed, showing itself now with increased fervour.

Two objects there are of supreme importance which have engaged our most anxious attention, in favour of which we "beseech you, brethren, by the mercy of God," to be "generous above measure."

First is the condition of our Ecclesiastical Colleges. On

these, as is evident, the numbers and qualifications of our priests depend. We have outgrown the capabilities of establishments which were amply sufficient at the time of their foundation. But now they are in need of great additions, that they may be able to maintain and educate students in such numbers, and with such appliances, as the changed circumstances of the times imperatively require. In our present straits we cannot think of establishing, how desirable soever it may be, separate colleges or seminaries for every diocese. We are forced to concentrate our energies and efforts at improvement on that one native seminary which serves, though most inadequately, as a feeder to our foreign colleges. There, for the whole country, we have but fifty-four students ; and there is no room for more. Even as it is, the premises are so cramped that much inconvenience, in the way of accommodation, is felt both by students and professors. Yet the wants of the country are such that we must provide without delay for the accommodation of fifty additional students. And when to this we add that, in order to embrace all the departments of science we have in view, and to give more efficiency to the teaching staff, it will be necessary to increase the number as well as the salary of the professors, you can easily understand how we feel ourselves compelled to appeal, with all earnestness, to your generosity, beseeching you to aid us in enlarging and consolidating a work so essential to the preservation and extension of the Church in this country. Each Bishop will gladly receive whatever contributions you can in the meantime advance to the general fund instituted for this object, trusting that those among you whom God has blessed with more ample means may see their way to promise annually a set sum for a certain period of years, and will not forget in their testamentary dispositions the clamant wants of our Ecclesiastical Seminary.

Our second object of anxiety is that no adequate provision exists for either the personal or the official wants of the Bishops. How much this sad destitution cripples us in the administration of our dioceses we need not here point out. Owing to the necessity of providing so many churches, schools, and presbyteries, much debt has been incurred by various missions ; and where the mission is poor, it is to the

Bishops that men look for the means of meeting these, as well as many other liabilities. And when you reflect that for none of us is any adequate income secured for our own wants, it must be evident to all that, without additional resources, we must inevitably be borne down by the heavy burdens imposed upon us.

We have the confident hope that this state of things has only to be made known to you to bring about at any rate the beginning of a fund that will free us from painful anxiety on this head, by affording us an assured means for carrying out our work of administration with greater efficiency.

While we are pleading for ourselves, we must not forget the destitution of our common Father in Rome. Like his sainted predecessor, he has been robbed of his modest revenues by an usurping government, that leaves him but the precarious possession of a palace and a garden. In cynical mockery they hold out to him a part of his own property, which he can accept at their hands only by acknowledging their right to withhold it. So that, to provide for his own wants, and to have wherewith to pay a small modicum to the numerous officials who in Rome have to administer the affairs of the whole Catholic world, he is obliged to rely upon the alms of his children. Even in times when he could command the revenues of the entire Patrimony of St. Peter, the contributions of Christendom were needed for the innumerable charges which the Head of the Church had to meet. And now that one government has robbed him of his all, and other governments have not the courage even to protest against so atrocious a wrong, it becomes all who love the Vicar of Jesus Christ, and the great upholder of morality and social order, to use their best efforts in ministering to his great necessity.

The coming year will test your devotion and generosity. For it is the year of Pope Leo's sacerdotal jubilee, when all Christendom will flock to Rome to do him honour; and we are extremely desirous that at such a time Catholic Scotland should rise to the full height of the occasion, and make him, through the Bishops and deputation of laity who will go to Rome for the celebration, an offering worthy of themselves and him.

Should we be able, with the Divine blessing, to obtain the desired increase in the numbers of our clergy, to make more comprehensive our course of ecclesiastical study, and to establish a substantial "Bishops' Fund," the full organisation of the Church might be attained, and all her resources brought into orderly and well-directed action. Thus might we trust with confidence that her influence would make itself felt on her own children with increased benediction, and on the non-Catholic world with lasting effect. For we feel that with St. Paul we are debtors to those also who are outside the fold. In these days especially no one who loves our Lord can fail to be filled with compassion when he thinks of the dangers to faith and holiness of life which abound on every side;—extraordinary intellectual activity, manifesting itself on one hand in a restless craving for new and startling speculations; and on the other, great talents, highly trained, putting before the public, with all the fascinations of perfect style, principles and theories utterly inconsistent with the truths of Divine revelation as regards both faith and morals. It is not only inexperienced youth that is led astray, but even in the religious world outside the Catholic Church the minds of the leaders of thought are unsettled, filled with the same doubts as unhappily seem to pervade every class. Almost are the words of Jeremias having their fulfilment: "This is a nation that hath not hearkened to the voice of the Lord their God, nor received instruction; faith is lost, and is taken away out of their mouth." On the whole subject of Divine revelation the non-Catholic world, distracted with doubt, has come to the division of the paths, and is rapidly separating in two opposite directions—some tending towards the final rejection of all supernatural truth, the other either clinging fanatically to obsolete theological formulas for salvation, or spending their energy on novel and attractive forms of worship, and so gladly ignoring the dogmatic difficulties which science and logic have made to them insoluble. They doubt and they fall away because they have "walked in a way that is not good, after their own thoughts."

To the Catholic Church it has been given to point out to men "a more excellent way." Would to God that our words, and the work we have done in this Council, may have some part in

clearing away that dense mist in which the prejudices of centuries have enveloped the Catholic Church and concealed her from the sight of our countrymen, or allowed her to be seen only as a hideous spectre to be avoided with detestation and terror. If we labour in season and out of season to bring the many earnest-minded and deeply religious among our countrymen face to face with the Church as she is in reality, God is our witness that it is because "we long after them all in the bowels of Jesus Christ." Unceasingly, then, must we continue to show forth before all men the beauty, the holiness, the truth of the Catholic Church, and to show them that she whom they have long regarded as a stumbling-block and foolishness, is in truth the living voice of Jesus Christ, "the power of God and the wisdom of God."

It is not alone that a repulsive travesty of Catholic doctrine has been accepted by the people of this country as her acknowledged teaching, but her nature and office are unhappily also misunderstood. Our age has become intoxicated with its triumphs in the field of natural science, and, revelling in the vast sphere of action which research and modern discovery have laid open, acknowledges no authority, will submit to no control, but claims for unaided reason absolute right of judgment, even in matters belonging to an order higher than Nature. It fearlessly subjects all things to question and discussion, and persuades itself that, as by questioning it has drawn from Nature her most hidden secrets, advancing with marvellous rapidity in knowledge of the natural world, so in the field of religion it assures itself of equal success, by multiplying theories which it is ready to change and make to fit in with its ever-changing ideas. And this is what it calls progress. In strong contrast to this the Catholic Church stands out "like a city seated on a mountain, that cannot be hid," alone stable and enduring, unchanged in her essential constitution, unchangeable in the eternal truths which her Divine Founder once for all delivered to her, and made indeed a part of her living consciousness. Hence has arisen the popular charge against the Church, that she is the enemy of progress. Men speak of the Church as if she were but an embalmed body bringing down to this generation of living men only a memorial of ages long since

past and gone. They give to her eyes without vision, nostrils in which there is no breath of life, a heart for ages dried up and dead to all feeling or human sympathy.

Now, beloved brethren, love of our neighbour and "the charity of Christ presseth us" to remove such fatal misconception. The Church is essentially a living body. The eternal truths which God has committed to her keeping for the enlightenment of "every man that cometh into this world," are unchangeable, for truth by its very nature is unchangeable. But then, because she is a living person, the Church takes watchful account of every real accession to human knowledge; she is in touch with the movement of every age she passes through. She adapts her methods and language to the wants of the changing world she addresses. Her doctrines are not dead forms, but the very "mind of Christ," eternal and living truths. Thus the Catholic mind, illuminated and strengthened by the confidence which the possession of religious certainty inspires, is progressive in the truest sense of the word. For the Church, by her divinely-guided mind and voice, separates for us the true from the doubtful or false in moral or dogmatic speculation, leading thus her children safely in the path of real progress.

Incalculable good would be effected could men be led to turn their eyes towards the Catholic Church for the solution of many problems, social and political, which at present agitate society, and are shaking the very basis of the social fabric. The rich and the poor, the labourer and the employer, the tenant and the landlord, are drawing asunder and forming up in hostile array. Each claims to be judge in its own cause. No supreme authority is acknowledged to whom all could make an ultimate appeal. There seems to be left only the lamentable prospect of social dissolution, with its train of unutterable miseries, for a world which, by rejecting the Church, practically excludes the Almighty from the government of human affairs. To all these we offer the Catholic Church as a refuge in every distress, as a sure guide in their doubts, as bringing peace to faint and weary souls which have been long seeking but "never attaining to the knowledge of the truth." And in her temples the many who are seeking to give fitting expression to their feelings

of love and devotion in the public worship of God will find a worship worthy of the majesty of the Most High, and satisfying the holiest feelings and desires of the human soul.

We have spoken in a spirit of heartfelt thankfulness of the triumphs of the Church in Scotland, and of the position to which she has risen. We have shown, too, that our hopes are great of her future progress. Let us not, however, be misunderstood as if we were looking for the immediate conversion of the country, or expected that neither domestic weaknesses nor outside hostility could hinder that happy consummation. Faults and shortcomings unhappily exist among our members, and lead to such abuses as naturally spring up from that inheritance of sin which has descended to us and to all men. We recall, with a full sense of our great responsibility, the warning of the Apostle: "Take heed to yourselves, and to the whole flock wherein the Holy Ghost has placed you bishops to rule the church of God, which He hath purchased with His own blood," and feel that we must be vigilant to prevent the growth of evil, and to correct in time abuses where they exist.

To aid us in the great work of building up and strengthening the Church in Scotland, we have summoned, to share in our deliberations, theologians and canonists with their learning and experience. With these we have also called the heads of religious orders, that thus the condition and wants of the whole Catholic body, clergy and laity, may be made fully known, and our legislation prove most salutary. This Plenary Council, thus constituted, has the high privilege of uniting again the links of hierarchical continuity which have been severed for now 300 years, and of ushering in a new era in the life of the Scottish Church. How different the circumstances under which it assembles from those in which that last Council of 1559 was summoned! Then the purpose was to save the falling Church from the overwhelming catastrophe which was already seen to be inevitable. Now it is to strengthen and beautify the Church, risen up again with youth renewed from her ruins. Then it met in the insecurity of a lawless time, when armed treason was marshalling its forces for the overthrow of altar and throne. It meets to-day, its peaceful issue assured by equal and beneficent laws, under the hospitable

roof of this great Abbey, itself a monument of our hopes and freedom, and a landmark of the Church's progress. Then fear and despondency oppressed the minds of the assembled Fathers, conscious as they were that the hour had passed when such help as they might render could have effect. Now we meet strong in the hope that "the winter is past, and that the rain is over and gone." If the Lord in His indignation hid His face a little while, He is now saying to His Church, "Enlarge the place of thy tent, and stretch out the skins of thy tabernacles; spare not; lengthen thy stakes, for thou shalt pass on to the right hand and to the left, and thy seed shall inherit the Gentiles."

We have indicated the twofold mission of the Church to be to feed and protect the flock of Christ, so that none of those whom God has given her may be lost, and to strive to bring into the unity of her fold those who are without, "until we all meet into the unity of faith and of the knowledge of the Son of God," in the one fold of the One Shepherd. The Church, now emerging from the obscurity to which centuries of legal disabilities had condemned her, is no longer compelled to limit her sphere of action to those of her own immediate household. These must at all times indeed command her first and most anxious attention. In the dark times that are past, when her struggle was for existence, and her one aim to save the light of the old faith from being utterly extinguished, her children were neither influenced by the state of feeling or opinion of the religious bodies by which she was surrounded, nor able themselves to exercise any influence among others. The wonderful changes which the present generation has witnessed made such isolation impossible to us. The universal diffusion of education—the facilities for learning now within the reach of all classes—a teeming press, freely bringing into discussion whatever can form a subject of human thought, and spreading everywhere an atmosphere of criticism and doubt,—are forces which we neither are able nor ought to ignore. Thus it is that to carry out her mission, even among her own, the Church can no longer occupy a purely defensive or isolated position. Whether to guard or to spread the Faith, she must make her presence known and her power to save felt in the actual world of which we form a part.

It was with prophetic foresight that the great Pontiff, Pius IX., with a view to the reorganising of the Church in Scotland, decreed the restoration of her ancient hierarchy. His successor, Leo XIII., by the very first act of his Pontificate, gave effect to the decree. And he now calls on us to complete the great work, in as far as the circumstances of the time and our limited means will permit. Nor do we doubt that the carrying out of the designs of the Sovereign Pontiff will be followed by important results. Under the imperfect organisation of Vicariates Apostolic the clergy were only a number of scattered units, devoted certainly to their congregational work, but without a common aim or united action. They were unknown or unacknowledged, and without appreciable influence in the general community. Provincial Synods will now bring home to us the religious state of the whole country. Diocesan Synods, held with greater frequency, will put before each Bishop the wants and the progress of his diocese. Uniformity of action, the speedy remedy of abuses, should they arise, will be secured, and the religious efforts of both clergy and laity directed to the advancement of Christ's kingdom on earth. Chapters have already been constituted in the two Archdioceses, and in the other dioceses Councillors have been appointed. Aided by these, the Bishop will feel that his burden has been lightened, and that new strength has been added to him in the administration of his charge.

We turn then to you, venerable brethren in the ministry, and beseech you that you "feed the flock of God which is among you, taking care of it, not by constraint, but willingly, according to God; not for filthy lucre's sake, but voluntarily . . . as made a pattern of the flock from the heart. And when the Prince of pastors shall appear, you shall receive a never-failing crown of glory." We know how laborious and self-denying is the life you lead. We know your cares, your many sorrows, your disappointments, your sufferings for the sake of Christ. We know well the severity of the trials to which you are exposed. And we thank God for the great grace that enables you to model your life on the precept of the Apostle.

The hardships of the priest's life have, to some extent, been lessened of late years by the increase which has taken place in

their numbers. But neither their responsibilities nor the calls on their zeal have been in any degree diminished. Ample scope for their energy is to be found in providing for the special wants which the development of the new conditions in which we find ourselves has caused. Besides his cares in providing for the education of the young, his endeavours to give due dignity to his church services, and the wider range which his preparation for the pulpit embraces, the priest has now to establish associations of different kinds, for the promotion of piety, temperance, and intellectual progress among his flock. He has to watch over them with loving vigilance, that they may advance the good cause for which they have been called into existence. Another arduous duty devolves on the priests of the present day in a measure far greater than on those of the last generation. Science, and indeed, we might almost say, universal knowledge, is brought home as a familiar thing to all of every grade in society. The whole world is familiarised with scientific theories which simply take the non-existence of a Divine revelation for granted, or lay down principles amounting to an absolute denial of its truth. The priest, above all men, has to take note of the tendency of popular teaching, and be able to judge with ready intelligence wherein danger lurks, to unravel sophistry, to detect the false, and separate what is true in the speculations which carry away the public mind. There are many thousands of earnest men outside the Catholic Church who are despondingly groping about in search of some assured principles by which they may be able to reconcile their belief in supernatural truth with their advances in scientific and historical knowledge. But where the criterion of truth is itself unsettled, the search must necessarily be futile. How gratefully would these learn, could they but be led to listen to the voice of the Catholic Church, addressing them in their own language of science, that there is within their reach a heaven-born truth, absolute and eternal, with which all that is true in science is in harmony. Our counsel, then, is summed up in St. Paul's advice to Timothy: "Take heed to thyself and to doctrine. Be earnest in them. For in doing this thou shalt both save thyself and those that hear thee." And "Be thou an example to the faithful in word, in conversation, in charity, in faith, in chastity."

We turn next with much solicitude to you, our faithful children of the Laity. You are our first thought in all our labours. In you our interest is mainly centred. Through you it is that we hope that in due season the seed which we are sowing will spring up to a glorious harvest. "For what is our hope or joy or crown of glory? Are not you, in the presence of our Lord Jesus Christ at his coming? For you are our glory and joy." To you is given no subordinate part in the present work of restoration. You are the mirror to which men will turn to behold the true image of the Catholic religion. In your life and conversation they have the right to look for the proof of its holiness, truth, and vitality. Our books are a closed volume to the outside world. Our churches are dangers to be shunned by the vast body of religious-minded men, whom centuries of misrepresentation have simply steeled against every utterance issuing from a Catholic pulpit. Our claims on their judgment have been put aside from of old. Perfectly satisfied in their state of traditionary blindness, they ask, "Can any good thing come out of Nazareth?" and pass on to think no more about us. But, beloved children in Christ, let the heavenly power of your religion be held aloft before the world in your lives, and men will see in them an argument of its divinity, by which they will be attracted as by an instinct of "the soul naturally Christian," which will affect them more powerfully than words from the most eloquent tongue.

In this day of rejoicing we do not enlarge on the general subject of the evils which, alas! too often make us an occasion of scandal to our neighbour, instead of an object of loving attraction, as we ought to be. Let it be sufficient at present for us to speak with fearless sincerity of one evil not unknown amongst us, grievous in itself, and the fruitful source of many others. It is in connection with the important subject of Holy Matrimony. On no point of Catholic faith and Christian life has the spirit of the age made itself more disastrously felt than in the question of Christian marriage. In the Church marriage is not only a sacred thing, but it is a Sacrament, and the bond of union never can be broken, save by the death of one of the parties. But the unceasing utterances of an irreligious press, the daily work which is publicly

done in the legal tribunals of our country, to the scandal of good Christians, and the general tone of the world around us in connection with this subject, is necessarily tending to strip the sacrament of Matrimony of the sacred character with which it has been clothed since the Son of God forbade man to put asunder those whom God had joined. Hence many are found to enter recklessly on this holy state ignorant of its obligations, and perfectly regardless of its responsibilities. Many who have been careless of all religious duties since their youth up, ignorant perhaps of Christian doctrine, rear up children to be a curse to themselves and a burden on outraged society. There are even to be found some who have so far lost sight of the sacramental nature of Marriage, that they have profaned the Christian institution, by seeking an unholy union at the hands of a civil functionary. What other results could be looked for than those we unhappily see? Misery at home, strife, want—all religious practices abandoned —hope of a better future extinguished. Drunkenness, we need not say, holds a foremost place among the woes brought on by imprudent and ill-assorted marriages. But the merited misery of the parents is not to be compared with the inheritance of suffering entailed on their innocent children. Often there is before them only the terrible prospect of the loss of faith, or a life of crime. It is far more from causes such as these than from honest poverty that the store-houses of proselytising agents are filled. For intemperance and improvidence, resulting from imprudent marriages, extinguish, it seems to us, the natural love of the mother for her offspring, and she purchases relief from the sacred obligations of maternity at the cost of her children's Faith.

Scarcely less to be deplored are the sad consequences of mixed marriages. Against those unions the voice of your clergy has often been lifted up in earnest warning. We need not here enter at length on the consideration of this matter, or point out to you in detail the unhappy results that so often flow from those marriages. We deem it sufficient to renew, with all the solemnity and weight that this our united voice can convey, our warnings and entreaties to avoid the dangers, and save yourselves from the tremendous responsibility which those incur

who wilfully seek such forbidden unions. The strong warning given by St. Paul to the Corinthians respecting unions with unbelievers is applicable in its principle to those who are divided from each other by difference of faith: "Bear not the yoke with unbelievers. For what participation hath justice with injustice? or what fellowship hath light with darkness? And what concord hath Christ with Belial? Or what part hath the faithful with the unbeliever?"

In every age the Catholic Church has jealously contended for the sacred nature of Marriage, and its absolute indissolubility. Often has she suffered loss in her struggles against the impulses of tribes whom she was reclaiming from barbarism, and the lust of tyrants in their efforts to shake off the obligations which, under the sanctions of the sacrament of Matrimony, they had undertaken. Duty loudly calls on us to maintain the same holy cause against modern impiety and error, in the interests alike of religion and society. If at the present day deadly corruption is spreading in all ranks like a cancer, eating away the foundations of faith, and enervating the strength of the nation, the Church seeks to purify the stream of society at its source. She calls on the nation to save itself from decay and dissolution by restoring Marriage to that high and holy position which from the beginning it occupied in the Christian system. Let its obligations be undertaken, not thoughtlessly, but with the serious consideration which their supreme importance demands. Let prayer for the Divine guidance be frequent and earnest. By devout approach to the Sacraments, the presence of our Lord at the Christian's nuptials should be sought, and the Church's blessing received, that the great ends of the Sacrament may be accomplished in the sanctification and happiness of the married pair, in building up the mystical body of Christ, and in giving to the commonwealth strength and length of days, secured in the numbers and virtues of its citizens.

We cannot close this Pastoral Letter without appealing to the charity of all to persevere in prayer for the conversion of this our country. It was falsehood and violence that tore it from Catholic unity, not the free and deliberate will of the people. It was the sin of our fathers that rent the seamless garment and

took away the daily sacrifice. "Our fathers have done evil, and sinned in the sight of the Lord God, forsaking Him; they have turned away their faces from the tabernacle of the Lord, and turned their backs. They have shut up the doors that were in the porch and put out the lamps, and have not burned incense nor offered holocausts in the sanctuary of the God of Israel." The doors are once more opened up, the lamp burns again in the sanctuary, the smoke of the incense ascends, and the daily sacrifice is restored. The prayer of faith must ascend from every heart, that the temple may be filled as of old with a people no more torn by religious dissensions or distracted by doubt, but united indissolubly together in one Lord, one Faith, one Baptism.

Given at the Abbey of St. Benedict, Fort Augustus, Aug. 26, 1886.

✠ WILLIAM, Archbishop of St. Andrews and Edinburgh.
✠ CHARLES, Archbishop of Glasgow.
✠ JOHN, Bishop of Aberdeen.
✠ JOHN, Bishop of Candida Casa.
✠ ANGUS, Bishop of Argyle and the Isles.
✠ GEORGE, Bishop of Dunkeld.

ON

CLINICAL EDUCATION:

THE

INTRODUCTORY ADDRESS

TO THE

CLINICAL SESSION, 1871-72,

AT THE

QUEEN'S HOSPITAL.

BY

FURNEAUX JORDAN, F.R.C.S.,

Surgeon to the Queen's Hospital; Professor of Surgery at the Queen's College; Consulting Surgeon to the Women's Hospital; Professor of Anatomy to the Royal Society of Artists.

LONDON:
J. & A. CHURCHILL.

ADDRESS.

THE custom of beginning a year's course of clinical instruction with a formal inaugural address is not a common one in English hospitals. No one, however, will deny that the most important work of a student's life-time is that which he does in a hospital. He has chosen for his calling the prevention, the removal, and the alleviation of human disease. That calling, if he ever learn it, he learns here. The task which he undertakes is the most difficult, and based on the most difficult and complicated sciences. If, then, a few words at the opening of his hospital career can give him any guidance, they are surely not ill timed.

To many of you the present time is an epoch of your lives. The more sensible you are of this, the brighter is your future. I can congratulate you on entering the medical vocation at a fortunate time. It never stood so high, it never promised to stand so high, in public esteem, as it now does. A healthy alteration in the national tastes has much to do with this. Subjects allied to medical science are now foremost studies; organised nature, physiology, natural history, the origin of species, are now taking the place of feeble literature—odes to the moon, and sonnets to mistresses' eyebrows. Those who, in the future, address your children, when they follow your footsteps, will have to offer them still warmer congratulations on their joining a pursuit of, at that time, larger knowledge, aims, and capabilities.

I purpose devoting the short time given to me to-day, altogether to the question of clinical education.

I was about, gentlemen, to ask you this somewhat personal question: Are you quite prepared to come here? I may take it for

granted that in some respects, some of you, necessarily, are not. I shall assume that you have cultivated minds and studious habits; that you are able to readily acquire and express ideas in more languages than one; and that you have such a general acquaintance with the sciences, that you can now wholly devote your time to those which are fundamentally important in the study of medicine. It is, above all things, to be hoped that you have severely disciplined minds. I am not going into the controversy on the best means of securing effective mental training. Why may not classics, mathematics, science, and metaphysics, all play a part? I maintain, however, that in early manhood, some thorough metaphysical study—say of Sir William Hamilton's Essays—gives this vantage ground to the student; it makes all other literature, abstruse or not, medical or otherwise, easy of comprehension, while it also directly and indirectly contributes to clearness of thought and precision of language. To these attainments I shall also assume, or you would not choose to enter the medical profession, that you possess the power of careful observation, as well as of reasoning accurately on its results. If the pleasures of the world have already, in some degree, become intolerable to you, your chances of future usefulness and true distinction are greatly increased.

But while you doubtless all possess this general preparation, some of you necessarily lack the, even more important, special qualifications which are needed for the practical study of disease. These, if you are wise, you will secure with all possible speed. What are they? To answer this question, we must consider for a moment what disease is. Every disease, or injury, is one of three things: it is either a deviation from healthy human structure, or anatomy; a deviation from healthy human action, or physiology; or it is a deviation from healthy human chemistry. It is clear we cannot tell what the deviation, the something wrong, is, unless we know what the thing deviated from, the prior something right, was. Everything that can be known of

the human frame is comprised in the three sciences, anatomy, physiology, and human chemistry. As complete a knowledge of these as is possible to you, is the true foundation on which to build your knowledge of disease. To these it is impossible for you to give too much time, labour, and care.

Having learnt then all the basic truths of human health, you have entered here to learn your highest, and best, and life-long lesson, the truths of disease. A hospital is a large arena, in which you may witness physiology out of gear. I say physiology, because in its largest sense physiology includes anatomy and human chemistry. You will find here practical illustrations of every mode in which physiology can get wrong. You will see, in other words, a great variety of diseases, and see them investigated for definite and ulterior purposes. The objects and the results of such investigations you will be able to arrange under a few definite heads :—the causes of disease ; pathology, or the peculiar kinds of deviation from physiological health ; diagnosis, or the discrimination of one pathological condition from another ; and treatment, or the adoption of means for the removal or alleviation of disease. You will see here precisely that kind of work done, which you yourselves will have to do in after life. You will not only see everything done, but you will be taught, if you are able and willing to learn, to do all that you see others do.

And now comes the most important question that can be asked to-day. How are you best to be taught, and how are you best to learn all about disease, to learn, in short, the science of medicine ? My reply is, in the same way in which you would best be taught and best learn any science, or art, or calling, or trade, or language, or anything which men can be taught, and which they can learn. I shall be glad if I have excited your curiosity to ask, what is this best way ? I will answer by giving you in three words the opinion of, as I believe, the highest living authority on such a subject, the opinion, namely, of Mr. Stuart Mill. In learning

anything, three things, he observes, are necessary, models, rules, and practice. The most difficult callings are best learnt as a child learns its mother tongue. It imitates such models as are near it, then it is taught rules, then it puts them into practice. If it be given the best models, taught the best rules, and afforded sufficient opportunities for practice, it best learns the language. The most successful clinical instruction then, I venture with confidence to affirm, is that which supplies the best examples of how diseases are investigated, discriminated and treated, which teaches the best and truest rules for the observation, detection, and treatment of disease, and which affords the fullest opportunities of imitating the examples, and applying the rules. It is the appropriate combination of these methods of study which leads to success. Both teachers and learners frequently adopt one method to the exclusion of all others. One teacher, if he can be called a teacher, for instance, will set an example only of what has to be done, and neglect to instil rules, or give opportunities for practice. Another teacher is indifferent to the importance of models, but will supply rules, perhaps to an indefinite extent, in the shape of formal lectures, in a room in which there is not a single illustration of disease. Another will set examples and teach rules, but will not encourage the pupil to imitate the examples, or apply the rules. I am compelled to say that pupils still more frequently fall into similar errors. A certain number are quite willing to witness the models, medical or surgical, and sometimes even to imitate them, but they shrink from the labour of learning the rules. These are the so-called practical men. Others see only the importance of the rules, and labour under the delusion that copious notes of systematic lectures and industrious reading by their own firesides will take the place of the imitation of models and of the practical examination of cases of disease. These are the so-called book-men. Incredible as it may seem, a few will neither witness the examples, nor learn the rules or principles, but will actually in their own sweet way ex-

amine and treat cases. It is difficult to say other of these men than that they are vain and ignorant. It is our duty as teachers to set the example of how facts are ascertained. Every method we adopt is the application of some fact, or rule, or principle; and it is our duty to explain these to you. We have, or ought to have, a reason for everything we do; the reasons are the rules.

Let me give a brief and simple illustration—simple, because I wish the youngest beginner here to understand it. There comes before the teacher and his class an injury of a thickly covered joint—the shoulder. The joint is deformed and the limb is useless. The teacher points to the rule that these symptoms are common to dislocations and fractures near joints. Is it, then, a fracture or a dislocation? The surgeon looks at the limb, handles the limb, and asks certain questions. Thus far he is an example. But he is acting according to rules which he explains. He looks at the limb in obedience to a rule: if the deformity be slight, and the limb fall toward the middle line of the body, it is a fracture; if the deformity be great, and the limb stand angularly out from the body, it is a dislocation. He handles the limb in obedience to another rule: if the deformity be easily removed, but as easily returns, if the mobility be greater than is natural, it is a fracture; if the deformity be removed with difficulty, and the mobility be less than natural, it is a dislocation. He asks a question in obedience to another rule: if there be pain only when the limb is moved, it is a fracture, if the pain be constant it is a dislocation. Continuing to act as an example, and to teach rules, he proceeds to ascertain whether the fracture, if it be one, is at the anatomical neck or surgical neck, or at the tuberosities; or whether the dislocation, if it be one, be sub-coracoid, or sub-glenoid, or sub-clavicular or sub-spinous.

The perfection of clinical teaching is this: that the teacher shall set the best example and the pupil shall follow it; that the teacher shall instil the best rules and suggest the best books, and

the pupil shall diligently learn them ; that the teacher shall freely furnish, and the pupil freely embrace practical exercises, on the imitation of examples and the applications of rules.

I wish you now to follow me in an inquiry very pertinent to our subject,—What are the peculiarities of a good teacher, and how should he teach ? What the peculiarities of a good pupil, and how should he learn ?

I am quite aware that I am not giving an address to teachers, and I presume that every one here knows that he who fills the position that I now occupy, expresses and is responsible for his own opinions only. I speak now for the pupil's advantage. It is well that he should know what a teacher should be. Neither am I speaking now to you only in this hospital, but to every pupil and every teacher, and every man interested in medical education. Exacting, questioning, critical pupils develop care, accuracy, and judgment in teachers. Good pupils develop good teachers almost as much as good teachers develop good pupils. Truisms often require repetition. I shall, therefore, say that a teacher must be full of information ; he must be accurate ; he must be ready in putting his ideas into words ; his mind must be clear and direct ; his language must be terse and to the point ; he must love his work. But this is not enough. He must frequently point to the line which divides the known from the unknown. In teaching the known he must be, more or less, a dogmatist ; in inquiring into the unknown he must be a student. But, as a student, he must frequently verify the known, and as a dogmatist he must ever remember that it is his duty to " encourage enquiry rather than enforce belief." But the teacher (and the advanced pupil, too,) is often in this difficulty—he has to decide for himself what is known and what is unknown. In examining the new views which are brought before his judgment in constantly increasing amount, it needs that he should be, as regards authority, not too deferential, nor too independent, neither too credulous nor too sceptical.

I have already said that the clinical teacher has—and it is a great responsibility for any one to have—to make himself the model of how investigation ought to be conducted, how inductive and deductive conclusions ought to be arrived at, and how remedial measures ought to be carried out. He has also to teach the rules or principles which have guided his actions, and which he believes are the best to guide the action of his pupils. It is perhaps more difficult to teach rules than to set an example. But the rules which enable the beginner to study and treat diseases are nothing more than the facts of those diseases. When the teacher elicits the facts of a disease, he is teaching and applying the rules by which the disease may be recognised. One great art in clinically teaching the rules or facts of disease is to classify them according to their importance. To interest and impress the student, it is necessary to group clinical truths very much as an artist groups objects in a picture. The large objects must be in the foreground, they must be well defined and stand in a good light; next to these are objects a little less noteworthy, and still further in the shade are smaller but still visible objects. So in disease, there are the large truths, the truths only a little less in size, and the crowd of smaller truths. To put these clearly in their proper place is a laborious but a much more effective educational means than to relate a dull chronicle of facts. There is as much difference between the two methods as there is between Carlyle's History of the French Revolution and the driest chronicle that was ever written.

Different modes of clinical teaching may be advantageously combined. At one time the salient points of many diseases may be cited; at another time the principal features of a few; and sometimes a minute examination of all that is known of one disease may be most profitable. Some pupils require frequent and lucid repetition of rudimental facts, others are prepared for flights into the upper regions of medical learning. It is needful to be slow with the slow, and quick with the quick. Exam-

inations not only test the extent of a pupil's knowledge, and stimulate his mental readiness and self-reliance, but they often serve to put a perhaps complicated idea in a new and more intelligible form. The teacher should often submit himself to examination, and convert his pupils into examiners.

However much depends on the clinical teacher, even more depends on the clinical learner. He has mistaken his vocation if he be not anxious for knowledge and capable of prolonged effort in obtaining it; if he be not prepared with a knowledge of anatomy, physiology, and human chemistry; if he be not capable of investigation and correct inference. He should be ready to question and be questioned. A question is an excellent mental stimulus; and to a question clearly put, the answer is already half known. A pupil should not let his teacher look at, or touch, or say, or do anything without asking the reason why, without eliciting the principle which guides the look, or touch, or question; a teacher often fails to do all the good he might by insensibly assuming that that which is extremely familiar to himself is known to others. If the pupil be critical, when his criticism is founded on knowledge, all the better. A body of advanced, informed, critical students, give rise to benefits which are not confined to themselves, they reach teachers, hospital authorities, and the poor. With such a body, there can be no indolence, no slovenliness, no inhumanity.

If I am correct in enforcing to-day, the utility of the application of Mr. Mill's dictum to the purposes of clinical education, it is clear that the zealous student has, like the teacher, a threefold duty to perform. He must witness good models, he must learn good rules, he must put both into practical operation. The rules which should guide his actions are nothing less than all the knowledge he can acquire. The very atmosphere of a hospital is, to modify the expression of an American writer, a strong solution of books; everything he hears, or sees, or smells, or touches, carries a lesson to the watchful. The microscope, the stetho-

scope, the laryngoscope, the ophthalmoscope, are to be, not learned toys to give a philosophic air to his study, but instruments of daily and hourly use. His work is not to be done in wards only, or the out-patients' rooms only. The *post mortem* room should occupy much of the student's time. I have already said that all disease is a deviation from the physiological state. The nature of the deviation can be learnt only in the dead room. The study of pathology is fundamental to all scientific medical education. The man who is indifferent to pathology is dead to science ; he is a retailer of remedies and an empiric in the worst sense.

To get knowledge, however, is not enough. It is well to cultivate every nerve function through which knowledge may be obtained. I may say more, by way of parenthesis, that we err in unduly cultivating the ideational aspect of our nervous system. Because in pigs sensations predominate over ideas, we must not, therefore, grow ashamed of our sensations. There is at present a tendency to under-rate animals, and to make ourselves as unlike them as possible. Man, however, was not intended to become a helpless bundle of ideas ; although the paragon of animals, man is nevertheless an animal. Acuteness of touch, of the muscular sense, of sight and hearing, quick action, endurance, courage, are all necessary to give ideas their fullest value. Trained sight for the use of the microscope, ophthalmoscope, and laryngoscope ; trained hearing for the stethoscope ; trained touch for the detection of fluctuation, elasticity, doughiness, crepitation and crepitus, are necessary adjuncts to trained observation and trained reasoning power. I have a strong impression that high nerve functions run together. Oftenest in the same man are combined the most delicate touch, the truest eyesight, the keenest emotions, the clearest ideas, the strongest will, the promptest action.

The practice of recording cases is almost essential to observation and sound inference. It involves the strongest personal experience in following examples and applying rules. Slowly and

carefully, and concisely recorded cases fix in the memory valuable precedents. To rapidly write down cases in a note book is a mere waste of time. It is the reflection on the case, not the act of writing, which is of use. It is better to well ponder over a case for hours without putting pen to paper, than to write down a dozen cases in as many half hours.

I wish I could convey to you my strong sense of the need of conciseness, not only in recording cases, but in every branch of medical literature. There are two ways of securing conciseness : by clothing essential ideas in the fewest possible words, and, secondly, by recording only essential ideas. The beginner must, of course, record much. It is only later that he can discriminate the essential and important from the non-essential and trivial. He who, in writing or in speaking, can shear off the superfluous, who with a few touches can give a bold effect, is no longer a tyro, he is already a master. Observe everything ; write down the essential. The competent reader will take the trivial as understood. Bear in mind, that that which is wearisome even to the patient and industrious, can be beneficial to no living soul. Diffuseness is the vice of the ignorant and the indolent. The ignorant cannot distinguish the momentous from the insignificant. The indolent find it easier to record everything than to use their judgment. Discoveries are made in various ways ; I venture to say they never arise out of the accumulation of masses of detail. One worker will fill his house with ponderous tomes of minutely recorded cases, and draw no single inference from them ; another, with keener observation and severer reasoning, but with briefer notes, will draw some useful inference from every case.

Not unfrequently students fail from too little exercise of reflection, rather than from too little industry. In reading books, I have known students remember nothing, when something was wanted, because they had tried to remember everything. The most important must be recognised, and chiefly studied ; to the less and the least important only proportionate attention should

be given. Much more frequently, however, students fail through want of industry. You come, I presume, filled with good intentions. Let me remind you that among the various materials with which moralists suppose that hell is paved, (it is singular that the pavement of hell should have such a fascination for speculative moralists,) good intentions hold a prominent part. I knew a student who bought every new book, and constantly discussed with his friends the best modes of getting information out of them. His book-shelves, desk, reading lamp, and other paraphernalia of study, were perfect. But here his industry came to a sudden end; his work ended with his good intentions!

Work is the first and greatest element of success. The unintelligent cannot work, the dishonest do not care to work, the pleasure-seeking will not work. So true it is that work is the thing most needed, that he who works persistently, without haste, but without rest, as Gœthe said, even though his method of work be not the wisest, his books not the best or the latest editions, his instruments ancient and clumsy, will nevertheless add something to the world's knowledge and resources. The advice I have frequently given to students is to work at difficulties. Easy things take care of themselves. For instance, for five minutes that you give to a fracture of the shaft of the femur, give five hours of study to fractures at the upper end. I might give the same advice to those who no longer regard themselves as students. Our serials are constantly containing proposals intended to assist in diagnosing what is easily diagnosed, and in treating that which is efficiently treated, while obscurities in diagnosis, and difficulties in treatment are too much neglected. Here and there a student will dress a "stump" for an hour, which a few months' tuition will enable him to do with efficiency, but he will scarcely look at an obscure tumour in the next bed, which he might examine for many hours and leave much unlearnt. Perhaps this artist in sticking-plaster will even take airs, call himself a practical man, and smile with disdain on those who desire to find out what is under the skin.

Gentlemen, begin to-day to work with the clear conviction that human life will depend on what you do and how you do it. Work as you would have another work if your life depended on his exertions. Heroism lives as strongly now as it ever did. Each one of you if the opportunity arose would spare no effort and risk life itself to save life from fire, or water, or other danger. It is slower and less sensational to save life by means of knowledge, but it requires not less courage, endurance, calmness, and intelligence.

All who are interested in clinical education are agreed that the time devoted to it is too short. The best clinical study is done when, what I may call, qualification or diploma work is over. Then an elastic and unburdened mind can give undivided attention to clinical imitation, clinical study, and clinical practice. *Active* studentship can best flourish, and be most fruitful in its results when the period of *receptive* studentship has passed away. This too is the best time to attend to the special departments of medicine, as obstetricy and diseases of women, diseases of children, and diseases of the eye, and to attend to them, wherever the best opportunities for special investigation are to be found.

I have yet a few words to say touching knowledge and experience. It is necessary that knowledge should be appropriate and pertinent, that it should be extensive but classified. It is not easy to have too much information on essential (by essential I mean clinical) subjects. It is of the first importance to classify it. Primary salient truths should be in the front ground, ready for use. But sometimes these salient truths are insufficient, and we require a reserve fund of larger information. We may see an aneurism which does not pulsate, and in which there is no murmur ; we may see a cancer which does not grow quickly, and does not affect the general health ; we may see a broken femur on which the sufferer can walk. There is even a third class of knowledge, which may include much that is vague and speculative. Out of this hazy stratum of knowledge from time

to time, new truths and principles and actions rise into clearness and utility. This knowledge will often serve us well when the practical man with his one handful of facts stands confessedly powerless.

But knowledge must be pertinent to our purpose. In the history of medicine there is no pleasanter fact to contemplate than this. When medical men have specially pursued sciences which only indirectly bear on clinical work, they have shaken off the responsibility of treating the sick. Men have been too magnanimous to grasp in one hand human life and high classics, or human life and botany, or human life and zoology, or human life and theology, or human life and active politics. Recreation and general culture are not unimportant, A rested and a cultivated mind will best pursue any profession. But if recreation and general culture rise to the first place, medical science and human life will go down to the second.

Experience has constantly been used to imply something more than knowledge. It may be described in a medical sense as something more than a keen personal knowledge. It is not a simple act of intelligence. Experience is knowledge intensified by feeling, emotion, life. An idea will pass away ; an idea associated with emotion will remain. Disease which has been personally observed, personally pondered, personally treated, is the most vivid clinical experience. To get this kind of experience should be your constant aim. To be of value, clinical experience must be personal, intense, and thorough. To examine a large number of cases superficially and hurriedly is not experience, but a spurious and dangerous imitation of it. There is unquestionably a difference between bed-side experience and book knowledge, but I think a little too much stress has been laid upon it. To a thinking man book knowledge is experience. The written statements of competent observers give results similar to those derived from bed-side observation. An active imagination is closely allied to observa-

tion, and by it the phenomena of disease, even when described by others may be made to take a living and a breathing form. When a Watson describes the attack and the progress of an apoplexy, is it not experience? When a Paget pictures the growth and features of a cancer, is it not experience? When a Syme tells how he directly cut into an aneurism, filled the wound with his hand, quickly, yet deliberately put his finger on the rushing orifice, and completed one of the greatest of modern operations, is it not experience? When you are reading or listening to portraits of disease, picture to yourselves the countenance, the figure, the posture, and the movements which are associated with it. Put the facts into a bed, and put yourselves at the bedside.

In conclusion, gentlemen, let me ask you to regard yourselves as travellers about to enter a strange country. Look on your teachers as guides, and their teaching as your guide-book. However complete the guide-book may be, and however trustworthy your guides, you will find your undertaking to be beset with difficulties. These you will often overcome, sometimes they will prove insurmountable. The sun may shine, the mountains, trees, and streams be clearly defined, and the path be easy. But the sun may have set, the hills and trees be wrapped in mist, and you can find your way only by examining minute objects, the vegetation around, the soil underneath. At another time thick darkness covers every object, large and small, storms choke the paths, and paralyse your efforts. But we are lighting our lamps, and slowly, it may be, clearing the paths. To-day is richer in its results than yesterday. Let us so work together that we may help to bring in a still more fruitful to-morrow.

WHITE AND PIKE, PRINTERS, BIRMINGHAM.

PRACTICAL SUGGESTIONS

RELATIVE TO THE

Disestablishment & Disendowment

OF THE

CHURCH OF ENGLAND.

SOCIETY FOR THE LIBERATION OF RELIGION FROM STATE-PATRONAGE AND CONTROL, 2, SERJEANTS' INN, FLEET STREET.

1877.

ADVERTISEMENT.

THE following SUGGESTIONS were prepared by a Special Committee of the *Society for the Liberation of Religion from State-Patronage and Control.* They were presented by that Committee to the Triennial Conference of the Society, held in London, May 1 and 2, 1877, and are published by the direction of the Conference, for the consideration of the Society's supporters, and of the public generally.

For information relative to the property and revenues now in the possession of the Church of England the reader is referred to a pamphlet entitled "The property and revenues of the English Establishment," by Mr. FREDERICK MARTIN (Editor of the *Statesman's Year-Book*), which has been published by the Society.

2, SERJEANTS' INN, FLEET STREET,
May, 1877.

PRACTICAL SUGGESTIONS RELATIVE TO THE DISESTABLISHMENT AND DISENDOWMENT OF THE CHURCH OF ENGLAND.

I.—INTRODUCTORY.

One of many signs of the recent progress of the movement for Disestablishment is the demand which has arisen for information relative to the modes in which Disestablishment can, or should, be effected. The abstract principles of State-Churchism have, to a very large extent, been given up by practical politicians; most of whom now acknowledge, willingly or reluctantly, that it is only "a question of time" when the English and Scotch Establishments will be dealt with as the Irish Establishment has been already dealt with by Parliament. Political action has not, however, kept pace with the growth of conviction. Naturally enough, there is hesitancy on the part of political leaders to enter on a struggle which, though it may not be protracted, may prove severe and trying. And that hesitancy is attributable, in part, to a want of knowledge, or of agreement, regarding the leading principles on which a measure of Disestablishment should be based. There is a disinclination to take a leap in the dark—even though it be forward, and hence the call for more light becomes louder as the necessity for going forward is increasingly felt.

This is especially the case in respect to the question of *Disendowment*—which, though it has come to be regarded as the inevitable corollary of Disestablishment, is attended with special difficulties, and, for a time, may occasion such differences of opinion as commonly exist in connection with a subject involving many perplexities, and which has not been thoroughly discussed. The immense pecuniary interests at stake in the case of the Church of England form one of the main obstacles in the way of its disestablishment. How is the great estate comprehended in the phrase "Church property" to be dealt with, when there will no longer be a "Church as by law established"? How are the vested rights of individuals, and of bodies, to be recognised, without violating the principles of equity, on the one hand, and without creating new evils and dangers on the other? To what purpose should the surplus property which will be available, after claims for compensation have been fully met, be applied, so as to confer the greatest benefits on the nation? These, and similar inquiries, would under any circumstances excite the keenest interest; but certain results of the abolition of the Irish Church Establishment have greatly increased their importance. Some of those who were foremost in pro-

moting that great act of justice towards an injured people declare their unwillingness to assent to the disendowment of the English Church on such terms as those it was thought necessary to accede to in the case of the Irish Church. The mischief done in Ireland may be small; but it is felt that it would not be so in England, where the property held by the Church is so vast, and its re-endowment on a large scale—in the guise of compensation to the members of the disestablished Church—would prove a source of serious and lasting evil.

It was in view of these facts that, at the close of 1874, the Executive Committee of the *Society for the Liberation of Religion from State-Patronage and Control* resolved to appoint a Special Committee to obtain legal and other information required for the preparation of a scheme of Disestablishment, and to offer suggestions which might aid in the framing of such a scheme.

The result of that Committee's inquiries and deliberations is contained in the following Suggestions. They are offered with a consciousness that they will not meet all the requirements of those at whose instance they have been prepared; or satisfy all the expectations which may have been excited by the announcement that such a work had been undertaken. It would be presumption to express a confident opinion on points which have hitherto been so little considered by the public that they present themselves in various ways to various minds. It is not the business of any organisation to prepare a Disestablishment Bill. *That* is a task which, necessarily, must be devolved on a Government—a Government called into existence for the purpose; and which would be guided in its course by the circumstances of the time, and would have at its disposal all the legal and official resources which only Governments possess, and which will be indispensable for the accomplishment of such a task. An *a priori* measure, framed in advance of the times, and with reference only to abstract principles, would possess a certain degree of speculative interest, but would not commend itself to the judgment of practical politicians. As time elapses, and public knowledge and interest increase, and opinion takes a more definite shape, new methods, or modifications of old methods, will suggest themselves; difficulties formerly thought insuperable may vanish, and changes once regarded as hazardous will be readily assented to.

Although it is believed that these suggestions rest upon a sound basis, they do not profess to be more than hints to aid in the public discussion of a great public question. They are a contribution towards the stock of ideas out of which there will ultimately be evolved a complete scheme, which will commend itself to the judgment of the nation. And, for obvious reasons, it has been thought better to lay down general principles, than to enter into details—the discussion of which might only serve to divert attention from points of greater importance.

It will occasion no surprise to those by whom these suggestions have been proposed to find that they occasion some diversities of opinion, even among those who are at one as to the object at which they aim. It would be more surprising if it were otherwise. The

advantages accruing from a thorough investigation of the subject will exceed any harm which may arise from the conflicting opinions of friends. Nor will it be a serious consequence if opponents easily detect apparent, and even real, inconsistencies in some of these suggestions. They would probably be but of small practical value if they were symmetrical in form, and mercilessly logical, but, at the same time, disregarded the tendency of all English legislation to sacrifice merely theoretical considerations, that it may mitigate the rigours of inevitable change, and deal generously, as well as justly, with vested interests of every kind. Some will think that concessions are pushed too far; while others may object that they do not go far enough. There will, in some cases, be a wish to insist on what is desirable, rather than on what is possible; and there will be room for doubt as to the limits within which action should be guided by principle, or by expediency. A conflict of opinion on such points need not be deprecated. It is one of the means by which substantial agreement may be eventually secured. The movement against Church Establishments has always been carried on in the light of day; and it is because the individual judgments of the advocates of religious equality has been allowed full play that they constitute, at the present moment, a disciplined and confessedly formidable force.

II. — DISESTABLISHMENT AS DISTINGUISHED FROM DISENDOWMENT.—THE IRISH CHURCH ACT.

The Irish Church Act of 1869.

1. As a set-off against the difficulties already adverted to, the advocates of Disestablishment possess the great advantage of being able to point to an important precedent. Up to 1869 the Church of Ireland was established in precisely the same way as the Church of England is now established; but in that year it was enacted that "on and after the 1st day of January, 1871, the union created by Act of Parliament between the Churches of England and Ireland shall be dissolved, and the said Church of Ireland" "shall cease to be established by law (*Clause 2 of Irish Church Act*)." Whatever complaints have since been made respecting the Act which abolished the Irish Establishment have related only to those portions of it which relate to *Disendowment*. As a measure of Disestablishment, simply, the Irish Act is as complete, and, it is believed, has worked as satisfactorily, as could have been expected. In regard to some details, experience may have suggested improvements; but it may be safely assumed that, whenever, and by whom, the English Church is disestablished, the precedent set by the Irish Act will, so far as the disestablishing clauses are concerned, be, in the main, followed.

How the Irish Church was disestablished.

2. That Act provided that, on and after January 1st, 1871, (1) the Church of Ireland should cease to be established by law; (2) every ecclesiastical corporation, whether sole or aggregate, and every Cathedral corporation, should be dissolved; (3) the jurisdiction of the ecclesiastical Courts should cease, and the ecclesiastical law of Ireland be repealed; (4) and that the Irish Bishops should no longer sit in the House of Lords. All new appointments

to office in the Church were prohibited immediately on the passing of the Act.

To provide the machinery for carrying the Act into effect, there was appointed, for a period of ten years, a body entitled "The Commissioners of Church Temporalities in Ireland;" to whom was given full power to decide all questions, whether of law or fact. On the passing of the Act all the property in the hands of the Ecclesiastical Commissioners of Ireland was transferred to these Commissioners. On the 1st January, 1871, all the other property of the Church—of whatever kind—also became vested in the Commissioners. The Act gave instructions to the Commissioners in regard to their mode of dealing with the property; authorized them to compensate the bishops and clergy, and other office holders, in a prescribed manner; and contained directions for the disposition of the churches, parsonages, and glebes, and private endowments. It also contemplated the formation of a "Church Body," and for the transfer to it of a portion of the property. It is some of these provisions of the measure which have been the subject of unfavourable criticism, and it is in regard to these that the following suggestions relative to the English Establishment propose, in some essential respects, to depart from both the principles and the details of the Irish Church Act.

III.—DISESTABLISHMENT AT A FIXED PERIOD.

Objections to gradual Disestablishment.

3. It will be seen from the foregoing statement that, while nearly a year and a half was allowed to the Irish Church to prepare for the change, the process of disestablishment was not gradual, but took place at a fixed period, viz., January 31, 1871. That particular proposal was accepted without opposition, and, so far as is known, it has not since been the subject of complaint on the part of the members of the Irish Church. Objection has, however, been made in some quarters to the adoption of the same method in England. The objection is urged with a view to avoiding some of the difficulties of compensation. "Let the existing Bishops and Clergymen," it is said, "remain where they are, and retain their emoluments till death, and then no compensation will be needed, and there will be a gradual extinction of rights, and privileges." The answer is, that this would postpone the completion of Disestablishment for a whole generation; while State-supervision would still be needed to ensure the discharge of episcopal and clerical duties. The members of the disestablished Church would suffer the great disadvantage of having to work under a double system; being disestablished in some parishes, and established in others. This would make the reorganization of the Church impossible, and would lead to confusion which would be embarrassing to the State, and absolutely ruinous to the Church. It might avoid one difficulty; but it would create a hundred others. It may, therefore, be confidently assumed that the Legislature will fix the time of Disestablishment in England, as it did in Ireland, and the suggestions now made are based upon that assumption.

IV.—TO WHOM COMPENSATION IS TO BE GIVEN.

Not to "the Church."

4. It is of cardinal importance to recognise the fact, that, whatever the Church of England may be ecclesiastically, it is not one great corporation, holding property, and exercising authority, as such, but consists of a number of corporations. What is called "Church property" is "simply the property of the several local churches, the ecclesiastical corporations, sole and aggregate, bishops, chapters, rectors, and vicars, or any other. The Church of England, as a single body, has no property" (*Disestablishment and Disendowment.* By E. A. Freeman, D.C.L., LL.D., p. 11). Nor have these corporations any proprietary rights apart from the arrangements made by the State for the exercise of their ecclesiastical functions. These "local churches" and "ecclesiastical corporations, sole and aggregate," hold, and administer, property on behalf of the State, and constitute part of the machinery by which it carries on the ecclesiastical work which it has undertaken in connection with a Church Establishment.

> "The fact was, that, materially and legally speaking, there was no such thing as the Church of England. There was an aggregate of corporations sole which had certain churches vested in them, but no body of the Church of England was in possession of land. He, as a bishop of England, was a corporation sole, and he got a certain income, which was secured to him by law. Every rector or vicar, and every cathedral chapter [?], was, in the same way, a corporation sole, and each had his income secured; but the Church, as an aggregate of these corporations sole, had no property."—*Speech of the Bishop of Manchester at Dewsbury, Dec. 2nd,* 1876.
>
> "Everything connected with the Church is subject to the law. The law defines the statutes of its clergy, fixes their duties, and controls their action. There is no ecclesiastical corporation of the Church of England: its clergy are officers of the State, with their duties clearly defined by the State."—*Letter of Canon Bulstrode, of Ely, to the "Manchester Examiner,"* Feb. 6, 1877.

Individuals only entitled to compensation.

5. The Church, as by law established, being a national organization for ecclesiastical purposes, its adherents, in an ecclesiastical sense, have no other pecuniary rights in connection with it than are possessed by the rest of the nation. Hence only the bishops, clergy, and other individuals having, by virtue of their office, a special beneficiary interest in the Establishment, together with the owners of advowsons and next presentations, will be entitled to compensation on its abolition. Though an Episcopal Church may afterwards be organized on a different basis, when Disestablishment is determined on, there will be no body having a legal existence capable of either claiming or receiving compensation.

V.—MODE OF COMPENSATION.

Freedom to members of Disestablished Church, but not special privileges.

When the Church of England is disestablished, no legal impediments should prevent Episcopalians organising themselves as members of a religious community, or communities, and managing their own affairs. For that purpose, they should possess the same

legal facilities as are possessed by other religious bodies; but no facilities should be granted which would re-create a privileged ecclesiastical body.

Objections to the endowment of a Church representative body.

6. The Irish Church Act repealed all laws which prevented the Church holding synods, and "making regulations for the general management and good government of the Church" (*sec. 19*). But it did not stop there; for, first it authorised Her Majesty to incorporate by charter a "Church Body," appointed by the members of the Church to represent it, and to hold property on its behalf (*sec. 22*). That Act also provided for the compensation of the clergy on the assumption that they would continue in connection with the Church, and not only re-endowed the Church directly, by the payment to the Church body of half a million of money, as compensation for the loss of private endowments (*sec. 29*), and the transfer of churches, parsonages, and glebes, but still further endowed it indirectly, by providing that the commutation of clerical annuities should be a transaction between the clergy and the Church body, and by holding out an inducement to general commutation in the shape of a bonus of twelve per cent. on the commutation money, if three-fourths of the whole number in any diocese commuted (*sec. 23*).

Relations of the Irish clergy to the disestablished Church.

7. Another source of mischief in the Irish Act was the provision that the former incomes of the disestablished ecclesiastics were to be paid to them not only so long as they lived, but on the condition that they continued to discharge such duties as they had been accustomed to discharge, or such duties as might be substituted for them, with their own consent, and that of the representative body of the Church (*secs. 14 & 15*). Lastly, while one clause of the Act abolished the ecclesiastical courts, and declared that after January 1st, 1871, "the ecclesiastical law of Ireland, except in so far as relates to matrimonial causes and matters, shall cease to exist as law (*sec. 21*), another clause enacted that "the present ecclesiastical law of Ireland, and the present articles, doctrines, rites, rules, discipline, and ordinances of the said Church," should, subject to any alterations which might be made, "be deemed to be binding on the members for the time being thereof," in the same manner as if they had mutually contracted to observe the same, and should be capable of being enforced in the temporal courts in relation to any property possessed under the Act; provided that no annuitant should be deprived of his annuity if he signified his dissent from any alteration within a month after the making thereof (*sec. 20*).

Commutation scandals in Ireland.

8. It is to the operation of these several provisions that there may be traced all those scandals relating to the manufacture of curates, and to "commuting, compounding, and cutting" on the part of the Irish ecclesiastics generally, which have brought the Irish Church Act into disrepute, and have created, in many minds, the feeling that it would be better not to disestablish the Church of England at all than to do so on terms resembling those of the Irish Act.*

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* The clergy of a great Church have commuted their annuities to be paid

Individuals only to be dealt with.

9. There is only one way of avoiding a repetition of such abuses, viz.: the adoption of the principle that, in the payment of compensation for loss of income, offices, or vested rights, the State *should deal only with the individuals concerned*, and not with any body, acting on behalf of the members of the disestablished Church, or with any ecclesiastical corporation which has been dissolved by the Act of Disestablishment. The Irish method was based on the principle that "it would be proper to continue to impose on the clergy those conditions on which they now held their office and emoluments, and that they should continue to perform their duties," as a condition of receiving compensation from the State.* It is suggested that this method should be reversed in the case of England, and that all the holders of ecclesiastical office in the Establishment should be released from obligation to the State to discharge their present duties, and that they should be dealt with in the same way as other public officials whose services are no longer required by the State.

Release of the clergy from their present obligations.

Clergy to be compensated accordingly.

10. If this principle be adopted, it will be necessary—on both equitable and financial grounds—in fixing the compensation to be paid to individuals, to have regard to the fact, that their further services will, so far as the State is concerned, be no longer required. They will have been deprived of offices held by a secure tenure, and will be entitled to compensation for such deprivation. But they will be free to contract any obligations, in connection with an Episcopal, or any other, Church organized by voluntary arrangements. There will be freedom on all sides; without the embarrassments which must be occasioned by the compulsory connection with a new system of men habituated to one which has been abolished.

In determining the compensation to be given to the clergy, it will also be essential to have regard to their age, as well as to the fact that they will be released from their present obligations. For example, an incumbent who is seventy years old, or upwards [or such other age as might be fixed], might continue to receive his present net income. If thirty-five, or less, he might receive one-half; and if between thirty-five and seventy a proportionate amount. This would show full consideration for the aged clergy; while recognizing the different position of the younger men.

The Bishops Resignation Act (32 & 33 Vict. cap. III.) gives bishops who retire, because of age, or infirmity, one-third of their income, or £2,000 a-year, if that proportion does not amount to so much.

While provision might be made for gratuities to curates, in cases where they are deemed to be entitled to compensation; no curate

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to them in virtue of the services which they were to render to that Church, and have compounded for those annuities with the Representative Body; putting the difference in their pockets, and in many cases deserting their charges and carrying their money with them to England, to the colonies, to foreign countries, and I am told even in some cases into a hostile communion.—*Speech of Mr. Edward Jenkins, M.P., in the House of Commons*, 1875.

* Speech of Mr. Chichester Fortescue, M.P.

should be so entitled who has become such after a date to be fixed by the Act.

Commutation claims.

11. The principle of commutation is not objectionable in itself; but may be adopted with advantage to both individuals and the State. The commutation might be effected by the payment of either a capital sum, or of an annuity for life. If it be objected that the general commutation of the clerical annuities would require funds far in excess of those at first derivable from the ecclesiastical property available for the purpose, such a difficulty could be met by the issue of Bonds for the payment of the annuities due to individuals, and the sale or transfer of such Bonds could be legalised. This would place the annuitants in an advantageous position, and relieve the State from any financial embarrassment. The clergy should also be at liberty to hand over to any church they may select the amounts which they might receive from commutation; but it would, in that case, be in the nature of a private transaction, and involve no responsibility on the part of the State.

The borrowing powers given to the Commissioners would enable them to obtain whatever funds might be temporarily required to pay capital sums to the clergy for compensation.

Compensation for loss of patronage.

12. Neither the members of the corporate bodies which would be dissolved by Disestablishment, nor public officers, or other persons, in whom patronage is vested on behalf of the public, will be entitled to compensation for the loss of the patronage they have been accustomed to exercise. Private patrons, and others who can dispose of their patronage rights by gift, sale, or bequest at their own pleasure, are in a different position. If it be objected that private patronage, equally with public patronage, is a sacred trust, and not a property, it may be answered that—notwithstanding the existence of laws against simony—the Legislature has distinctly sanctioned the sale of advowsons. It did so when the municipal corporations were reformed, and were directed to sell their patronage. It has done so more recently, in passing the Lord Chancellor's Augmentation Act (26 and 27 Vict., cap. 120), which authorised the sale of small livings in the gift of the Lord Chancellor, that the proceeds might be applied to enhance the value of the livings. Since that Act came into operation (Nov. 1, 1863), £222,759 have been paid by the purchasers of these livings; and for the Legislature now, on moral grounds, to deny to them some compensation for the loss of what they have purchased would be an act of injustice. Rightly, or wrongly, Church patronage in private hands has been treated, both by law and usage, as property, of which the holders cannot equitably be deprived without an equivalent.

The Scotch Church Patronage Act of 1874, which gives to congregations the power to choose ministers, compensates the patrons, by giving to them a sum not exceeding the amount of one year's stipend; which is to be paid out of the minister's stipend, in four annual sums. In Scotland patronage is less frequently sold, and is less valuable, than in England.

VI.—DISPOSAL OF BUILDINGS.

Ancient and modern buildings.

13. Both ancient and modern buildings, as well as all endowments, now appropriated to the use of the national Church must be regarded as national property, at the disposal of the State. It would not, however, be consonant with public feeling to act strictly on this principle, however logically defensible. It may, therefore, be assumed that, in the disposal of the property now devoted to ecclesiastical uses, regard will be had to the voluntary origin of many recent churches and endowments.

Cathedrals, &c.

14. With such exceptions as may be determined on, the cathedrals, abbeys, and other monumental buildings, should be under national control, and be maintained for such uses as Parliament may from time to time determine. Provision should be made for the retention, for public use, or else for the disposal, of the Bishops' palaces, and also of the buildings in the nature of appendages to the cathedrals. The educational endowments, and other charities, connected with the cathedrals should be separately dealt with, for the national benefit.

Churchyards.

15. In all cases, parochial burial-grounds attached to churches should be transferred to some parochial body, for the continued use of the parishioners, who should have equal rights therein.

Proprietary churches.

16. Proprietary churches should remain in the hands, or be at the disposal of, the present proprietors.

Old churches.

17. All churches existing at the date of the passing of the first of the Church Building Acts [1818] should be deemed to be ancient parish churches.

> The date of the first of the Church Building Acts is suggested as the line of division between the ancient and modern churches, because the church building movement, which is one of the characteristics of the present century, commenced at that time. According to the Census of Religious Worship of 1851, only 55 churches were built from 1801 to 1811, and but 97 were built from 1811 to 1821; whereas 2,140 were built from 1821 to 1851. It is estimated that the 2,529 churches built from 1801 to 1851 cost £9,087,000; of which £1,663,429 came from public funds.
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> Mr. Horace Mann (see Census of 1851) estimated that, allowing for defective returns, the number of church edifices in England and Wales was about 16,000; of which 2,560 have been consecrated within the last forty years, and 4,210 from the beginning of the century to the end of 1873.

Parochial Church Boards.

18. Ancient churches (as defined in Sec. 17) should be vested in a parochial board, to be elected by the ratepayers, which board should have power to deal with them for the general benefit of the parishioners, in such ways as it may determine. The power of sale, at a fair valuation, and under proper regulations, should also be given.

Churches built by individuals.

19. Churches erected after the date already named, which have been built at the sole expense of any person who may be living at the date of disestablishment, should, on his application, be vested in him, or in such persons as he may appoint.

Churches built by subscriptions.

20. Churches (other than parochial churches which have been re-built) erected after the date named, by means of voluntary subscriptions exclusively—and also churches not claimed under the above-named provision—should become the property of the existing congregations, and be held in trust for their use. If, within a given time, such churches be not accepted on behalf of the congregations, they should vest in the parochial board, and be dealt with as ancient churches.

Churches built from mixed sources.

21. Churches built after the date named, which have been erected partly by subscriptions, and partly from parliamentary grants and other public sources, should in like manner be offered to the congregations; but the amount so derived from public sources should be a charge upon the building, to be paid, or redeemed, in accordance with regulations made by Commissioners under the Disestablishment Act.

Two objections are likely to be taken to the proposal to hand over the modern churches to the existing congregations; as well as to the subsequent proposal to deal in the same manner with the modern endowments.

The first objection will take the form of an inquiry. How can property be vested in an undefined and fluctuating body, such as a congregation? The question is really one to be answered by professional persons, and the professional advice received on this point justifies the assertion that there is no insuperable difficulty in defining a congregation, and in determining the modes in which property may be held in its behalf. The problem has, in fact, been already solved, both in this and other countries. This will be seen by reference to the following:—1, The Statutes (63 to 69) of the disestablished Church in Ireland; 2, The Statute Law of various American States (see Tyler's American Ecclesiastical Law, 1866, vol. i., p. 60); 3. The Act for abolishing Patronage in the Church of Scotland, 1876; 4, The Compulsory Church-Rate Abolition Act, 1868 (*sec.* 9).

The other objection may take this form. The proposal recognizes only the existence, and interests, of congregations, and ignores the Church. But who are most concerned in the matter—the persons who have been accustomed to worship in the churches, and have had the benefit of the endowments hitherto, or a vague, intangible body designated "the Church?" In the Act of Disestablishment it will be the duty of the State, not to legislate in the interest of the Church of England, or of any Church, but to make compensations and concessions in the way which will best prevent the infliction of injustice and loss where they will be palpably and directly felt. It would do this by giving liberty of choice and action to the congregations of Episcopalians, for whose use the churches and the endowments exist. On the other hand, the greatest possible disservice might be done to them by handing over the property created for their use to an

institution to which they might not wish to belong, or to some of the regulations of which they might strongly object.

The method here proposed would not prevent the congregations uniting themselves with an Episcopal Church, constituted by voluntary arrangements, and even transferring to a representative Church Body the property placed at their disposal by Parliament. Such transactions, however, should be transactions between the congregations and the Church, and not between the Church and Parliament. The legislature has no right to assume that all Episcopalians will, throughout all time, constitute but one Church; neither ought it, either by bribes or by legal compulsion, continue to bind the Church of England together as it now does by the still more cohesive forces of an Establishment. It will be seen that these suggestions, while they would leave a considerable amount of Church property in the hands of Episcopalians, recognize the right of congregations, and of the inhabitants of particular localities, to determine for themselves their future ecclesiastical relationships.

VII.—MODERN ENDOWMENTS.

Endowments created by individuals.

22. If an endowment—whether it includes a parsonage or not—has been created by a private individual, and he be living at the date of disestablishment, the Commissioners should, on his application, vest the same in him, or in such other person or persons as he may appoint. Any parsonage so reconveyed should be subject to the provision in Section 26.

Recent endowments.

23. Where endowments have been created, by voluntary subscriptions exclusively, since the date of the first of the Church Building Acts (1818), they should become the property of the existing congregations, and be held for their use. Endowments not reconveyed under Section 22 should, in like manner, become the property of the congregations.

See note as to Congregations, following Section 21.

Endowments from mixed sources.

24. Where such endowments have been created partly by subscriptions, and partly from national sources, the amount of the latter should be deducted, and should form part of the surplus.

25. The endowments dealt with under Sections 22, 23, 24 should be charged with the annuities paid as compensation to the clergymen who have been the recipients of such endowments.

VIII.—PARSONAGES AND GLEBES.

26. As the annual value of the parsonages and glebes would be included in the estimate of the incomes of the clergy, the pecuniary interest of the clergy in them would cease, and this part of the property could be dealt with by the Commissioners in the same way as the other surplus property coming into their hands. The subject, however, is one involving more than pecuniary interests, and a proposal to eject the inmates of all the parsonages in the country—even with compensation—would be regarded as a

harsh proceeding, and as inflicting undeserved suffering on the clergy and their families. That would be avoided, and ample time be afforded for making charges without personal inconvenience, by allowing the existing incumbents to occupy their parsonages so long as they continue to be ministers of the churches in which they now officiate; but, of course, on payment of rent, according to the valuation adopted in settling their claims for compensation. Whether an existing incumbent should continue Minister of the church in which he was officiating at the time of Disestablishment would depend on the arrangement made by the congregation, acting as such, or in connection with any religious organization with which it might determine to connect itself.

Existing Incumbents.

IX.—MISCELLANEOUS.

Redemption of tithe.

27. The Irish Church Act provided for the sale of tithe-rent charge to the owners of land on the payment of 22½ year's purchase; and an English Act should contain similar provisions. The power of levying church-rates, in any form, should also cease; provision being made for extinguishing debts, or for meeting other claims, for which compulsory rates may still be levied. Easter Dues and other minor ecclesiastical impositions, which are either small in amount, or vexatious in their character, should be abolished. Special arrangements would also be required to relieve the inhabitants of corporate towns, such as Liverpool, and of parishes, such as Marylebone, who have to pay large sums out of municipal or parochial rates to maintain churches, and to provide incomes for the clergy officiating in them.

Church-rates and other imposts.

X.—DISPOSAL OF SURPLUS PROPERTY.

28. It is not essential that these suggestions should answer the oft-repeated inquiry—"What will you do with the surplus?" and there are several reasons why it is not at present desirable to do so. It is not incumbent on those who advocate Disestablishment and Disendowment, to prescribe the purposes to which the released funds shall be appropriated. Those who agree as to the first, may naturally differ as to the second. As a matter of fact, while the Irish Church has been disestablished, the Legislature has yet to determine what use shall be made of the surplus. A particular disposition of it was proposed; but it occasioned diversity of opinion, and was wisely abandoned. When the English Church is disestablished there may be no considerable surplus available for years to come. When that surplus becomes a reality, instead of existing in imagination only, the nation will decide on its appropriation with reference to the wants and feelings of the period, and is not likely to be bound by proposals made years before. The surplus may be devoted to education—to the maintenance of the poor—to effecting great sanitary improvements—to the reduction of the national debt, or to other objects of a secular character, which would be beneficial to the whole nation. It may, however, be suggested that, inasmuch as a large portion of the property now devoted to ecclesiastical purposes belongs to the

parishes, such portions of it as Parliament may from time to time determine should be applied to local objects, and be administered by municipal and other local authorities.

CONCLUSION.

Act of Settlement.

29. It has been already stated that these suggestions are not to be regarded as an exhaustive statement of the various points which would require to be dealt with in connection with the disestablishment of the English Church. It is necessary to add that there are also subjects which, though popularly associated with such a change, have no necessary connection with it. The most important of these is, the succession to the Crown, under what is known as the Act of Settlement. The exclusion of members of the Roman Catholic Church from the throne of Great Britain is a political, quite as much as an ecclesiastical question, and must be dealt with on its own merits. It was left untouched when the Irish Establishment was abolished, and may, in like manner, be left untouched when those of England and Scotland are disestablished also.

Minor questions.

30. There are also minor questions—such as the laws relating to Sunday observance—the appointment of army and gaol chaplains, &c., which are equally distinct from the objects which would be properly aimed at in a Disestablishment Act. Such an Act would have for its object the putting an end to the State-machinery which regulates the affairs of a Church now established by law. How far the principle involved in such an Act should be applied in other directions, might be matter for subsequent consideration; but need not, and ought not, to be imported into the discussion of the perfectly separate issues raised by the pending controversy.

OCCASIONAL PAPER.—No. II.

TEINDS IN GLASGOW.

I. INTRODUCTORY.

II. SKETCH OF THE HISTORY OF TEINDS.

III. KINDS OF TEINDS.

IV. AUGMENTATION OF STIPEND AND LOCALITIES.

V. PARISH OF GLASGOW AND ITS TEINDS.

VI. APPENDIX. — *(a)* MEMORANDUM BY REPRESENTATIVES OF COUNTIES; AND *(b)* REPORT OF INTERVIEW OF DEPUTATION WITH THE LORD-ADVOCATE.

Prepared by the Joint-Committee, and published with the sanction of the Glasgow Landlords' Association and the Association of House Factors in Glasgow.

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OFFICE-BEARERS, 1881.

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TEINDS IN GLASGOW.

I. INTRODUCTORY.

TEINDS or Tithes are generally considered a subject of antiquarian rather than of practical interest. The attention, however, of the general public has now been drawn to the subject by reports in the public prints of cases of augmentation of stipend, and litigation in regard to Teinds, and to the complaints by Heritors of the inequality in the mode of their assessment. Purchasers of land have found their estates liable to a burden which they had not taken into consideration before acquiring them, and the amount of which they find they cannot definitely ascertain, and they, along with the owners of hereditary estates, are harassed by applications by ministers for augmentations of stipend, necessitated by the increased cost of living.

In the City of Glasgow, in particular, public attention was called to the subject, and the unsatisfactory condition of the law was strikingly illustrated in the application and subsequent process for augmentation of stipend (begun in 1864), made by the ministers of the charges of the Parish of Glasgow.

Representatives from the Commissioners of Supply of the various Counties in Scotland were appointed at the October County Meetings in 1880, to consider the present state of the Law of Teinds in Scotland. These representatives met in Edinburgh, on the 4th November, 1880, and approved generally of a memorandum suggesting certain reforms. This memorandum will be found in the Appendix No. I. At this meeting, on the invitation of Mr. Dundas, of Arniston, the Convener, the Associations were represented, and certain suggestions were made; but these suggestions do not apply to the case presented in urban Parishes, and particularly in Glasgow, which holds a unique position in regard to Teinds. It has therefore appeared desirable to the Associations, in view of any

legislation which may be proposed, to point out the peculiar position of this Parish.

A deputation representing the Scotch Counties met with the Lord Advocate on the 28th December, 1880, and submitted to him the memorandum beforementioned. The Lord Advocate, without committing himself to the details of the proposed scheme of Reform, stated that he was willing to submit a Bill to Parliament on the basis of the recommendations in the memorandum, and he has now introduced in the House of Commons a Bill on the subject. A newspaper report of the meeting between the deputation and the Lord Advocate will be found in the Appendix No. II., and the text of the Bill will be found in the *Scotsman* of Monday, 21st March, 1881.

II. SKETCH OF THE HISTORY OF TEINDS.

The first historical mention of Teind is in Genesis xiv. 20, where it is related that Abraham gave to Melchisedec, "priest of the Most High God," a tithe of his spoil. This however appears to have been exceptional, and the first mention of a permanent tithe appears to be in Genesis xxviii. 22, where Jacob vows to give to the Lord one-tenth of all God should give him. In the Mosaic law a tenth is provided for the priests, and at the time of our Lord it would appear that tithes were still levied, and they continued to be so until the destruction of the Temple by Titus.*

The Church of Rome adopted the system of Teinds from the Jewish Church, and from the fourth to the middle of the eleventh century the influence of the Church was persistently exercised to establish the system over all Christendom. In 1050 there is the first Pontifical decree on the subject, and about that time the system of Teinds may be regarded as fully established in the Western Church.

It is not known when the system was first introduced into Scotland, but it was no doubt gradually extended after its first introduction by the exertions of the clergy. It was finally established by David I.† And David II. ordained that excommunication should be inflicted upon those who refused to pay Tithes.

* NOTE.—Lord Stair, in his Institutions of the Law of Scotland, states: "The heathens also did consecrate their Teinds to their idols, and paid them to their priests. Thus Plinius, c. 14 and 19, observeth, and Herodote observeth in his first book the Tithe of Cyrus."

† James I. observed that David I. had been a "sair sanct for the Crown." He referred, however, rather to his gift of Crown lands to the church than to his having established the Teind system.

Parishes also were established in the reign of David I., and the Tithes were appropriated as due by law to the parish minister, unless there was a special grant to a monastery or other religious body. This appropriation took place in Scotland as early if not earlier than in any other country. Although the principle was much encroached upon both by the Crown and by lay subjects, who were patrons of livings, by grants of parish churches, including the Teinds of the Parish, being made to monasteries, it always continued to be recognised. When parish churches were granted to monasteries, chaplains were appointed by the monasteries to look after the religious interests of the parish. These chaplains not being rectors or pastors, but acting in right of the monasteries which appointed them, got the name of vicars. The monasteries paid these vicars only a small proportion of the Parish Teinds, and the small allowances they received were the cause of many complaints. Provincial Councils issued numerous regulations on the subject, and about the middle of the thirteenth century it became customary to increase the allowance of the vicars by appropriating the small tithes of each parish to the vicar. In time the vicars of Scotland thus came to be vested with the *de jure* right of drawing the small tithes (such as those of hay, cattle, fowls, eggs, &c.), and hence these were known as Vicarage Teinds, to distinguish them from the larger Teind leviable out of grain by the proper pastor or rector of a parish, and known as Parsonage Teind.

Previous to the Reformation (1560) numerous Acts of Parliament were passed recognising the system and confirming the rights of the clergy. Restrictions also were imposed upon them, both by the Church* and by the State, to prevent their alienating or disposing of the right to the Teinds.

Immediately after the Reformation, the clergy of the Reformed Church claimed the Teinds. They did not, however, succeed in making their claim good, although it was almost universally acknowledged that the clergy of the Reformed Church stood in the place of the clergy of the Roman Catholic Church. Only a small part of the Teinds was devoted to their support, and although numerous Acts of Parliament were passed with the view of establishing the right of the Church, the great bulk of the Teinds was seized by the Crown. The greater part of the Teinds in Scotland was then, or shortly afterwards, treated as Crown property, and given in gift to

* A canon of a Lateran Council in 1179 provides, "*Prohibemus ne laici decimas cum animarum suarum periculo detinentes, in alios laicos possint aliquo modo transferre. Si quis vero receperit, et ecclesiæ non reddiderit, Christiana sepultura prevetur.*"

nobles and other powerful supporters of the Government for the time being, and a small and very inadequate provision was made for the clergy. The persons to whom these grants were made were called Lords of Erection or Titulars. The Teinds of some parishes were retained by the Crown, and among these were the Teinds of the Parish of Glasgow, of which the Crown is consequently Titular.

The clergy persisted in their demand for the full amount of the Teinds, as by Divine right belonging to the Church, and although they never succeeded in establishing their claim, we find that it was acknowledged by statute, as in the Act of the Scotch Parliament, 1567, c. 10, provision is made for the ministers of the gospel "until the Kirk come to the full possession of *their proper patrimony, which is the Teinds.*"*

In the reign of Charles I. a design was formed with the view of making a provision for the clergy, and of freeing the owners of land from the oppression caused by the levying of Teinds in kind, to recall the grants of Teinds which had been made to nobles and others at the Reformation. This proposal to resume the Teinds excited great alarm and forced the holders of Teinds to enter into a reference to the king, the result of which was that an arrangement was made by which provision was made for payment of Teinds in money instead of in kind, and the landowners got the right to purchase the Teind at a certain rate. It was provided that Teinds in the hands of Titulars should be redeemable at nine years' purchase by the landowner, and that Teinds in the hands of a Patron† should be redeemable at six years' purchase. The prices were fixed low because of the liability of such redeemed Teinds to augmentation of stipend. These results were contained in a decreet arbitral by the king dated 12th September, 1629, and were ratified by the Acts of 1633, c. 14, c. 17, and by the subsequent Acts of 1663, c. 16, and 1690, c. 23.

By the Act 1633, c. 19, it was provided that one-fifth of the rental should be held to be the Teinds. Practically this makes one-fifth of

* It is worthy of attention that the Protestant clergy, while claiming the Teinds as the patrimony of the Church, did not pretend that they were entitled to them for purely church purposes. Thus shortly after the Reformation, in a supplication to the Convention of Estates, they requested that "the patrimony of the Church should be employed to the sustentation of the ministry, *the provision of schools, and entertainment of the poor;*" and in the First Book of Discipline it is stated, "two sorts of men, that is, the preachers of the Word, *and the poor, besides the schools, must be sustained upon the rents of the Church;*" and again, "not only the ministers, *but also the poor and schools, must be sustained upon the Tithes.*"

† All Teinds which had not belonged to Bishops previous to the Reformation, or to which no one could show a heritable right, were held to belong to the Patron.

the rental equivalent to one-tenth of the yearly produce from the land for Teind purposes, and substantially abolished the distinction between Parsonage and Vicarage Teind.

Teinds thus came to be a fixed burden upon land which could be redeemed or purchased by the proprietor, and, while unredeemed, payable according to a fixed valuation.

At present all lands are liable to this burden, except certain lands granted *cum decimis inclusis et nunquam antea separatis*,* which need not here be considered, and lands of which the Teinds are redeemed. These latter, however, are still liable to a share in any augmentation of stipend. Teinds are payable to the Titular (*i.e.*, the proprietor of Teind as a separate estate), or to a tenant of the Titular or to a clergyman.

As has been said, in the Parish of Glasgow the Crown is the Titular, and thus the Crown is entitled to payment from the proprietors of the ground in the Parish of the surplus Teinds, after the stipends of the ministers of the Parish have been paid.

III. KINDS OF TEINDS.

Teinds are a separate estate, and the right of the Titular to his own tenth is as good as that of the proprietor of the land to his nine-tenths. They are held by a separate title, and even where the proprietor of the land is also Titular or Owner of the Teinds, a conveyance by him of the land will not convey the Teinds to the purchaser, unless they are specially mentioned as included.

Teinds are of three kinds—Drawn Teinds, Valued Teinds, and Redeemed Teinds.

Drawn Teinds were divided into Parsonage Teinds, or Teinds which were payable to the Parson of a parish out of grain raised by culture, and Vicarage Teinds, or Teinds payable according to usage out of minor products of the soil, to the Vicar of a parish, or, failing a Vicar, to the Parson. The origin of this distinction has already been explained, and probably the origin of Vicarage Teinds explains the difference between the two kinds of Teinds in regard to Prescription. Teinds were held to be leviable and payable by Divine law, and the

* To make good the exemption "it is necessary that there should be produced a title bearing date, prior to the Act of Annexation, 1587, c. 29; that it be granted by a Churchman of one of the regular orders of clergy" (say the Cistertian), "that it bear expressly that the lands are conveyed *cum decimis inclusis et nunquam antea separatis*" (that is to say with the Teinds included and never before separated from the stock), "or words of a similar import, and that it be confirmed by the Pope before the Reformation, or by the King before the Act of Annexation,"—Mr. Nenion Elliot, S.S.C., Teind-Clerk, Edinburgh, quoting from a law paper of 1864.

right of the Church to them could not therefore by any neglect be lost, but when the small tithes were separated for the benefit of the Vicars, their sacred character was lost, and if the Vicar, who was on the spot, and had every opportunity of enforcing his rights, did not choose to do so for forty years these rights lapsed. Thence it came to be law that Parsonage Teinds could not, but Vicarage Teinds could, be lost by Prescription.

Valued Teinds are those in which the rent has been fixed by a valuation by the Commission on Teinds (now the Court of Session). As has been seen, the valuation of Teinds was introduced in the time of Charles I. These valuations were made by sub-commissioners, with the assistance of officers called procurators fiscal, and when approved of by the general commissioners, became final. The records of a number of these valuations, preceding the year 1650, were lost at sea when they were being brought back to Scotland after having been removed to London by Cromwell, and the greater part of the records down to 1700 was destroyed in that year by a fire. Some of the valuations by the sub-commissioners were not brought before the general commission when made, but were acted upon, and from time to time since, these have been brought before the Court and approved of. In other cases, where the records had been lost or destroyed, the commissioners were empowered to hold Extracts of Decrees of Valuation, recorded in books kept by them for that purpose as equivalent to the original records, and this power they still retain and exercise when required. Much litigation has arisen as to the value and effect of such valuations produced in actions of augmentation, and this is not to be wondered at when their effect, especially if of old date, is considered. In such cases the rental of the land would be about one-tenth of what it is now, and the Teind, consequently, would be nine-tenths less than it would be if taken as one-fifth of the present rental. For instance, if in the time of Charles I. an estate had a rental of £100, the Teind would be £20, and, if then valued by the commissioners, would remain in all time coming at that amount; but if it had not been valued, it would be in the same position as, say, a neighbouring estate, the Teind of which was not valued, of the same rental then, but of which the rental now is £1000, and the Teind, consequently, £200. The proprietor with the valuation thus saves £180 in Teind, and has the further advantage that on the minister applying for an augmentation, he can surrender the whole valued Teind of £20, and be free from all further claims, as the Teind on his estate will then be exhausted.

A valuation of his Teind may still be effected by any Heritor by

a process in the Court of Teinds, but it is obvious that a valuation made now, when the rent of land is high, is of little benefit; and in the event of rents falling, of which there seems a prospect, would be disadvantageous to the landowner.

In the Parish of Glasgow very few Heritors have valuations.

Redeemed Teinds are those which have been redeemed by the landowner by purchase from the Titular. The terms of the redemption of Teinds have already been referred to and so far as known only a few proprietors in the Parish of Glasgow have redeemed the Teinds on their lands.

IV. AUGMENTATION AND LOCALITY.

The surplus Teinds form a fund for the increase of the Minister's stipend, and the apportionment among the Heritors of the unexhausted or surplus Teinds is under the jurisdiction of the Court of Session, as Commissioners of Teinds. No increase or augmentation of stipend can be allowed till after the expiration of twenty years from a previous augmentation.

An augmented stipend not localled (or assessed) on any particular Heritors may be demanded from any Heritor, but the Heritor who pays has a right of relief against the other Heritors. To prevent the confusion and litigation which would arise from this, on the Court allowing an augmentation an interim scheme of Locality is made up, according to which the payments of Heritors are made, subject to their right of relief when the final scheme is approved. Locality, therefore, means allocation, and the scheme is an apportionment of the stipend among those liable. In a Locality the stipend is not assessed in money, but in different descriptions of victual. Formerly the victual was measured according to old Scotch measure, and this, again, was converted into imperial measure. Since the Weights and Measures Act of 1878 became law, however, it is measured in imperial measure. The minister does not receive this in kind but it is paid in money according to the Fiars' prices * of grain for the year. As prices vary, the stipend varies, and there is thus an element of uncertainty as to the exact amount of a Minister's stipend.

* The custom of striking Fiars' prices of grain is very ancient, and other payments besides Teinds are determined by these prices. They are generally struck in February, and March, in all the Sheriff Courts by a Jury on hearing evidence of the prices drawn. The Jury divide the total of the prices received by the number of transactions of which they have evidence, and the result is declared the Fiars' prices for the year and crop preceding. The mode, however, differs in different counties, and is always very uncertain in the result.—*See Treatise Mr. G. Paterson, Advocate, Edinburgh*, 1852.

The expenses, so far as augmentation and modification of stipend are concerned, fall, at least in the first place, on the Minister, but the real opening for litigation and expense arises when the question as to the allocation of the augmentation among the Heritors comes to be settled. An approximate allocation is first made, and as soon as this is approved of by the Court as an interim Locality, the Minister draws his stipend in accordance with it, leaving the parties in it and other Heritors to litigate and settle as to over and under payment, after the final Locality has been got. Where necessary the interim Locality is followed by a rectified scheme of interim Locality, according to which the Minister then draws stipend, and which may raise another crop of litigations as to over and under payments. At last a final Locality is prepared by the Teind Clerk, and, if no objections are taken to it, is approved by the Court. If it is objected to, and objections are sustained, it is amended and is approved of by the Court as a rectified scheme of final Locality. Objections to all or any of the schemes of Locality may be made, and these have to be answered and argued before the Court, and their number may be, and often is, very great. The time required to bring such a process to a close is, as may be supposed, always long and uncertain. In one famous case it took 49 years, in the first case of the Parish of Glasgow 19 years, and in the last process of augmentation of that Parish, 15 years to obtain a final Locality. As will be shown afterwards, the result arrived at, after incurring enormous expense, is most unsatisfactory in both of the Glasgow cases to all parties concerned. All the expenses of making up these Localities, and of most of the litigation arising out of them, fall on the Heritors directly by decree of the Court, but even the Ministers' expenses in the process, and the expense of collecting stipend to which he is put, also fall on the Heritors indirectly, as the Court, in fixing the amount of augmentation, takes these into consideration, and, if they are heavy, increases the amount allowed.

This fruitful source of annoyance to the public, and of profit to the legal profession, is far from exhausted. The total amount of Teinds in Scotland available for the support of the Clergy has been estimated* at £330,000, of which £200,000 is already enjoyed by them, leaving £130,000 still available for future augmentation of stipend. Until this large sum has been exhausted, in the absence of Law Reform, there will still be room for all the legal complications and delays referred to.

* By Anderson Kirkwood, Esq., LL.D., Writer, Glasgow.

V. THE PARISH OF GLASGOW.

The Parish of Glasgow, more correctly called the Parish of Glasgow and Barony thereof, originally contained about 10,944 Scotch acres. Immediately prior to the Reformation the parish was of this extent, and the Minister having the cure was the Parson of Glasgow, and had the right to the whole Teinds, both Parsonage and Vicarage, of the Parish, and he was also Prebendary Primo of the Cathedral. Then, and for some time after the Reformation, there was only one place of worship, the Cathedral, and one minister in the parish.

In 1590 another minister was appointed for the Tron Church, but he does not seem to have had any right to a stipend out of the Teinds, and he and his successors were, and have continued to the present time to be, paid by the Corporation of the City.

In 1595, on an application to an Assembly of Ministers held in Glasgow, a minister of the Barony was appointed, and his congregation met in the lower part of the Cathedral, which was called the Laigh Barony Kirk.* After this the inhabitants of the town and territory of Glasgow were understood to be under the charge of the Minister of the Cathedral, or High Kirk, which is sometimes called the First Charge; and those of the landward part of the Parish under the charge of the Minister of the Barony, or Laigh Kirk, which is sometimes called the Second Charge. The Minister of the Second Charge ultimately acquired right to a stipend out of the Teinds of the Parish. The territory of the Burgh of Glasgow was included in the Parish, but whether it was co-extensive with the "town and territory" of Glasgow is unknown.

The original Parish of Glasgow, or of Glasgow and Barony thereof, continued to be of the same extent from previous to the Reformation till about the middle of the present century. But in June, 1847, the Parish of Shettleston; in July, 1849, the Parish of Calton; in July, 1850, the Parish of Maryhill, and in June, 1854, the Parish of Springburn, were disjoined from the Parish of Glasgow, and erected into new parishes *quoad omnia*. After the disjunction of these parishes, the Parish of Glasgow and Barony thereof contained, and according to the Ordinance survey still contains, 2734·818 imperial acres, and this includes the territory of the Burgh of Glasgow.

At the Revolution of 1688 the Teinds of the Parish of Glasgow were annexed by the Crown, and were afterwards let by the Crown, under successive tacks of nineteen years each, to the Magistrates of Glasgow for the good of the community, but under burden of stipend

* This is the church referred to by Scott in "Rob Roy."

to the Minister of the High Kirk, and, after the Second Charge was established, to the Minister of the Barony Kirk and their successors in office. These tacks included both the Teinds of lands within the Burgh or ancient Royalty and those of the lands without the ancient Royalty, but there were excepted from them the Teinds of Partick Mill, and certain others let to Campbell of Blythswood.

The Magistrates do not appear as tenants of these Teinds to have ascertained the true Teind of every Heritor, but they allocated the total amount of the burden which they had to meet from the Teinds upon the Heritors in proportion to the amount of valued rent of their respective lands appearing in the Land Tax Book. These books do not show the small sub-divisions of the land in the town, and the owners of such land therefore entirely escaped assessment, and only in one or two instances, where Heritors had obtained valuations from the Teind Court, were they assessed in the full valued Teind. The burdens which the Corporation had to meet from the Teinds were the Ministers' stipend, the Tack Duty to the Crown, and certain small charges for keeping the Cathedral in repair. The only persons, therefore, who profited by these leases were the Heritors.

Ultimately the Teinds collected by the Magistrates became insufficient to provide the amounts of stipend considered necessary for the maintenance of the Ministers, and in 1814 Principal Taylor, then the first Minister of the Parish, raised an action of modification and locality of the stipend of the Parish; and shortly afterwards Dr. Burns, the Minister of the Barony, instituted a similar action. In these actions, which were heard together, the Heritors admitted that the Burgh and Barony of Glasgow had originally formed only one Parish, and still continued in that position so far as Teinds were concerned, and that the whole Teinds were liable in stipend to the Ministers. The result was that Principal Taylor obtained a stipend of 25 chalders* half meal, half barley, with £30 for communion elements, and Dr. Burns a stipend of 32 chalders, with £30 for communion elements.

The Teind Court thus determined (first) that the Parish of Glasgow, or of Glasgow and Barony thereof, comprehended the Royal Burgh of Glasgow, as well as the adjacent territory called the Barony, and was one Parish and not two so far as Teinds were concerned; and (second) that the Teinds of that one Parish were liable in two stipends—one payable to the first Minister or Minister of the High Kirk, and the other payable to the second Minister or Minister of the Barony or Laigh Kirk.

* A chalder is an old Scottish measure containing 16 bolls, used for grain, and is the same as the English chaldron, which, however, is only used as a measure for coals.

In making up the Locality the smaller Heritors were omitted, and the rental was confined to the larger proprietors whose properties were mostly unbuilt upon, and in an agricultural or *pastoral state. The reasons for this were (first) there was no official register of the names and addresses of these smaller proprietors; (second) even if there had been there was no means of ascertaining the extent or agricultural and pastoral value of their lands; and (third) even supposing these could have been obtained, the Ministers would have been put to serious annual expense in collecting very small amounts from an immense number of persons. It would also appear that at that time there was an impression that land built upon was not liable in Teinds. The Locality, after objections had been stated by various Heritors and a considerable amount of procedure had ensued, was approved of on 2nd June, 1832, and a final decree of Locality was pronounced and remained in force until 1870.

In 1817, and while this Locality was being prepared, a fresh lease of the Teinds for 19 years was obtained by the Magistrates of Glasgow from the Crown. This lease expired in 1836, and no subsequent lease has been granted by the Crown to the Corporation.

Since 1836, therefore, after payment of the stipends, the surplus Teinds of the Parish have been payable to the Crown. After that date the Crown made various efforts to collect the surplus Teinds, and so far as the agricultural and pastoral districts of the old Parish were concerned these efforts were successful, and so also in some measure as regards portions of the Parish upon which buildings were erected. This collection proceeded upon the basis of the Locality of 1832, and therefore omitted the Teinds of all lands not contained in that Locality, and it was continued till 1864.

In 1864, in consequence of the Ministers having brought actions of augmentation, the Crown had to stop collecting the surplus Teinds, and, in the present state of the law, until a final decree of Locality was pronounced in 1879, the collection by the Crown had to be intermitted, as until then no Heritor could be compelled to pay surplus Teinds to the Titular, because until the stipend were finally fixed it was impossible to tell the amount of the surplus Teind. These arrears were only a personal debt and not a burden on the properties, and where properties changed hands, would in many, if not most cases, be lost. The amount of Revenue thus lost to the Exchequer

* It was decided in the case of Leavenworth's Trustees *v.* The City of Edinburgh, 19th January, 1856, that land in pasture as well as arable or agricultural land was liable to Teind, and that the Teind was in the case of both sorts of land one-fifth of the rent.

must have been very considerable, and the expenses of collection must have pretty nearly absorbed the remainder which was recovered.

In 1864 the Ministers of the Parish brought before the Court of Teinds a summons of augmentation, modification, and locality of stipend, in the usual form. They called as defenders the Crown as Titular, and about eight thousand persons and corporations as Heritors. The Heritors in the disjoined Parishes were not called, as although liable in augmentation to their own Ministers, the stipend payable to the Ministers of the Parish of Glasgow from the Teinds of these Parishes was fixed by the Locality of 1832, and is not liable to any increase. The names and designations of the defenders in this action were ascertained from the Lands Valuation Roll of the Parish. A copy of the roll was lodged as the "Ministers' rental" of the Parish, and it included the Burgage as well as the Barony portion of the Parish. The greater portion of the Parish being built upon, this rental gave not the agricultural or pastoral, but the house or rather the buildings rental. Advertisement of the Ministers' application was made in the usual form, which does not include any service on the defenders, or notice in the local, that is, in this case, the Glasgow newspapers; and on 24th December, 1864, the Teind Court held the Heritors confessed upon the rental with the exception of a few proprietors who had entered appearance. Those proprietors who appeared objected to the rental on the ground that it did not give the agricultural or teindable rental of their lands, and these objections were given effect to; and subject to them the Ministers' rental became the "proven rental," and on this erroneous basis the Teind rental of the Parish was assumed to be the enormous sum of £232,947, being about one-fifth of what was then the rental of the Parish according to the Valuation Roll.

On 31st January, 1866, the Court granted to each minister an augmentation of twelve chalders of victual—half meal, half barley. A Common Agent was thereafter appointed, and the Heritors were ordained to produce their rights to Teinds and Valuations. The orders of the Court were advertised in the Edinburgh newspapers only, and no valuations were produced. The Common Agent prepared a state of Teinds, which was lodged in process on the 26th June, 1868. The Lord Ordinary thereafter remitted to the Teind Clerk to prepare a Locality, and on 1st March, 1870, the Clerk reported two Localities,—the one for the first Minister, and the other for the second Minister. On the 4th March these were approved as interim Localities, and on the 11th March the Court allowed them to be seen and objected to as final Localities.

In 1870 the collector in Glasgow for the Ministers began his collection of stipend in terms of the Localities, and his demand for the first time called the attention of the great majority of the Heritors to the existence of the process of Locality, and some of them combined to have the Localities examined and, if possible, corrected. These Localities did not contain a list of Heritors from the "proven rental," but only those supposed to correspond with the Heritors entered in the Locality of 1832, and the others, called as defenders, were placed in an Appendix.

The Corporation of Glasgow lodged objections on the ground that the Burgh part of the Parish was not included, and after appearance had been entered by one Heritor in the Burgh and warning by advertisement given, the Lord Ordinary, on 18th October, 1872, sustained the objections by the Magistrates, and found "that the whole lands situated in the Parish of Glasgow and Barony thereof, except in so far as any of these lands are situated in the four Parishes of Shettleston, Maryhill, Calton, and Springburn, which have been disjoined from the said Parish of Glasgow and Barony thereof, *quoad omnia*, are liable in payment of stipend to the Ministers of the Parish of Glasgow and Barony thereof, and ought to be included in the scheme of Locality." Thus in 1872, as in 1832, it was held that no part of the Parish is entitled to exemption. The Localities were rectified in accordance with this judgment, and with certain other objections lodged by a few Heritors and sustained by the Court.

In 1872 new Localities were ordered, and in 1876 there were issued two rectified Localities. One of these is of the stipend of the first Minister, and contains 3701 entries, and the other is of the stipend of the second Minister, and contains 3469 entries. The stipend is stated in victual first, in Scotch bolls and decimals thereof, and then a conversion thereof into imperial bolls and quarters and decimals thereof. These localities thus contain 7170 separate entries, and of these about 6680 apply to the Parish of Glasgow and the remainder to the four disjoined parishes. In these Localities the Burgage part of the Parish in the centre of the city is included. The Teind set down in them opposite each name is, however, only an approximation arrived at arbitrarily, as the common agent had no data to enable him to ascertain the true amount, and no means of getting such data. These Localities are, therefore, only a little less incorrect than previous ones. On 17th January, 1879, however, they were declared final Localities by the Court. These Localities are erroneous in respect (first), a great number of the properties in the Parish have been omitted altogether; and (second) while a few of the properties included are rated according

to their agricultural and pastoral value, a great number of the properties included have been teinded upon the house or buildings rental.

To obviate these objections to get a perfect Locality, a correct state of the Teinds must be obtained. A statement of the essentials of such a state shows at once the difficulty, practically amounting to an impossibility in the present state of the law of ever getting in the Parish of Glasgow a perfect state of Teinds or Locality. These essentials are—

(1.) The name, designation, and address of each owner of property in the Parish.

(2.) A description of the property of each, sufficient (1.) to distinguish it from other properties, and (2.) to enable its annual agricultural or pastoral value to be ascertained, which would require its extent in square measure, and its exact position in the Parish to be defined.

(3.) The gross Teind of each property.

(4.) The old stipend, if any, localled upon each property under the Process of Augmentation of 1814-33.

With regard to the first of these essentials, the information can be got from the Lands Valuation Rolls. This would be a work of considerable labour, as the Roll for the Parliamentary Burgh of Glasgow contains parts of other Parishes, and the Valuation Roll of Scotland of Railways, Canals, &c., of the railways, canals, gas and water works in the Parish would have to be referred to. In 1864 there were about 8000 Heritors' names on the Valuation Roll. Since then the amount of building and consequent sub-division of land in the Parish has been very great, and there must be now at least 12,000 separate owners of land in the Parish. To make up a list from the Valuation Rolls is, therefore, very laborious and expensive.

As to the second essential a brief description of each property is in the Valuation Roll set opposite the name of its owner; but, except where the property is agricultural land in actual cultivation, the description is insufficient for Teind purposes. Where, also, the property is a house, or a combination of houses and grounds, except as to the local position of the property, the Valuation Roll for Teind purposes is useless. It does not give the area of the ground occupied, without which the agricultural or pastoral value, and consequently the gross Teind, cannot be calculated. Then, if properties be not what is called self-contained, it does not give sufficient data for distinguishing between the properties of different owners. Thus there may be two or more properties all falling under one description, as appearing in the Roll, though belonging to different proprietors, whose names are given in the Roll. Again, if a property

is a tenement of flats, these flats may belong to different proprietors, and the Valuation Roll will show each proprietor as owner of the ground. This confusion is even further increased where flats, as is not uncommon, are sub-divided among different owners. The brief description of properties in the Valuation Roll is thus not only insufficient, but misleading. Indeed, as the Valuation Roll is made up on quite a different basis and with a different object—viz., taxation according to actual rental, and not according to agricultural value—it almost necessarily follows that it is useless for Teind purposes. The Ordnance Survey maps, even those on the largest scale, do not give subdivisions sufficiently small to enable satisfactory description of separate properties to be prepared from them. Even supposing the exact extent of each Heritor's ground were got, to arrive at a correct rental it would be necessary to know exactly where in the Parish it was situated, and the quality of the soil in that Locality. It is clear that the rich land near the River would bring a much larger rental for agricultural purposes, than land on Blythswood Hill or Garnethill. The former might be worth £5 an acre per annum, the latter 30s, and between these are all varieties of soil ; and the rental, and consequently the Teind, if correctly stated, depends on the sort of soil, and its agricultural or pastoral value.

The third essential—ascertaining the gross Teind of each property according to existing law—may be accomplished in one of two ways. The first manner, viz., the ascertaining the one-fifth of the agricultural or pastoral rental required that that rental in each property should be first ascertained, and this we have seen is practically impossible. The second manner is by a decree of valuation by the Court of Teinds. In the Parish of Glasgow there are as yet very few such valuations, and of these properties so valued still fewer are now occupied as agricultural subjects. It cannot be expected that each of the 12,000 Heritors, whose Teinds are not valued, will bring an action in the Court of Session to have his Teind valued. The interest of each is too small to induce him to take such a step, and the expense out of all proportion to the result. The only way to fix the Teind, therefore, is to ascertain the area of each property, put a fair estimate of rent on it as an agricultural or pastoral subject, and take one-fifth for Teind. This, however, cannot be done, through the impossibility of ascertaining the area of the very numerous properties in the Parish.

The last essential—viz., the old stipend localled upon each property under the decree of 1814-32—at present it is impossible to obtain. The old properties, each of which was localled on as a whole in that Locality, have now been subdivided and covered with streets and build-

ings, but supposing the other three essentials mentioned were obtained, this would come to be merely an arithmetical process of division.

It is clear then that unless either all the Heritors in the Parish voluntarily give their assistance in making up a correct state of the Teind, or compulsory powers are granted to some judicial body or Court to compel them to give such particulars, substantially the preparation of a correct state of Teind becomes an impossibility. It seems hopeless to expect that the Heritors in the Parish, whose number is so great, can be expected, each and all, to trouble themselves to give the necessary information when, as has been seen, in a great majority of instances, their doing so will only lead to a burden, which meanwhile they escape, being placed upon their shoulders. The present state of the law on the other hand provides no means of compelling them to give the required information. A perfect state of Teinds for the Parish of Glasgow in the present state of the law may therefore be regarded as an impossibility.

The position of the Ministers of the Parish, meanwhile, is far from satisfactory. On the one hand the cost of collection of their stipend is very great, while on the other they must be aware that they are collecting their stipend from only a part of the persons who are liable in its payment, and consequently are inflicting an injustice upon those whom they force to pay. A correct Locality, however, would much increase the former of these grievances, as, while the amount levied on each person would be much decreased from what it is on those who pay at present, the number of persons from whom the stipend would fall to be collected would be much increased, and consequently also the expenses.

It will be seen from what has already been stated that the expense of an augmentation of stipend in the Parish of Glasgow must be enormous. The amount of the expense to the Heritors, directly and indirectly arising from the late process, including the objectors' expenses, must have been at least £7,000.* *This*

* The amount cannot be exactly ascertained. Even the Return lately authorised by the House of Commons, but not yet made, to show the total sum of taxed expenses found due, or for which decree was pronounced in processes of augmentation and locality in the Court of Teinds in Scotland during the twenty-five years ending 31st December, 1880, will not show the expenses incurred by heritors in having their titles examined in regard to Teinds where no litigation ensued, nor extra judicial expenses in litigations. There is another opening for annoyance, litigation, and expense which has not as yet been much noticed. Where a property subsequent to the final localities has been subdivided, the Teind of the whole is collected from one only of the proprietors, and he has to recover from each of the others his proportionate share of the whole. As time elapses from the date of the final localities, this must more and more give rise to litigation.

sum is nearly the whole increase in the stipends of the Ministers capitalized at twenty years' purchase. The augmentation of both Ministers was twelve chalders, half meal, half barley, and as each chalder may be estimated as worth about £16, the whole increase of stipend is only about £192 a year to each of the two Ministers. Of course the expense is incurred not in obtaining this, but in allocating it among the Heritors. This expense, and the expense of the previous Locality falls upon the Heritors, but is very unequally proportioned among them. So far some have escaped it altogether, others have paid an unduly small proportion, and a few have paid very much more than their fair share, while in return for all this expense, the loss to the Crown of surplus Teinds, and the annoyance caused to the Ministers and to Proprietors, what has Glasgow got?—*two final Localities of which it may be safely stated that not a single item affecting the present Parish of Glasgow is correct.*

From the foregoing it appears that in Glasgow the present Teind system—if what is so unsystematical may be so called—is most unsatisfactory:—

I. *As regards the Ministers.*—Because (*a*) of the expense they are put to in collecting their stipends in small sums varying from a fraction of a penny to a few pounds from an immense number of persons; (*b*) of the expense they have annually to bear, incurred in getting about 7,000 fresh calculations made every year to reduce to money the items of stipend stated in grain and meal, which vary annually in price; and (*c*) of the unpleasant position they are placed in of having to enforce payment of stipend unjustly levied even according to the present law, and of thus giving rise to complaints by Heritors belonging to all churches, but especially by Dissenters.

II. *As regards the Titular* (the Exchequer for the Crown).—In the loss of arrears of the surplus Teinds, and the opening for disputes and for litigation about small claims with each Heritor, leading to disproportionate expense.

III. *As regards the Heritors* (or proprietors in the parish).—Because (*a*) of the uncertainty of the burden on their properties. The present Locality is incorrect, and there never has been, and there never can be, in the parish a correct state of the Teinds; hence in any future process of augmentation and locality, there is no certainty as to what tax may be arbitrarily thrown on any proprietor, not only in name of Teind, but of expenses; and (*b*) of the inequity of the present Localities under which some Heritors are paying too much Teind, some too little, and some none at all.

IV. *As regards the Parish of Glasgow and Barony thereof.*—Because

it is in a very exceptional position in regard to Teinds in comparison with agricultural and pastoral Parishes, and it seems necessarily to follow, that in any legislation on Teind law exceptional provisions will be required to meet its exceptional position.

From the foregoing it will be evident that public attention, so long withheld, may be profitably directed to the Teinds. The incidence of this impost, founded in a remote ecclesiastical twilight, is unsuited to present requirements. The facts which appear in this paper relating to Glasgow are such that words can scarcely be found sufficiently strong to express the injustice inflicted on urban proprietors in the present state of the law. To obtain an increase of £192 of stipend to each Minister, is it credible that the whole cumbrous and expensive machinery of the Court of Session is required to exact that paltry sum from some 7000 individuals, at an expense of about £7000? Yet the employment of this legal steam-hammer to drive in a tin tack does not end the satire. The two Ministers of the Parish have to make an annual collection among the 7000 heritors to bring in on an average a very trifling sum from each contributory. What a misexpenditure of time and money, alike unsatisfactory to the contributories and the recipients! The absurdity is increased when we consider that the unfortunate Ministers cannot tell whether or not they are enforcing payment from parties who are really equitably liable in payment. They only know they have a decree against certain persons whom they force to pay.

Neither Churchmen nor Dissenters can lend their approval to the perpetuation of this anachronism. The movement now before the country for the rectification or abolition of what has become an anomaly will be materially strengthened and its progress hastened by the intelligent and earnest co-operation of the heritors in united action.

NOTE.—The following are authorities on Teinds :—Stair's Institutions; Erskine's Institutes; Connell on Teinds; Buchanan on Teinds; Second Report of the Commissioners of the Courts of Justice in Scotland; History and Settlement of Teinds in Scotland, *Edinburgh Review*, February, 1823; Dr. Anderson Kirkwood, Law of Teinds in Scotland, Journal of Jurisprudence, vol. 16; Teind Papers, by Mr. Nenion Elliot, 1874. In regard to the Parish of Glasgow, the writer is much indebted to a Memorandum prepared by a gentleman in the legal profession in Glasgow in 1874, not published.

APPENDIX No. I.

Memorandum for Use of Committee upon Teinds.

All lands in Scotland are liable in Teinds, with a few exceptions where the lands are held *cum decimis inclusis* flowing from a competent granter of such rights. The stipends of the Parochial Ministers of the Church of Scotland are provided out of the Teinds—the Court of Teinds being charged with the duty of providing a competent stipend in each case out of the Teinds of the particular parish. Subject to the burden of providing such stipend, the Teinds belong either to the landowners themselves, where the titles to the lands include the Teinds, or to persons who do not possess the lands, and who are in that case termed Titulars of the Teinds.

The amount of Teinds for which the lands of any proprietor are liable was originally held to be a Tithe, or tenth of the produce, which Tithe was by Act of Parliament held to be equivalent to one-fifth of the real rent of the land. But in the early part of the seventeenth century, under statutory enactments, the landowners were allowed to obtain valuations of their Teinds under certain prescribed procedure, and thus fix the value of the Teinds of their lands for all time coming. Sub-Commissioners, who went to the parishes, were appointed to make such valuation, and their Report required to be ultimately approved of by the Judges of the Supreme Court, forming for that purpose what was termed the High Commission. The powers of the High Commission were afterwards transferred to the Court of Teinds, whose approval is still required for any Report of the old Sub-Commission, which, notwithstanding the lapse of time, may from any cause not have been approved of. And any heritor whose Teinds have not been valued can now have them valued by process in the Court of Teinds.

The power conferred on landowners of having their Teinds valued was originally, and has continued to be, a permissive power, leaving it optional to each landowner to use or not as he chose, and the power might be exercised by him either as to the whole or part of his lands, even in the same parish. Hence has arisen much, if not all, of the confusion and litigation in connection with Teinds, and which never would have occurred if it had been imperative to value the Teinds of all lands, and then to settle an unchallengeable Teind Roll for each parish.

In each parish there is what is termed a "Locality," being a statement approved by the Teind Court, under which the minister's stipend is apportioned upon the Teinds of each heritor in the parish. Where the stipend which has been fixed by the Teind Court is equal to or exceeds the amount of Teind in the parish, then such "Locality," as settled after such exhaustion of Teinds, continues without alteration as the measure of the available Teinds of the parish. But the minister of a parish is entitled to apply for an augmentation of his stipend every twenty years if there is, or if he considers there is, any free Teind in the parish—*i.e.*, any Teinds not already localled upon. After certain procedure the Court of Teinds decide what, if any, augmentation shall be granted, and it then falls to be determined from what Teinds the augmen-

tation is to be satisfied. The heritors have then to appoint a common agent to prepare a statement of the Teinds in the parish and the liability of each heritor. This statement, when settled, affords the material from which the future "Locality" of the parish is to be framed. This is done in the first instance by an "Interim Locality," so that the minister may at once receive his stipend, but the titular and each heritor is at liberty to object to the interim apportionment if he considers that too much stipend has been laid on the Teinds of any of his land. At this stage the evils arising from the permissive character of the valuation come into play. It may be matter of uncertainty whether all the lands in a parish have been valued—whether the valuation held by a particular heritor includes all the lands held by his predecessor at the date when his Teinds were valued, perhaps two hundred and fifty years previously—whether the old valuation founded on by an heritor was made with all the formalities required by statute, or may not be set aside as informal—and various other questions which need not be here enumerated. For the discussion of these questions the interests of all parties are antagonistic, it being the interest of the minister to have lands declared unvalued, as otherwise there may not be Teinds to meet his augmentation, and equally so of one heritor against another, as the stipend has to be made up proportionally out of Teinds of the parish, and if an heritor can make out his neighbour's lands to be unvalued this will lessen the burden upon himself. And every time there is an augmentation the position of the Teinds of the parish is open to discussion, and litigation is encouraged.

A little consideration will show that most of these evils would be removed by making it imperative to have a Valuation of the Teinds of all lands in the parish, and this once done, and the Teind Roll of the parish settled, to allow no after challenge either as to the amount of Teinds or the lands liable therefor. This, it is considered, might be done by reverting to the original idea of a Commission for that purpose, in place of leaving it to the Court of Teinds, whose procedure is necessarily tedious, cumbrous, and expensive; and by the further provision that the Teind Roll of the parish when made up shall be final and unassailable as above expressed. It will still remain for the Court or some authority to determine whether the minister shall obtain an augmentation or not. But if he does get one, then there would be no unsettling of the previously existing state of payment of stipend by the different heritors, nor dispute as to the allocation of the augmentation, which would be allocated by determinate rules without the possibility of raising any of those questions which cause so much expensive litigation. And in those parishes where the Teind is exhausted by the present stipend, there will be no object for the minister to attack the formality of existing valuation.

It is suggested that the object in view would be best obtained by the appointment of a Royal Commission on the footing of the old Commission and of the English Procedure for Commutation of Tithes, regulated by the Act 6 and 7 William IV., cap. 71. This should not be difficult of accomplishment within a very reasonable time. Under the English Commission, the Commissioners valued the Teinds of 5695 parishes in five years. The number of original parishes in Scotland (to which alone the Teind Roll would apply), is under 1000, and the procedure in these should be much simpler and more expeditious than in the English cases. In the great majority of cases it will not be necessary to value the Teinds, but merely to call in the existing valuations. In many parishes the whole lands are confessedly valued, and have been so held in the existing "Localities" of the parishes, and all the Commissioners would have to do in these parishes will be to make up the

Roll from existing materials, and after such procedure as may be considered necessary have the Teind Roll of the parish declared final.

It is obvious that an Act of Parliament for carrying into effect the objects in view can only be passed by the Government of the day, and that it must be left to the legal advisers of the Government to determine the exact line upon which legislation should proceed. The Committee would therefore only indicate generally the heads of a Bill which, in their opinion, might be brought before Parliament:—

I. The Teind Court to be abolished as a separate Court. All its jurisdiction, so far as not affected by subsequent provisions of this Act, to be transferred to Court of Session. Separate office and Teind Clerk to be maintained, under direction of Court of Session.

II. Two Commissioners, one at least being a member of the Bar of years' standing, to be appointed by Crown, with power to appoint Assistant Commissioners, Clerks, &c. Assistant Commissioners may hold inquiries in parishes where this will facilitate operations.

III. The Commissioners to make up a Teind Roll for every parish in Scotland. This Roll to show—

(1.) Teinds of the whole lands in parish.
(2.) Stipend presently payable from lands.
(3.) Unexhausted or surplus Teinds (hereinafter termed Surplus Teinds), and whether proprietor has an heritable right to such Teinds, or if Crown or Titular has right to same.
(4.) Any other matter considered requisite to show the position of the Teinds in the parish.

IV. When the amount of Teinds has been set forth in a Locality and has been unchallenged, the amount thus stated to be accepted by Commissioners as correct; and generally old valuations to be accepted when same have been judicially founded on in any Locality and not challenged. When valuations have been reduced or set aside on ground of informality, Commissioners may consider circumstances, and limit Teinds to present payment of stipend, or to amount of stipend with a reasonable addition. When Teinds not valued, one-fifth of rental to be taken, subject to present rules as to deduction.

V. After such procedure as may be directed in the Act, and after such power of appeal to Court of Session against Commissioners' decision as may be defined, the Teind Roll of each parish to be held as finally settled. To be printed, and accessible at Sheriff-Clerks' offices, &c.

VI. All future applications for augmentation of stipend to be dealt with by Court of Session under procedure to be detailed in the Act. And the allocation of any augmentation granted to be made by the Teind Clerk under direction of the Court, upon the heritors holding Surplus Teinds as shown by the Teind Roll of the parish, and according to the legal rule applicable to the order of liability.

The Committee consider that legislation on this footing would not impinge in any way upon the rights of the Church of Scotland in the matter of Teinds, leaving these exactly as they are, while removing cause of possible ill-will between a minister and his heritors, and putting an end in as far as the heritors are concerned to the present uncertainty and litigation *inter se*, and to the expense consequent upon the present system.

A further suggestion has been made by some of the Committee, by which an enactment should be made enabling heritors to purchase up their Surplus

Teinds, the price being paid to Ecclesiastical Commissioners to be appointed by the Act, who would then hold such price as a surrogate for the Surplus Teinds of the parish, and subject to the legal rights of all concerned. Such enactments would provide for the division of such price between the Titular, where there was such, and the Ecclesiastical Commissioners, and deal as might be arranged with the case of the Surplus Teinds drawn by the Crown, and for the preservation of the rights of all parties interested therein. It has further been suggested that the price fixed might be converted, at the option of the heritor, into an annual payment for twenty years, such annual payment being the amount of the annuity which the purchase price would purchase for twenty years at 4 per cent. interest, and to be a first charge on the heritor's lands, after feu-duties, &c.

Whilst mentioning these Suggestions the Committee consider them to be matters not strictly within their province.

APPENDIX No. II.

The Lord-Advocate on the Law of Teinds.

A deputation, representing a committee chosen from the different counties in Scotland with reference to an amendment of the Law of Teinds, met with the Lord-Advocate in his official chambers in Parliament House, Edinburgh. The members of the deputation were—The Earl of Minto; Mr. Dundas, of Arniston; Mr. Brodie, W.S.; Mr. T. G. Murray, W.S.; Sheriff Guthrie Smith, and Mr. Balfour, W.S.

Mr. Dundas explained the views of the committee, which, he said, consisted of representatives from 25 Scotch counties, and Mr. Balfour read the committee's report. It stated that the committee, in the present scheme, had no intention of impairing the financial interests of the Established Church. There were 453 parishes in which the Teinds were believed to be exhausted, and 470 in which there were free Teinds. Of the latter number, there were 130 in which the value of the Teinds did not exceed £100, and in the remainder it was over that sum. In cases where the Teinds were under £50, it was suggested that the Teind might optionally be given to the minister as an augmentation, and the Teind Roll declared final. If this were done, the Teind question might be settled in from 500 to 600 parishes. In the parishes remaining to be dealt with, the committee suggest that the amount of Teinds already stated shall be held as final, and that old valuations judicially founded on shall be accepted as final, and titles acted on as conveying rights held to have conveyed them. In cases where Teind rights have been set aside, power shall be given to reconsider them; and in the case of Teinds not valued, they should now be valued.

After some questions had been put and answered,

The Lord-Advocate said—It is a satisfaction to me to meet this influential committee on such an important subject; and I think no one can doubt that they have taken a most proper mode of dealing with this question, and submitting it to the consideration of Parliament, by appointing a committee of their own number, including several legal gentlemen of experience and position, to confer with me on the matter. I need not say it will be the anxious desire of Government to give all possible weight to the opinions of such a body. I am not surprised that the subject of the administration of the law of tithes should have engaged the attention of the landed proprietors of Scotland. Teind law has long been the unweeded garden of Scottish jurisprudence; and I know of no reason for the neglect with which this subject has been treated by reformers unless this, that the parties most interested have not until now moved in the matter. Having had an opportunity of reading the report of the committee, I have of course considered whether it is practicable to carry out the objects desired without touching upon other subjects of a more controversial nature; and, as the question is within my own department, that is no reason why I should not at once give an answer to the request of the deputation. You will not, of course, understand me as committing myself to all the details of your scheme; but I may say that I am willing, as soon as the state of the public business admits of progress being made, to submit a bill to Parliament on the basis of your recommendations. I believe we are at one in

desiring that the measure shall be purely a Property Act, an instalment of what is popularly known as the amendment of the Land Laws. It is not to touch even the fringes of any ecclesiastical question; it is not to take away or diminish the pecuniary rights of any minister of the Church; nor is it to affect in any way the proprietors' or titulars' rights in the unexhausted Teinds, or the claims recognised by law upon the revenue of this description of ecclesiastical property. What we contemplate is, that the value of the Teinds and the order of liability of the heritors *inter se* should be ascertained once for all, instead of being contested under an interminable series of litigations between heritors, renewed every time that the stipend of the minister is augmented. I agree with the committee that where Teinds have been treated as valued in successive localities, such valuations should not be disturbed on the ground of technical errors affecting the decree of valuation. I also agree that the order of liability amongst heritors, when once settled by judicial authority, should not be subject to revision by other Judges under a new application to the Court. When it is considered that on every occasion of modifying a stipend the rights and titles to the Teind Property of the parish are investigated, it is plain that the materials exist for an assessment roll such as the committee suggest, and that there are, and can be, very few unsettled legal questions which might not be summarily settled without detriment to any substantial and real interest. All that is necessary is that notice should be given to all parties interested, and that in the few and exceptional cases where a legal difficulty may present itself there should be a reference to an Executive Commissioner, whose decision would command respect, and would most probably be acquiesced in. I think that the existing legal establishment of the Court of Teinds may reasonably be expected to give their services towards the work of making up a General Teind Roll, with such assistance as Parliament may be advised to sanction. I need not say that our prospects of dealing effectively with the question depends very much on the support we may receive from the land proprietors and the public. An unopposed measure could be passed during the ensuing Parliamentary session, and it will be my endeavour to frame a measure which may pass unopposed. If my expectations on this subject should be disappointed, it will be for the Government to determine whether time can be found for its discussion, having regard to other requirements, and to the fact, too often overlooked, that only a small part of the time of the House of Commons is devoted to actual legislation. There is just one special point in the report to which I have not referred, but on which I may be permitted to add a word. I think it is the last preposition of the report, with regard to dealing with these cases in which Teinds have been unvalued. That is the suggestion of the Clerk of Teinds. I think there may be cases where that would be a useful and reasonable proposal, and I think there are others where it might be improper. If there were abundant free Teinds then the question would be whether the decision of the Court holding lands to be unvalued should be reconsidered. That would be a question for the heritors. I mean the reconsideration of their decision would involve the increasing the liability of other heritors, and probably they might not object, on the ground of neighbourhood and the sense of equity, the appeal of this paper to allow such consideration to take place without setting up their proprietary rights as a bar to it. On the other hand, where the Teinds are exhausted or nearly exhausted, and the chance of a minister getting a further augmentation depends upon the validity of the decree holding the land to be valued, then it would scarcely be fair to reconsider that question. It could not be reconsidered without touching upon the rights of the Church, which, according to your first proposal, it is not intended to affect. Therefore this appears to be a point

rather for compromise, on which power might be given to the commissioners appointed to deal with the subject, to reconsider upon the basis of equitable arrangement come to with the consent of all the parties concerned.

Mr. MURRAY said there was a class of cases in which the Court of Session reduced a number of decrees upon the ground of technicality. Then a particular case went to the House of Lords, and the House of Lords took a different view and sustained the decree. These were the cases that were really pointed at in the paper. He could adduce one particular parish where there was a decree of the valuation of the whole parish which was set aside by the Court of Session on the ground of technicality. If that case was now to go to the House of Lords, according to the decision since given, it would not have been set aside. These were cases where obviously an executive commissioner could settle the thing without further litigation.

The LORD-ADVOCATE said he thought the kind of commissioner which would be satisfactory would be a commissioner of judicial rank, and, as his time ought to be saved as much as possible, he would have competent legal assistance, so that he would only be required to interfere where there was a legal question for decision.

The Earl of MINTO then stated that he wished merely to say what satisfaction it gave him to have taken part in a movement which, under the judicious and admirable management of the convener of Mid-Lothian, with the aid of the Lord-Advocate, promised to have such good effects as he thought they might now look for. As far as he could gather from what had been said by the Lord-Advocate, he thought they should be perfectly satisfied that he had entered into the feelings which animated those in the county committees, that they should not encroach upon what they might call political questions or controversial subjects, but confine themselves to the practical and particular matter of improving the Law of Teinds, and keeping scatheless all the interests which might be connected with it. That he understood to be the object of the Lord-Advocate. If the Lord-Advocate could be fortunate enough to introduce a measure which should not meet with opposition in Parliament he would be very glad, but he confessed he would be very much astonished; because some persons would think they had an ulterior object in view, which would be far from his mind. It might be said that this was not a time to bring forward a question not of primary importance. The time of Parliament would no doubt be occupied with the Irish question, but he hoped that this was one of a class that, with the ordinary intelligent discussion, might meet with as much success as if they had organised a great system of agitation and a rebellious movement. He thought that in some respects the time was very auspicious for the introduction of such a measure, because, as the Lord-Advocate had observed, it was part of the great land question, not perhaps a very important part, but still an essential part of the question. The insecurity of the present state of the law was such that a man might think twice before he bought a bit of land when he did not know what liability attached to it. He could only say for his own part, and he hoped the feeling of the deputation was the same as his own in that respect, that he had to thank the Lord-Advocate for the manner in which he had received the deputation, and the observations he had made.

The LORD-ADVOCATE said he was much obliged to Lord Minto, who would be of great assistance to him in the House of Lords.

The deputation thereupon withdrew.

SOME PRACTICAL HINTS

FOR THE

TREATMENT AND THE PREVENTION

OF

DISEASES OF WOMEN.

BY

WILLIAM GOODELL, M. D.,

PHYSICIAN-IN-CHARGE OF THE PRESTON RETREAT; CLINICAL PROFESSOR OF THE DISEASES OF WOMEN AND CHILDREN IN THE UNIVERSITY OF PENNSYLVANIA, ETC.

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1874.

SOME PRACTICAL HINTS

FOR THE

TREATMENT AND PREVENTION

OF

UTERINE DISORDERS.

By WILLIAM GOODELL, M. D.,

Physician in charge of the Preston Retreat, Clinical Lecturer on the Diseases of Women and Children, in the University of Pennsylvania, etc.

From letters of inquiry which I am receiving from widely distributed portions of this country, I am led to infer that a few hints with regard to the treatment and the prevention of the more ordinary forms of uterine disorders will not come amiss to some of the many readers of this journal. In order, however, to make these hints as practical as possible, this paper will be made up mainly of categorical answers to the leading questions of my correspondents. But for this very reason it will necessarily be somewhat dogmatic as well as desultory in its character; and will also, I fear, compel the frequent use of the first person, an egotism for which, in advance, I ask indulgence.

Instruments.—The instruments which I recommend the students of the University to purchase at the outset of their practice are as follows:—

One base-expanding bivalve speculum (a modification of Smith's), whose blades are three inches and three-quarters long, and one inch and a quarter wide. Two glass speculums (Fergusson's), the one not longer than five inches and three-quarters, with the smaller aperture measuring one inch and a quarter in diameter; the other five inches long, and at the smaller aperture seven-eighths of an inch wide. Two probes or applicators, of aluminium wire, with one adjustable handle. One uterine tenaculum. One small volsella forceps. One speculum forceps. One uterine sound. One uterine repositor. One hard rubber uterine syringe with a long and flexible nozzle. One uterine dilator.

This list by no means exhausts the number of instruments required for special cases of uterine disease. But, in my opinion, no one can intelligently and successfully treat the ordinary diseases of the womb without, at least, the foregoing instruments.

At first blush the blades of the bivalve speculum (Figs. 1 and 2), may seem too short. But practically, if their tips be directed to the previously ascertained site of the cervix, it will be found that, when widely separated, they will so stretch the uterine end of the vagina as to bring down the cervix into the field of vision, not only very close to the eye of the physician but within reach of his index finger. For diagnostic or for operative purposes these are advantages not to be overlooked. In very rare cases, such as of fat women, whose vaginas are large and flabby, of those in whom, by a fibroid or an ovarian tumor, or by pregnancy, the womb is lifted up above its accustomed site, the cervix may not be well exposed by this instrument. In these very exceptional cases the larger of the Fergusson speculums may be substituted for the bivalve. The smaller glass speculum is put down in the list because it will occasionally be found useful in the examination of un-

Fig. 1.

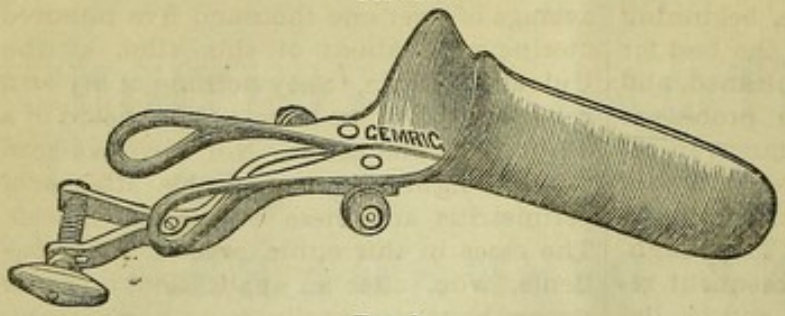
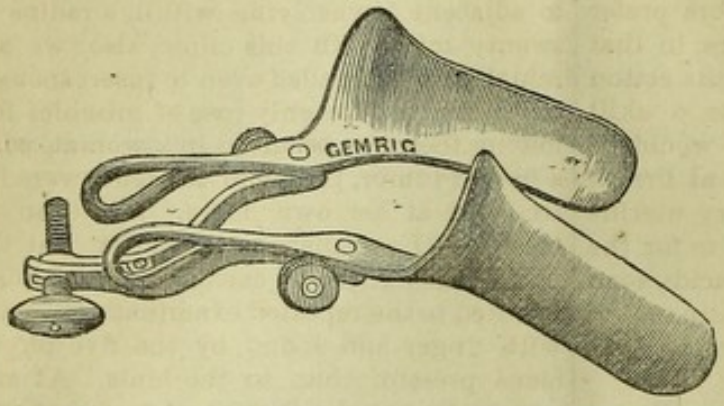


Fig. 2.



married women, or of those in whom the introitus vaginæ is either unnaturally small or hysterically contracted. Yet even in these cases, after the slow admission of one, and then of two fingers, the parts can usually be sufficiently dilated for the admission of the bivalve speculum. Under ether this can always be done.

I feel quite sure that physicians who have once used this speculum, with the woman lying on her back, will never wish to return to their old-fashioned cylindrical or quadrivalve speculums. One hint, however, to those of my readers who do not feel disposed to give up their long-used glass speculums for a new and untried instrument. The Fergusson speculums as sold in the shops are entirely too long and too narrow. For exceptional cases it is well to have on hand the two sizes above given; but the best working speculum of this kind is, in my experience, one not over five inches in length, and with the smaller aperture not under one inch and one-eighth in diameter.

The uses of the other instruments will be indicated in the proper place; but a word here with regard to two articles on the list: The probes, or applicators, of aluminium wire, are chosen because this metal is flexible and resists the action of most of the corrosive agents employed in uterine therapeutics. A sliding and removable handle is recommended for these applicators, both because a fixed one makes the instrument too long for easy carriage, and because I have found that the wire is very liable to break off at the line of junction with the handle. The uterine sound should have merely the usual knob at the distance of two inches and a half from its tip. If otherwise graduated it will very soon snap off at one of the deep notches made to mark off the inches. It should, further, consist of one piece; else by the wearing away of the thread of the uniting screw the relation between the handle and the tip is lost. One more word with regard to the sound. It should never be introduced until the physician has first satisfied himself that the womb is not gravid; and this golden rule holds good for all uterine applications. I lay stress on this point, for I once carelessly brought on an abortion in an estimable married lady, who was quite as much surprised at the result, but not quite so much mortified as I was. Again, I have, on more than one occasion, been consulted for uterine disease by designing women, who, being pregnant, sought advice with the hope of having a cheap riddance, induced by the treatment. Once, after arranging to meet a physician who lived some twenty miles off, I received a countermanding telegram followed by a letter, explaining that the supposed uterine disease of his patient, a reputable married woman, was pregnancy, and that her sole object was the hope of having an abortion provoked by the examination. His suspicions had been aroused by mine, and by working on the fears of his patient he extorted a confession. These facts should lead one to be on one's guard.

Local Treatment.—The following agents employed at the clinic of the University are enumerated in the order in which they are ordinarily used. The undiluted commercial liquid carbolic acid (Calvert's No. 4), or a saturated solution of the crystals; a solution of one drachm of nitrate of silver to the ounce of glycerin; a saturated tincture of iodine; fuming nitric acid and the solid stick of lunar caustic.

With the exception of the last, each caustic is applied by means of a film of cotton

wool wrapped evenly around about two inches of the aluminium probe, beginning at its tip. Jeweler's cotton is the best for this purpose; it is chemically cleaned, and has a long and fine fibre. These probes are usually roughened for that distance, in order to give the cotton a hold which would prevent it from slipping off and remaining behind in the uterine cavity. This roughening, however, makes the subsequent removal of the cotton too tedious, and too liable to stain the fingers. I therefore prefer to use a smooth probe, taking care, in that case, to wrap the terminal end of the cotton very tightly. But, as this needs a skill which practice alone can give, it would be well for a beginner to make use at first of the roughened wire. The ordinary uterine sound can of course be resorted to for the same purpose; but the stronger acids soon corrode it, while the bulb at its tip makes the removal of the cotton a dirty and difficult process.

The probe thus armed, after being dipped into one of the above liquids, I *always* carry, through a speculum, *up to the fundus of the womb whenever the internal os permits it to pass.* In the great majority of cases this can be done, provided the anterior lip of the cervix is first hooked down by the uterine tenaculum (Fig. 3); a procedure which steadies the womb and straightens it out. My reasons for cauterizing the whole mucous tract of the womb are fourfold. (*a*) If the mucous coat is alone involved, the symptoms often fail to inform me how far up the disease has extended. (*b*) Owing to the absence of any sub-mucous connective tissue, the inflammation of the mucous membrane must sooner or later more or less involve the parenchymatous structure, and this must be avoided at all hazards. (*c*) Whenever the internal os is sufficiently patulous to admit the armed applicator, I accept this fact as an evidence that the disease is not limited to the cervix. (*d*) By this practice, in a measure empirical, I err on the safe side, and obtain far better results than I did when limiting my applications to the cervical canal. Nor is this bolder plan of topical medication more hazardous than the ordinary one limited to the cervical canal. Out of a yearly average of over one thousand five hundred uterine applications of this kind, at the University clinic, to say nothing of my own private patients, we have not yet heard of a death from this cause. Nor have we seen any but light and manageable attacks of perimetritis, and these very seldom indeed. The cases in this clinic consist of out-patients, who, after an application, however strong, have necessarily to go home, many to adjacent towns lying within a radius of twenty miles. In this clinic, also, we are reluctantly compelled even to insert sponge-tents, and yet the only case of mischief following their use occurred in a woman with a fibroid tumor, in whom the tents were introduced at her own home. But even in this case I am disposed to think that the peritonitis lighted up can be more fairly attributed to the repeated examinations, made with finger and sound, by the five physicians present, than to the tents. At any rate, it taught me the lesson to forbid any but absolutely necessary examinations of the uterine cavity. I have about come to the conclusion that he is the most successful gynæcologist who is the most plucky, and that, no matter how severe or mild the treatment of uterine disorders, the percentage of accidents will be about the same, and that a very low one. The only severe attack of perimetritis of which we have any knowledge followed the application of the solid stick of nitrate of silver merely to a patch of granular erosion on the cervix. In my private practice I have yet to see, from this cauterization of the whole mucous lining of the womb, any worse results than an occasional attack of uterine colic, but rarely so urgent as to require morphia hypodermically. For all pelvic inflammations induced by a uterine treatment, or, indeed, for those following labor, I am in the habit of recommending from 16 to 24 grains of quinia during the twenty-four hours; morphia in quarter-grain doses repeated frequently enough to keep under the pain; and, while the pulse runs high, from 60 to 80 grains of the bromide of potassium. From the umbilicus downward the abdomen is to be painted twice a day with the compound tincture of iodine, and then to be covered by a large mush poultice, over which is spread a piece of oiled-silk or a well-greased sheet of brown wrapping-paper. The diet is to consist of beef-tea and milk *ad libitum*, egg-nog, and

FIG. 3.



more or less of whiskey or of brandy. When the pelvic pains are very acute the morphia should be given hypodermically until they are controlled.

With the exception of that of the fuming nitric acid, the liquid applications are to be made about once a week, and to be constantly changed about from one to another. In order to insure a thorough cauterization, it will often be advisable to make two or three applications, the one directly after the other, until the walls of the uterus are irritated into contracting down upon the probe, and griping it; and also when the cervical canal is not very patulous, first to stretch it open by the uterine dilator. In making these applications no other care need be taken than, before removing the speculum, to swab out or syringe out the redundant portion of the fluid, which has run down over the posterior lip of the cervix. But, in order to apply the nitric acid safely, greater precautions must be taken. The cervical canal, unless very patulous indeed, must be previously dilated, either by a tent or by the dilator, preferably by the latter. If the bivalve speculum be used, very great care should be observed to avoid touching the walls of the vagina with the acid. Whatever the speculum, water enough to reach to the lower margin of the os should be thrown into it, by that very handy little instrument, the uterine syringe (Fig. 4). Immediately after the application, several syringefuls of water should be projected upon the cervix. A tampon of cotton-wool, with a withdrawing thread attached, may then be dipped into water and left for twelve hours in contact with the cervix. After ten days or two weeks have elapsed, one of the milder caustics may be applied. In obstinate cases I have sometimes found it necessary to make a second application of this powerful acid. This, however, should not be done before a month has passed by, lest closure of the cervical canal should result. When granular erosion is associated with a gaping or an everted os, there is no better treatment than by this acid. In such a case it must be applied freely to the cervical canal and less so to the uterine cavity. In menorrhagia springing from a congestion or from a sub-involution of the womb; in cases of wombs too tender to bear the pressure of a hard pessary; in obstinate leucorrhœa, it does much good when boldly carried into the uterine cavity. I am very partial to this escharotic, nor have I yet found that its use is followed by symptoms more urgent than those produced by the milder caustics. In carrying this acid about, one caution must be carefully observed by the physician for his own protection. By the jolting of a carriage, or by other constant agitation, a gas is generated which, upon the quick removal of the stopper, violently forces a fine spray of the contents out of the bottle. He must therefore avert his face while he slowly removes the stopper, which, by the way, should be made of glass.

FIG. 4.



The solid stick of nitrate of silver is no great favorite in our clinic. It gives more pain than the liquid preparation, is less manageable, and often causes a brisk hemorrhage. Its prolonged use is so apt to be followed by a hard, gristly cervix, or by contraction, or even by closure of the cervical canal, that it is restricted pretty much to those cases in which the os is gaping or everted. By first warming the tips of the aluminium probes and then dipping them into fused nitrate of silver, they receive a coating of the caustic which can be readily passed up into the uterine cavity; not, however, without considerable uterine colic. A common test tube held over the flame of a candle is all the apparatus necessary for this purpose. This is an admirable way of treating sub-involution and other affections of the body of the womb. In stubborn cases of amenorrhœa advantage may thus be taken of its tendency to excite hemorrhage. Whenever this caustic is passed up into the uterine cavity the hypodermic syringe should be within reach.

A saturated ethereal tincture of iodine being much stronger than the corresponding alcoholic tincture, I have found very useful in marked cases of cervical endometritis. But the fear lest the subtle vapor of the ether should escape through the fallopian tubes into the peritoneal cavity, or should force in some of the liquid before it, has made me somewhat chary of introducing it into the uterine cavity.

The above caustics being applied weekly, in the meantime the woman should herself daily irrigate the womb with tannin, lead or zinc solutions. A very excellent one is a

strong or even a saturated solution of the chlorate of potassa. For this purpose the Davidson syringe is the best. A still better treatment is the introduction, at bedtime, into the vagina, of a suppository containing a few grains of the acetate or the iodide of lead, of the sulphate of zinc, or, what is better, from five to ten grains of tannic acid. For obstinate congestions, apart from local depletion, one drachm of the fluid extract of ergot, or an equivalent dose of one of its preparations, should be nightly introduced into the rectum, either by a suppository or by a starch clyster. As vaginal suppositories are expensive and quite difficult to make, certain very efficient substitutes can be used. For instance, the tannin or any other dry astringent powder may be projected by the woman herself upon the cervix, through the nozzle of one of those ingenious tin toys which are imported from France for the purpose of scattering "roach-powder" about. Or else—after the plan of my friend, Dr. E. L. Duer—a teaspoonful of glycerin, containing five grains or more of tannin, of acetate of lead, or of sulphate of zinc, may be poured into a hollow pressed by the thumb into the centre of a thin sheet of cotton-wool, not quite so broad as one's palm. The edges being now gathered up and securely tied, there will be formed a small and dry tampon, which the woman, after getting into bed, can herself push up against the cervix. For convenience of removal, the ends of the string should be left long enough to hang outside of the vulva. Medication by vaginal suppositories is to be preferred to that by vaginal injections, because in the former the remedy lies longer in contact with the cervix, and because it is probable that more or less of it is carried up directly into the uterine cavity, either by capillary attraction or by that reversed peristaltic or suction action of the uterine fibres so lately described. In future, when the vaginal suppository is mentioned, the term will mean, indifferently, some one of the above methods.

I am more than ever impressed with the fact that in general the caustic applications are made too continuously for nature to have fair play, and that irritation and inflammation are actually kept up by too short intervals of rest. It is, therefore, my habit, after making from four to six applications, each one a week apart, to send my patient away just before a catamenial period, with directions not to return until two such have passed. Not only will much be gained by this intermission in the treatment, but an opportunity for impregnation is thus given.

With regard to the conjugal relations during local treatment, while, as a rule, abstinence is recommended, I yet sanction the advice of the apostle, that "the husband render unto the wife due benevolence; and likewise also the wife unto the husband." While coition should always be completely performed, on the one hand the husband must not be too exacting; on the other, the wife should not restrain her own inclinations; for intercourse, then, appeases the congestive orgasm of the reproductive apparatus.

Local Depletion.—Since congestion is the essential basis, the *punctum saliens* of uterine disorders, it stands to reason that local blood-letting should be the remedy. Whenever, therefore, the cervix has lost its natural pink or gum-like color, and becomes crimson, it needs depletion. For this purpose nothing answers better in the end than two or three leeches pushed up to the cervix through a glass speculum. In leeching, the os uteri must first be well plugged by a clean morsel of cotton, with a withdrawing thread attached; otherwise a leech may creep into the uterine cavity and fasten itself there, giving intolerable anguish. The week succeeding the catamenial flux is always the best time for their application. But leeches are often capricious, always expensive, sometimes unattainable, and their application is a tedious and unpleasant job. A substitute is therefore necessary. In lieu thereof, once a week or a fortnight, the cervix may be punctured at three or more points by Buttle's spear-pointed scarificator (Fig. 5.) by a straight-pointed bistoury, or by a tenotomy knife. Not more than from two to four tablespoonfuls need be taken at one time. The difficulty usually consists in drawing blood enough, but occasionally too much will flow. I have seen it spout out as if a large vein had been struck. It is well, therefore, to watch for a moment the first puncture before making others. In a large, flabby and angry-looking cervix, in cases of retroflexion accompanied by marked con-

Fig. 5.



gestion, blood enough will often escape from but one superficial puncture. In firmer and paler cervices the punctures must be made deeper and more numerous. The point of the instrument should penetrate to a depth of from one-eighth to one-quarter of an inch, and, in order to enlarge the opening, should be withdrawn by a slight turn of the wrist. To collect the blood as it flows out of the speculum, without soiling the clothes of the patient, I have found nothing so convenient as an ordinary kitchen gravy-ladle of tinned-iron, which has its well-earned place in my leather bag.

After the bleeding has ceased, the uterine application is to be made. If it persists, a stream of cold water may be thrown upon the cervix, or each bleeding point can be touched with the solid stick of nitrate of silver. Often the mere introduction of the ordinary application into the uterine neck and cavity will so condense the tissues as to stop the bleeding. On very rare occasions I have been obliged to tampon the vagina loosely with cotton-wool dipped in a solution of the subsulphate of iron. Local depletion is a very important adjunct to the treatment of uterine diseases. It is, indeed, often the pith of the treatment. Its neglect is a common cause of failure. The condition of the cervix is not, however, always an infallible criterion as to the necessity for drawing blood, for the congestion of the womb may be limited to its body. Depletion may, therefore, in general be resorted to whenever the womb is hypertrophied; whenever its body is tender to the touch, or too sensitive to bear the pressure of a pessary; whenever pelvic pains resist the ordinary treatment, and, finally, in most cases of flexion or of dysmenorrhœa. No inflexible rule can be laid down with regard to the number of times this operation should be performed. My own custom is to draw blood at intervals of a week or two until the general or local symptoms are decidedly improved.

General Treatment.—One cardinal rule in the treatment of all uterine disorders is the internal administration of iron, and of other tonics, unless contra-indicated. To these may be added, whenever the womb, as a whole, is congested or hypertrophied, ergot, quinia, arsenic, or bromide of potassium, either singly, or more or less in combination. Whenever one of my patients can or will take cod-liver oil in conjunction with the syrup of the iodide of iron, I feel that half the battle is won. The bowels should be kept soluble. An excellent pill for this purpose, to be taken at bedtime, is:—

℞.—Ext. colocynth. comp., gr. ij;
Ext. belladonnæ, gr. $\frac{1}{3}$;
Ext. gentianæ, gr. j;
Ol. carui, gtt. ss. M.
Et ft. pil., No. j.

The following tonic pills are much prescribed at the clinic:—

℞.—Acid. arseniosi,
Strychniæ sulph., āā gr. $\frac{1}{35}$;
Ext. belladonnæ, gr. $\frac{1}{5}$;
Cinchoniæ sulph., g. jss;
Pil. ferri carb., gr. ijss. M.
Et ft. pil., No. j.

℞.—Acid. arseniosi, gr. $\frac{1}{35}$;
Cinchoniæ sulph., gr. jss;
Ferri et potass. tart., gr. ij. M.
Et ft. pil., No. j.

The sulphate of cinchonia in these pills may be advantageously substituted by a proportionate dose of sulphate of quinia, the former being used simply on account of its cheapness. One pill may be given after each meal. Basham's iron mixture, with the addition of fractional doses of strychnia, will be found very admirable in its effects.

There are so many indifferent recipes for making this celebrated mixture, that I shall here give the one which seems to me to be the best:—

℞.—Tinct. ferri chloridi, fl.ʒiij;
Acid. acetic. diluti, fl ℥ss;
Liquor. ammoniæ acetat., fl.ʒiijss;
Curaçoa,
Syrupi simplicis, āā fl.ʒj;
Aquæ q. s. ad fl.ʒviij. M.
Sig. One tablespoonful after each meal.

The following formula makes another very elegant and generally useful preparation of iron:—

℞.—Tinct. ferri chloridi, fl.ʒij;
Acid. phosphorici dilut., fl.ʒiij;
Spts. limonis, fl.ʒj;
Syrupi simplicis, fl.ʒijss;
Aquæ q., s., ad fl.ʒvj. M.
Sig. One tablespoonful after each meal.

The dilute phosphoric acid is added, both because it is a valuable nerve tonic, and because it has the property of disguising the styptic taste of the iron; so much so that children readily take this mixture.

When patients complain of nervousness, or of sleeplessness, the bromide of potassium must be given, either alone or in combination with other remedies. A cheap mixture,

much thought of at the University clinic, is as follows:—

℞.—Potassii bromidi,
Rad. calumbæ contus.,
Rad. zingiberis contus., āā ℥j ;
Ferri sulphat., gr. xxx ;
Aquæ bullientis, Oj.
Steep for twelve hours and then strain.
Sig. One tablespoonful in a wineglassful of water just before or just after each meal.

I cannot say much for the palatableness of this infusion, nor more for its pharmaceutical elegance. But it does good, and we therefore give it largely to our poor patients. For a better class of patients the following nervine can be prescribed with very general satisfaction:—

℞ Elixir humuli, ℥j.
Elixir valerian. ammoniat.,
Elixir lactucarii, āā ℥ss. M.

Sig.—One dessertspoonful at bedtime, or during the day when necessary.

When ergot is indicated it may be given continuously and in full doses, either by the mouth or by the rectum. The suppository is made by inspissating the fluid extract by a moderate heat and incorporating it with cocoa butter. Of these two modes of administration I much prefer the latter, as it does not disturb the stomach. In country practice the ergot may be given in a starch clyster.

In addition to these remedies an effort should be made to distract patients from self, to make them forget that they are invalids. Their tendency is to give too much heed to every little ailment. They should be urged to give up the recumbent posture, to take regular exercise, and to expose themselves, without veils and parasols, to the direct rays of the morning sun. Woman, as well as plants, needs sunshine. Tea and coffee should be given up, and milk or claret substituted. A wholesome diet of easily digested meats and vegetables should be ordered, pastry interdicted, and the old adage inculcated of "early to bed and early to rise." A moderately cool bath may be taken daily, provided no great fatigue is induced by it, and a healthy glow follows its use. The brisk rubbing down after a cool bath, by putting many muscles into play, is one means of furtively giving exercise to those patients who are indisposed to take it as such. The corset should be discarded; the clothes must fit loosely and be supported from the shoulders. However unreasonable this advice may have seemed to the woman while her health was good, she will now usually adopt it, but not without many a pang and many an inward struggle. No vanquished knight ever yielded up his armor with worse grace.

For obvious reasons, when young girls or unmarried women exhibit symptoms of uterine trouble, an examination by the finger or by the speculum, or a treatment requiring the use of the latter, should never be insisted upon, until other measures have first been faithfully tried. These measures will be limited to the hygienic and constitutional treatment just detailed, and to such local remedies as the patient herself can use, viz., the hot douche, the hip bath, vaginal suppositories, vaginal injections, etc.

Retroversions and Retroflexions.—For these forms of displacement, and for those forms of prolapse in which the womb is not unduly lengthened out, Hodge's closed lever pessary is one of the best. When fitting properly, it acts physiologically by propping up the dislocated fundus, and by restoring the posterior wall of the vagina to its natural length. Again, since its anterior bar plants itself firmly against the posterior surface of the pubic symphysis, or against the angle formed by the converging rami of the pubic bones, it offers a very efficient and powerful support. It will not, however, always answer. Whenever the relaxation of the parts is great, or the vaginal portion of the cervix has disappeared, as it sometimes will through senile atrophy, or through the stripping off of the vagina by the upward traction of the womb in repeated pregnancies, the physician may be driven to the globe-, or to the ring-pessary. But this alternative should be deemed a misfortune, for all pessaries which distend the vagina at the expense of its length are mere makeshifts. Such instruments cannot effect a cure, since by overstretching the vagina laterally, and by thus impairing its tonicity, they weaken this great supporting column of the uterus, and, in prolapse, tend to confirm the usual cause of the displacement. Further, the ring-pessary is not trustworthy, and needs watching, for it is liable, by its elastic pressure, to excite ulceration and to become buried up by over-arching granulations. In this manner it sometimes eats its way into the bladder or the rectum. There are few physicians with a large uterine practice who have not had to dissect out a ring vital-

ly imbedded in the vagina. Another very great objection lies in the fact that, when made of poor and brittle rubber, as these pessaries usually are, they crack at one place or more during the process of their introduction; and then, sooner or later, by the rusting of the steel wire at these points, they spring open. This accident I have so repeatedly seen as to make me timid about using them. When the base and neck of the bladder are very sensitive, or when, as in some old women, the vagina has lost its elasticity and is shortened, Cutter's pessary answers a very admirable purpose. It is practically a Hodge pessary, having an external fulcrum attached by an elastic band to an abdominal belt.

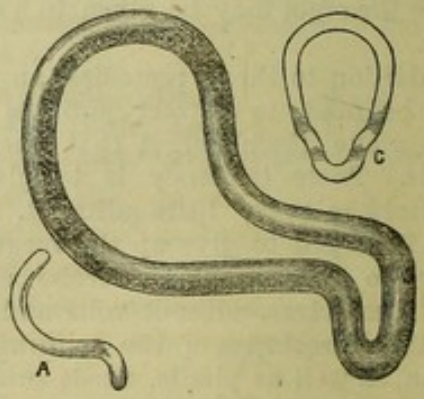
My friend, Dr. Albert H. Smith, has made a modification of Hodge's pessary to which I am very partial, the more so because it meets several very important indications. The healthy vagina is a cone-shaped tube, widening out above and narrowing down as it approaches the vulva. Its uterine portion is thin, membranous and almost devoid of muscular fibre; while its lower portion is rich in elastic and muscular tissues, and powerfully acted upon by the strong muscles of the perineum. Now, Hodge's pessary being of a uniform width throughout, in fact, a parallelogram in shape, will often unduly stretch laterally the vulval, viz., the narrowest, portion of the vagina, while it too loosely fits the uterine portion. The pressure being unequally distributed, is liable not only to irritate the points of firmer contact, but also to cause the pessary to tilt over on its side, or to become otherwise displaced. Again, its front bar, by pressing upon the pubic bones, may irritate the overlying soft parts, and may also so compress the urethra as to make micturition painful. To avoid these defects, and also to distribute the pressure in front over the surface of the anterior vaginal wall, which responds to the movements of the diaphragm, Dr. Smith slightly narrows this pessary anteriorly, and then bends the tip thus rounded sharply downwards, at almost a right angle.

The Hodge pessary is readily moulded into this shape in the following manner:— The *anterior part only* is either dipped into boiling wax or lard (the temperature of boiling water is not high enough), or else is buried in sand heated to about 350° Fahr. When sufficiently plastic, the uterine, viz., the unheated, portion of the pessary, with the concavity of its curve looking downward, is grasped by the thumb and fingers, and so compressed that the anterior portion of each lateral bar slightly converges towards its fellow. While still undergoing this pressure, the pessary is quickly carried to a deep wash-basin, one-fourth full of cold water. The tip is now bent almost at right angles by pressing it for a moment strongly against the dry surface of the basin, over which it is then made quickly and firmly to glide down into the water below. The contact with the water at once "sets" the pessary in the desired shape. The sand bath is certainly the handiest and cleanest way of moulding these pessaries, but, unless carefully watched, it is liable to overheat and spoil some of them.

This form of pessary I can confidently recommend as one that will best fit the large majority of cases ordinarily met with of retroversion, retroflexion, or of prolapse. By comparing a Hodge pessary with Fig. 6 the alterations in shape will be at once seen. A side view is given at A and a front view at C.

Whenever the body of the womb is too tender to bear the pressure of this hard rubber pessary, the provisional use of inflated rubber rings will be called for. These air-cushions must be used in conjunction with local depletion, with intra-uterine applications of carbolic acid as a local anæsthetic, and with the hot douche, the last, provided the woman can herself remove and re-introduce this pessary. Some stubborn cases I have overcome by a free application of fuming nitric acid to the uterine cavity. Whenever these inflated rings cannot be procured, wads of oakum or sponges dipped into a weak solution of carbolic acid will answer as very good substitutes. The dis-

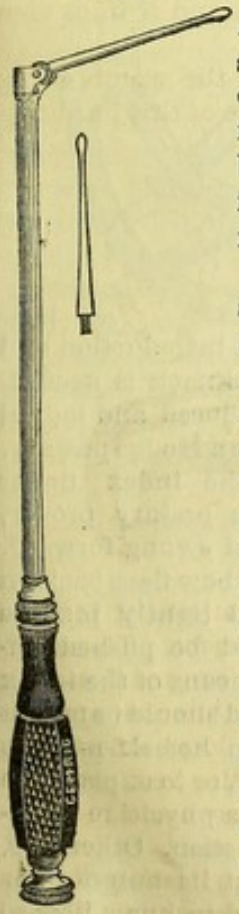
FIG. 6.



tressing pelvic pains and aches which torment these patients will be greatly alleviated by passing into the vagina, at bedtime, a suppository containing one grain of morphia and two of the extract of belladonna.

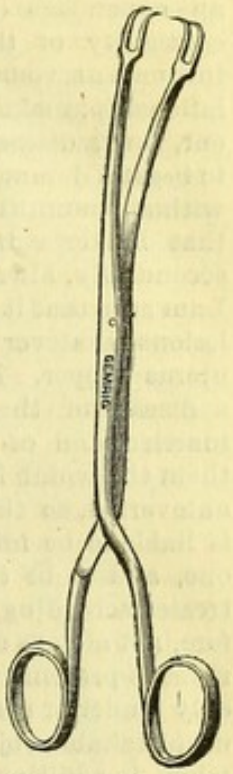
In most cases of retroversion or of retroflexion it will prove advantageous to stretch out the contracted utero-sacral ligaments by the repositor (Fig. 7). This instrument is used by introducing the stem into the uterus, and then giving varying angles to it by a screw in the handle. In this manner a retroverted womb can be temporarily forced into a state of anteversion. The womb when flexed should also be straightened out, by giving varying curves to the sound; or by first seizing and drawing down the cervix with the volsella, and then pushing up the fundus by a finger passed up either into the vagina or the rectum. By this manœuvre a retroverted womb can also be readily redressed; but it is then best not to push the fundus directly upward over the jutting promontory of the sacrum, but somewhat laterally, so as to make it skirt this bony shelf. As will be seen, under its appropriate heading, the uterine dilator bids fair to do much good in obstinate cases of retroflexion.

FIG. 7.



One word here on the subject of the volsella (Fig. 8). Since it maintains its hold better than the tenaculum, it is to me one of the most precious instruments in my bag, amounting in value almost to a third hand. Apart from using it, as above described, in redressing or straightening out any kind of version or flexion of the womb, it subserves other useful purposes. By hooking down the cervix and holding it steady, it materially aids in the introduction of sponge-tents. For the same reason, upon the removal of the tent, it renders the exploration of the uterine cavity with the finger very much easier than by the usual plan of forcing the womb down upon the finger by suprapubic pressure, a procedure always painful, and in a fat woman, very difficult of execution. By thus lowering and fixing the womb, it facilitates very materially the removal of intra-uterine polypi, or the scraping away of benign or of malignant growths from the cervix or the fundus. In such cases, I usually apply it without the aid of the speculum, and generally seize hold of the anterior lip. In redressing versions, a mechanical advantage is gained by seizing hold of that lip whose name does not correspond with that of the version. Thus, in retroversions the anterior lip is seized; in anteversions, the posterior lip. But in flexions, as one object of the traction is to stretch out the flexed side the most, that lip should be seized whose name corresponds with that of the flexion. This advice is theoretically correct; but it may not always be found practicable. Let me here state that I teach all right-handed students to use the left hand for making uterine examinations and for other internal work. This leaves a clean right hand for manipulating the various instruments and for any necessary outside work.

FIG. 8.



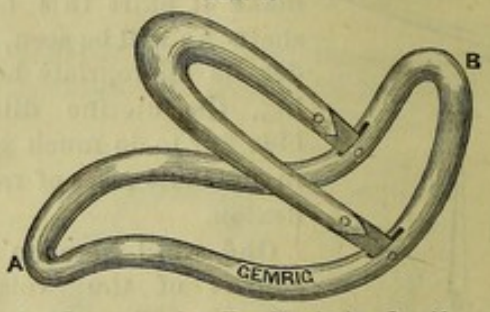
Anteversions and Anteflexions of the Womb.—Since these conditions are more or less the natural ones of the nulliparous or of the healthy uterus, and especially so when the bladder is empty, it by no means follows that every case of hysteria or of pelvic irritation exhibiting these forms of displacement requires a uterine treatment. I am led to make this remark, because a congestive irritation, or, perhaps, an inflammation of one ovary, or of both, is often at the bottom of symptoms usually referred to the above displacements, and because many a hysterical woman has, consequently, been unfortunately subjected to a purely uterine treatment, when it should have been a moral one, or a constitutional one, or, at the most, an ovarian one. The paramount influence of the unseen ovaries over body and mind is too much overlooked. With much truth

it has been said, that anatomically we may speak of the "womb and its appendages," but that physiologically the womb is really an appendage of the ovaries. True, the contiguity of these structures, and their intimate nervous, vascular and functional relationship, make them so mutually dependent, that a disease in the one is very likely to beget a derangement in the other. But, without committing myself to the doctrine that hysteria in woman is, primarily or secondarily, always an ovarian expression, I am sure that it is often present when no lesions whatever can be discovered in the uterus proper. Hysteria is pre-eminently a disease of the unmarried, of the newly married, and of the sterile. But, since in them the womb is naturally anteflexed and anteverted, so this physiological condition is liable to be mistaken for a pathological one, and to be treated, that is to say, maltreated accordingly. The diagnosis is, therefore, not always clear, but, when dysmenorrhœa is present, when the womb is markedly tender or congested, or it exhibits other unmistakable objective evidences of disease, when, in addition, the marriage is an unfruitful one, then may the hysterical and other subjective symptoms be intelligently referred to the uterus proper as the primal cause.

Since typical examples of pure anteflexion alone, or of pure anteversion alone are rarely to be met with, the one lesion usually blending with the other, the same kind of treatment for each will often answer. By the same means as were described for cases of retroversions and of retroflexions, but of course in an opposite direction, the utero-vesical folds of the peritoneum must be forcibly stretched out, and the womb, when bent, straightened out. This should rarely be done oftener than once a week; in the meantime anodyne vaginal suppositories at bedtime will usually be very grateful. At each visit local depletion and topical remedies will also be generally called for. Since, as has been remarked, these forms of displacement more commonly occur in unmarried or in sterile women, the cervical canal is often tortuous and contracted. Tents of sponge, or of laminaria, or of slippery-elm bark will, therefore, be needed as auxiliaries to the treatment. This method of cure, however, being tedious and unsatisfactory, I have lately, with great success, been treating these cases by forcible dilatation; an operation which will shortly be described.

The treatment of this class of displacements by pessaries is by no means so satisfactory as in the former class. No two cases can in this respect be treated exactly alike. The difficulty lies in the construction of an instrument that shall lift up the body of the womb by pressure made in front of the cervix, without irritating the bladder through which the support must be communicated. By pushing the cervix forward the Hodge pessary will sometimes, in pure cases of anteversion, tilt the fundus backward off from the bladder. Sometimes in anteflexions, by sharing with the bladder the weight of a congested womb, it will alleviate the vesical distress. Again, this instrument, in conjunction with an abdominal brace, will at times give much comfort. In a few selected cases Thomas' anteversion pessary will act admirably; but in the majority it cannot be borne. It has, however, served me some very good turns, and I, therefore, give a cut of it. (Fig. 9.) It is practially a Smith-pessary armed posteriorly with a movable bow, which is added to make pressure upon

FIG. 9.



the fundus uteri. In its introduction and removal some degree of knack is needed. After closing it, it is introduced and lodged behind the cervix, just like a Hodge pessary. Then, by insinuating the index finger between the bow and the pessary proper, the former is prized up and swung forward. Since, in the removal, the bow flaps back on the posterior bar (B) and tightly pinches the cervix, the latter must be pushed upward out of the gripe by means of the index finger. This sleight of hand should be taught to the patient, so that she herself may be able to remove the pessary, or to explain the method of its removal to a physician ignorant of its peculiar construction. Otherwise, he will tug away in vain at its anterior bar (A), and be at his wits' end to know how to get it out of the vagina.

The ordinary globe- and ring-pessaries will occasionally answer when other measures fail. Of all mechanical agents, I have,

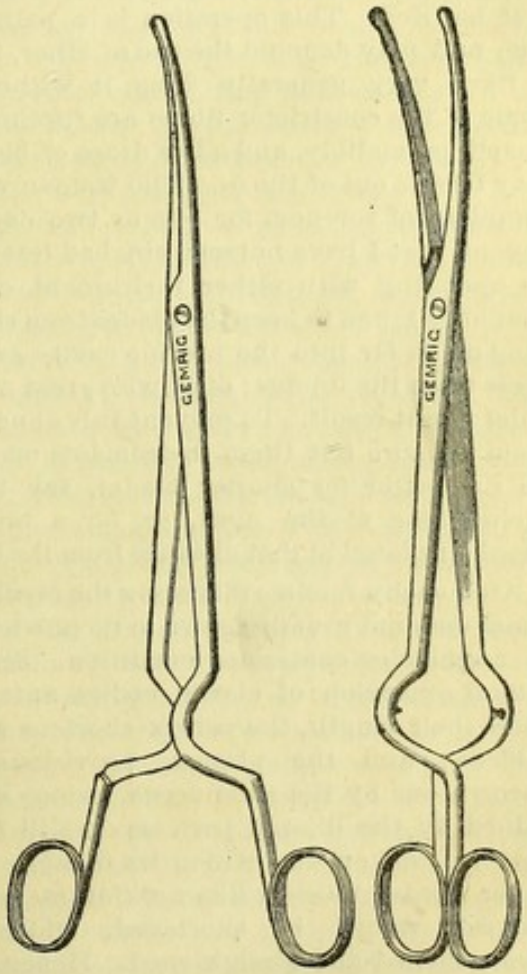
in the long run, found the inflated ring pessary to be the best. This soft-rubber air-cushion can generally be well borne, while, by the admission of the cervix into the opening in its centre, the fundus is tilted off from the bladder. This pessary has, however, three grave faults: it over-distends the vagina; it soon becomes useless by collapsing; it is very liable to generate offensive discharges. Yet, in spite of these objections, I am often driven to its provisional use, while resorting to such measures as are calculated to relieve the congestion, for after all this is the marrow of a successful treatment.

My experience with the intra-uterine stem pessary has not been very encouraging. It may be a very excellent pessary; it certainly is a very good one, to watch. In a very few cases of anteflexion it has answered admirably. In the majority the womb has resented its presence. In one case a smart inflammation set in, which kept my patient confined to bed for two weeks. In another, the agony was unbearable. Their use involves so much care and anxiety that I have pretty much discarded them from the treatment of the out-patients. In private cases I occasionally use the glass-stem pessary, which is the least irritating one, but which tends to slip out. Chambers' hard rubber stem pessary has recently been so lauded by the British medical press, that I intend to give it a fair trial. In the only case in which I have thus far employed it, so much irritation was excited that its removal became imperative within six hours after its introduction. By being split into two portions, which spread apart, this stem has the great merit of not slipping out, and that, I fear, is its sole merit. But, with regard to intra-uterine stem-pessaries, my own conviction is that they have had their day, and that, since the discovery of the method of rapid dilatation, they will in the future be occasionally used for a few days, and then only after this operation.

Before quitting this subject, I should add that Hewitt's modification of the Hodge pessary has, in my hands, occasionally given great comfort, after the failure of every other kind of pessary. It is, however, like its fellows, adapted only to single and isolated cases, cases which cannot be determined beforehand. From the foregoing record of my experience with pessaries, it is plain that he who, in anterior displacements, trusts to mechanical means alone, is doomed to disappointment. He, on the other hand, who combines the therapeutic with the mechanical treatment, will meet with the greatest success. Under the next heading I purpose to give an additional method of treating this stubborn class of flexions, which will, I believe, in the great majority of cases, yield the very best results.

Rapid Dilatation of the Cervical Canal.—This most valuable operation can, at a pinch, be imperfectly performed with the ordinary curved uterine dressing forceps. A far more efficient instrument, however, is a delicate uterine dilator, which, in shape, is like the former, but whose blades are stronger, and so constructed that they diverge as the handles approximate (Figs. 10 and 11). By the aid of the tenaculum, or of the volsella, applied

FIGS. 10 AND 11.

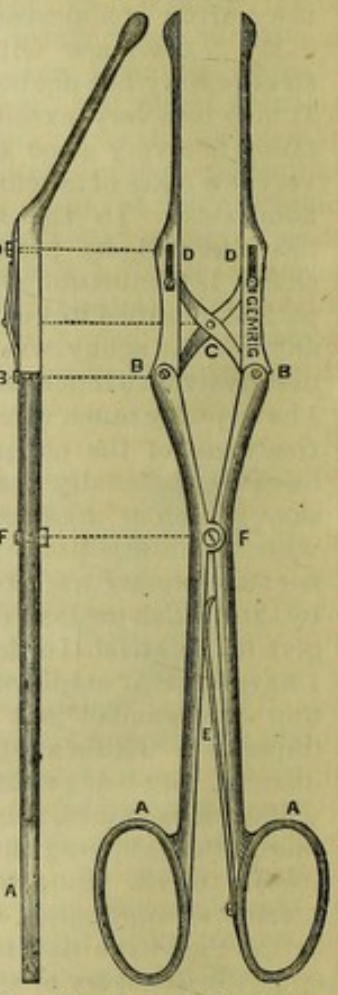


through a speculum, the anterior lip of the cervix is seized, and the dilator is introduced as far as it will go. Upon gently stretching open that portion of the canal it occupies, the stricture above so yields that, when the instrument is closed, it can be made to pass up higher. Thus, by repetitions of this manœuvre, little by little, in fifteen minutes'

time, a cervical canal is tunneled out which previously could not admit the finest probe. As soon as the cavity of the womb is gained, the blades are withdrawn far enough to lodge their tips just above the internal os, and their handles are then brought firmly together. When the cervix is cartilaginous in character, or so unyielding as to bend these delicate blades, then a much larger and stronger dilator, with a screw in the handles, must be used. For ordinary purposes I have found the more delicate instrument sufficiently strong, while it has the merit of requiring no previous dilatation of the canal by tents, and the further merit of preparing the way for the admission of the larger instrument when needed. It can very frequently be used without the aid either of a speculum or of a tenaculum; and in unmarried women this method should always first be tried. This operation is a painful one, and may demand the use of ether, but I have very generally done it without. Some of the constrictor fibres are ruptured, sometimes audibly, and a few drops of blood may trickle out of the os. The woman will complain of soreness for one or two days; beyond that I have not seen any bad results. In operating with either instrument care should be taken to keep the blades from slipping up so far into the uterine cavity as to press upon the fundus; otherwise great mischief might result. To prevent this danger, I am not sure but these instruments would be the better for shorter blades, say two inches long at the most, or for a broad shoulder placed at that distance from the tip.

After such a forcible dilatation the cervical canal does not usually return to its previously angular or contracted condition. Since lateral extension of elastic bodies antagonizes their length, the cervix shortens and widens; and the plasma, provisionally thrown out by the submucous lesions sustained by the dilated part, serves still further to thicken and stiffen its tissues. In other words, the stem-like neck of the pear-shaped womb is shortened, widened, strengthened and straightened. Hence for straightening out anteflexed or retroflexed wombs, and for dilating and shortening the canal in cases of sterility or of dysmenorrhœa, arising from stenosis or from a conical cervix, the dilator will be found to be a most efficient instrument. In its results it is not infallible; but, by it I have, at one sitting, cured cases of long-standing dysmenorrhœa, and relieved absolutely all the distressing symptoms of several very obstinate cases of anteflexion, and thus far of every stubborn case of retroflexion. Dr. John Ball (*New York Medical Journal*, October, 1873, p. 363) recommends the use, for a few days after dilatation, of an intra-uterine stem. I have not yet found it necessary to splint the womb in this manner; but his suggestion is plainly a valuable one, and not to be forgotten. Chambers' intra-uterine stem, or a tent of slippery-elm bark would then be my preference. A few notches cut in the latter will prevent it from slipping out. Dr. Ellinger also states (*Archiv für Gynäkologie*, Vol. v., Part II, 1873, p. 268) that he has found forced dilatation to be a very efficacious remedy for flexions. The blades of his instrument (of which a front and side view are given in Fig. 12) are made short, so as not to reach, and thereby to injure, the fundus uteri. They also open parallel to one another, and therefore, do not tend to slip in or out. In these respects it is an instrument superior to those previously described. But, on the other hand, the latter are more simple in construction, and, consequently, less expensive. I have been surprised at the improvement following a forced dilatation made, in cervical endometritis, for the easier introduction of remedies. Perhaps this may be explained partly by a change produced in the nutrition of the parts, and partly by the temporary paralysis of the constrictor fibres, just as fissures of the anus are cured by forcibly dilating the sphincters. Since the cervical canal tends to remain open, good results may be expected from this operation in the hemor-

FIG. 12.



rhages caused by sub-involution, or by fibroid tumors of the womb. In metrorrhagic attacks and in other cases requiring the injection of fluids into the uterine cavity, I have obtained a free avenue for the escape of the liquid by first dilating the canal with this instrument, and then by introducing the nozzle of the syringe between the expanded blades. Hitherto, the great danger of the fluids being forced into uterine vessels or through dilated fallopian tubes into the abdominal cavity, by spasm of uterine fibres and coarctation of the internal os, has deterred me from often resorting to the use of intra-uterine injections, even in stubborn cases of endometritis. But now, the conjoined use of the dilator, as described above, has, by robbing the operation of its greatest risks, inspired me with more confidence, and I shall certainly try these injections in all cases which other means have failed to relieve. The uterine dilator will also be found very efficient in preparing the cervix for the admission of the armed applicator, and for the reception of a stem-pessary or of a large tent. What is better still, it will often obviate the necessity for using a tent. It is but just to add, that to Dr. Ellwood Wilson is the profession of this city indebted for this method of rapid dilatation, a method which bids fair to revolutionize the treatment of many uterine disorders.

Uterine Tents.—Tents may be made indifferently of sponge, laminaria, or of slippery-elm bark. By glueing together two or three slips of the last, very good-sized tents can be constructed. Sponge and laminaria tents ought not, as a rule, to be left in longer than twenty-four hours. The cervix, while they are in, should be irrigated every two or three hours, during the waking hours, with a strong solution of table salt, or, what is better, with a saturated solution of the chlorate of potassa. I reject carbolic acid, because it does not ordinarily mix well with water; and the permanganate of potassa, because it weakens the elasticity of the sponge-fibres, and stains the clothing. Such detergent injections saturate the sponge and correct the fetor. They also, by imbibition, and by capillary attraction, pass up into the uterine cavity, and thereby lessen the risk from septicæmia. When a tent is put in as a cervical plug to arrest a uterine hemorrhage, then these detergent injections are not necessary, for the blood that will ooze past or through the tent, by washing away the putrid secretions, keeps it sweet. It then can be kept in for over twenty-four hours. For this reason a tent may, with comparative safety, be put in the day before that one on which the catamenia are expected, and be kept in during the flow. This has been repeatedly and successfully done for sterility arising from stenosis; but for this purpose, the dilator would now be my choice. The slippery-elm tent can be left in much longer, as it softens down, and becomes dissolved by the discharges. Although inferior in expansive power to the other two, yet it will be found of great value in cases requiring no very great dilatation, and a prolonged treatment, such as in flexions. The introduction of tents will be much facilitated by the previous use of the uterine dilator, and by the fixation of the cervix with the tenaculum or the volsella. By this means they can often be slipped in without the use of the speculum. Much time and safety will be gained if, after the introduction of one large sponge-tent, it is surrounded by a fagot of smaller tents, made of laminaria.

Let me here impress upon my readers the importance of dilating the cervical canal with but one introduction, or, at the most, with but two introductions of tents. It is not, save with rare exceptions, the tent, or the batch of tents, crowded in at the first visit, that is attended with risk, but those inserted at the second or at the third visit. The history of the reported fatal cases shows that the danger increases with every fresh installment of tents. It is *greater* at the second; *greatest* at the third. This is probably owing to the fact that the removal of the first tent, or batch of tents, more or less abrades the now irritated mucous coat of the canal, and by this raw surface are absorbed the putrid discharges generated and retained by the subsequent tents. It is especially in cases of previous pelvic inflammation, and in those of interstitial or of submucoid fibroids, that I dread the effects of a series of tents, and avoid such a use of them as much as possible. Let me, however, add that, since adopting the plan of injecting the above-given detergent solutions, I have yet to see the slightest ill-effects from the introduction of tents.

Abdominal Supporters.—Within a few months I have become convinced that much advantage can be gained from a judicious use of braces as adjuvants to the treat-

ment of uterine disorders. Alone, they may not cure, but they certainly will often palliate those symptoms which are referable to pressure upon the pelvic organs. They seem to me to be especially indicated whenever a pessary fails to relieve the woman of the feeling that the lower portion of her abdomen needs an external support, a support which she instinctively seeks to give by pressure with her hands. There certainly is, in my experience, no surer way of getting a bed-ridden, hysterical woman on her feet again than by their use. The moral effect of their adjustment is, in such cases, good; and by interposing a shelf upon which the abdominal viscera partly rest, they relieve a congested womb or an irritable ovary from undue pressure. The proprietary character of these instruments has very naturally prejudiced the minds of the profession against them; but *fas est ab hoste doceri.*

The *rationale* of their action is briefly as follows: From the oblique inclination of the pelvis to the spinal column, which is produced by the natural hollow in the back and by the more or less sigmoid shape of the spine, the axis of the trunk does not coincide with that of the pelvis. The womb and the ovaries, therefore, lie in a measure under the shelter of the sacral promontory and of the lower lumbar vertebræ. For the same reason, the sum of the weight of the supernatant abdominal viscera is spent upon the smooth surface of the pubic bones, and upon the adjacent abdominal wall, but not upon the womb, although it is the lowest of the pelvic organs. The little pressure to which it is subjected is not in a vertical line but in an oblique one.

A displaced or a flexed womb may in itself give rise to no unpleasant symptoms whatever; but let it once take on a congested or an inflamed condition, and the weight of the abdominal viscera at once becomes oppressive. If now, pessaries being found inadmissible, a suitable brace is put on, a portion of this load is taken off by its pad, which, by pressing the abdominal wall upward and inward toward the sacral promontory, forms a shelf upon which the viscera rest. Further, by this virtual shortening of the conjugate diameter of the superior strait, the space into which the viscera tend to settle is lessened, and consequently, the womb is to that extent the more protected from sudden succussions.

Again, whenever the retentive power of the abdomen is lost, say by the absorption of the fat-packing in the omentum and in the abdominal walls; by the general decrepitude of old age, or by the muscular debility of ill-health, the woman's figure often becomes greatly changed. Her spine now loses its double curve and becomes bow-shaped; her shoulders droop, her chest bends forward, she stoops; the pelvis, departing from its obliquity, becomes more nearly at a right angle to the spine; and the axis of the superior strait, instead of striking a point in the *linea alba* below the umbilicus, tends now to coincide with that of the trunk. As a consequence the intestines crowd down into the pelvic cavity, and the sum of their weight now converges, not upon the pubic bones and their adjacent muscles, but directly and vertically upon the nicely poised reproductive organs. But since the womb and the ovaries were never intended by nature to be the atlas of the abdominal organs, the one resents the burden, and the other bends and sags down under it. A pessary, by shoring up the womb, gives some relief; but common sense points clearly to the necessity of bringing back the erect carriage, of restoring the sigmoid curve to the spine, and of swinging the pelvis back into its oblique position. To meet these indications a brace is needed, one which is both abdominal and spinal.

Guided by these hints, I feel sure that some of my readers will be able to get once more upon her feet a patient who has been doomed by her friends to a bed-ridden life, on account of some supposed spinal affection. For let me here remark that, since most women in delicate health exhibit one or two very tender spots in the spine, difficult locomotion dependent upon uterine or ovarian trouble is very liable to be mistaken for "spinal irritation" or "spinal inflammation."

Prolapse of the Womb.—For a clear understanding of this lesion, and for its better treatment, it should be divided into three distinct varieties: (*a*) prolapse of the womb proper, viz., a descent of the womb as a whole; (*b*) prolapse of the cervix from growth (hypertrophic elongation) of its vaginal portion; (*c*) prolapse of the cervix from elongation (by traction) of its supravaginal portion. In the first variety there is a descent of the whole womb, together with its furniture of ovaries and ligaments;

and but little, if any, increase in the length of the uterine cavity. In the other two there commonly is, although unessential, a more or less sinking down of the fundus, either from the newly acquired weight of the cervix, or from traction upon the cervix, and there always is a marked increase in the length of the uterine cavity.

The degree of displacement in the first variety, being proportionate both to the weight of the prolapsing body and to the relative relaxation of its supports, the womb will be found either more or less low down in the vagina, as in incomplete prolapse, or else wholly extruded from the vulva, as in complete prolapse. The terms *complete prolapse* and *incomplete prolapse* are, to my thinking, preferable to those of *prolapsus uteri* and *procidentia uteri*, because no two writers agree as to the meaning of the latter terms; for by some they are used interchangeably, as if they were synonyms, and by others in a contradictory sense. An incomplete prolapse is a common accompaniment of retroversions and retroflexions; in fact, the latter are but transitional stages of descent modified by the firmness of the vesico-uterine attachments which sling the womb from its middle. The complete prolapse can be readily discriminated from the other two varieties, by noting the inversion of the vagina, and the distinctness with which the whole of the projecting pyriform tumor can be outlined by the grasp of the fingers. The uterine cavity will not be found unduly lengthened out, and the tip of the sound can be felt in the mass outside of the vulva. To clinch the diagnosis a rectal examination will show that the womb and vagina have vacated the pelvis. Although not so frequently met with as the third variety, *prolapse of the cervix from elongation of its supra-vaginal portion*, yet it will occasionally be found in old women, whose vaginas have become lax and wrinkled through the absorption of the fat-packing of the pelvis, or whose spines have lost that important double curve. In younger women, sub-involution, or such congestions as increase the thickness of the uterine walls in every direction, long-continued vomiting, tight-lacing, the wearing of skirts unsupported from the shoulders, lacerations of the perineum, and last, not least, the prolonged use of the obstetric binder, are the usual factors in the production of this kind of displacement.

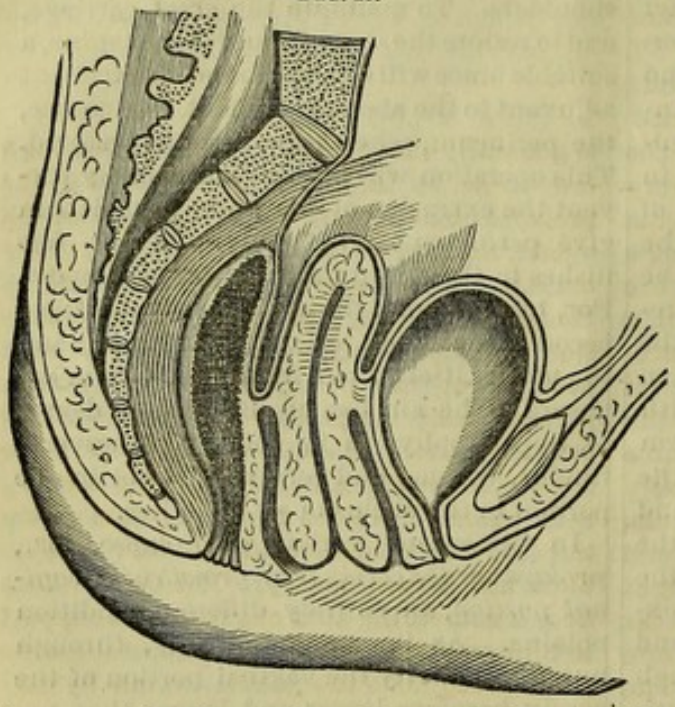
In the treatment of this variety of prolapse, whether complete or incomplete, the same kinds of pessaries are to be used as are mentioned under the heading of retroversions and retroflexions. In some cases Cutter's or Spooner's pessary answers best. In very rebellious cases the proprietary cup-and-stem pessaries will sometimes, although very rarely, be found useful in propping up the womb. In addition to its replacement, the womb, when congested, must be treated by local depletion, by the hot douche, by vaginal injections of solutions of common salt, of the chlorate of potassa or of the astringents, and by the topical remedies previously described. The patient must be enjoined to keep the contents of the bowels soluble, to avoid the lifting of heavy weights, and to wear loose clothing supported from the shoulders. To maintain the erect carriage, and to restore the sigmoid curve to the spine, a suitable brace will often be found an excellent adjuvant to the above treatment. Of course, the perineum, when torn, must be restored. This operation will of itself temporarily prevent the extrusion of the womb; but it can give permanent relief only when it furnishes to the pessary a firm base of support. For, by this time, the uterine supports have become very much relaxed or stretched; and the uterus itself, from friction and from exposure to the air, has acquired some degree of hypertrophy, in its totality, however—fundus, corpus, and cervix—and not in one portion to the exclusion of the other.

In the second variety of prolapse, viz., *prolapse of the cervix from growth of its vaginal portion*, an entirely different condition obtains. As its name indicates, through nutritive activity the vaginal portion of the cervix becomes larger and longer than natural. Although its increased weight drags down the womb somewhat, yet this is so unessential a sequence that this affection has, by Virchow, been termed "prolapse of the womb without locomotion of its fundus." A very marked degree of growth is uncommon. Whenever the vaginal portion of the cervix is so long as to protrude from the vulva, it is, as a rule, either a congenital condition, or an exaggeration of a congenital condition, and is therefore found in nulliparæ. One of its modifications, the conical cervix, is interesting from its bearing upon dysmenorrhœa and sterility. In child-bearing women, through cervical metritis excited by the contusions of repeated labors,

the vaginal portion takes on a hypertrophy, but this is less an elongation than a general increase in every direction. There is yet another form of hypertrophic elongation which involves one lip of the os, usually the anterior. From its resemblance to the snout of the tapir it has gained the name of *tapiroid*. All these acquired forms of hypertrophy are usually traceable to the injuries sustained in labor or to defective involution.

By consulting the diagram (Fig. 13) it will be seen that the diagnosis of this affection is not difficult. Its character is sufficiently marked by the unnatural length of the uterine cavity, by the absence of vaginal inversion and of vesical prolapse, and by the presence in the vagina of a cone-shaped

FIG. 13.



tumor evidently prolonged out of the cervix, and bearing at or near its extremity the os externum. This form of prolapse needs no treatment unless the growth of the cervix is excessive, or unless it interferes with the comfort or the fecundity of the woman. Whenever the cervix is unduly voluminous it may be amputated, and that by the scissors, the écraseur, or the galvano-cautery. The merely conical cervix, however, rarely needs shortening. Slow dilatation by sponge-tents just before the catamenial flux, or preferably, rapid expansion by the dilator just after, will usually be followed by conception, and parturition then completes the cure.

The third variety of prolapse, *prolapse of the cervix from elongation (by traction) of its supra-vaginal portion*, is entirely distinct from the other two, and is, perhaps, the most commonly met with. Essentially it is a hernia of the bladder and of the vagina acting mechanically upon a tensile womb. In other words, the initial event is a prolapse of the conjoined bladder and vagina, which, by traction on the cervix of a congested or of a subinvoluted womb, draws out the then ductile supra-vaginal portion, viz., that portion of the neck and body which lies between the uterine ligaments above, and the vesico-vaginal attachments below. The lower portion of the corpus participates in this elongation, because its muscles are less strongly developed than those of the upper portion. But the elongation is greatest at and about the internal os, because, from the absence of muscular structure at this point, the resistance there is least. By impeding the circulation of the vaginal portion, this traction begets an eversion of the os and a circular hypertrophy of its lips.

By examining figure 14, it will readily be seen that the term *prolapse of the womb*, as applied to this kind of elongation, is a misnomer; because, although the cervix protrudes from the vulva, it does so more through elongation than from displacement. There is a descent of the cervix, a prolapse of the cervix, if you please, without necessarily any sinking down whatever of the fundus.

Protruding from the vulva there will be found a large boggy tumor, looking very like the snout of a pig or the penis of a horse. In shape like a truncated cone, its apex will be occupied evidently by the vaginal portion of the cervix, which is clubbed, hypertrophied, but not much elongated. Theopening at the apex is usually funnel-shaped through the eversion of the lips of the os, and the cervical canal thus lies exposed to view for some distance up; so that the internal os becomes almost an external one. Upon grasping the tumor it will be found that only a portion of the womb is outside of the vulva, and that the apex, which corresponds to the vaginal portion, is soft and spongy; while, running through the base of the tumor, as far up as it can be reached, may, on firm pressure, be felt the wire-drawn supra-vaginal portion of the cervix as a hard stem or cord, not thicker than the little finger. Very commonly, from expo-

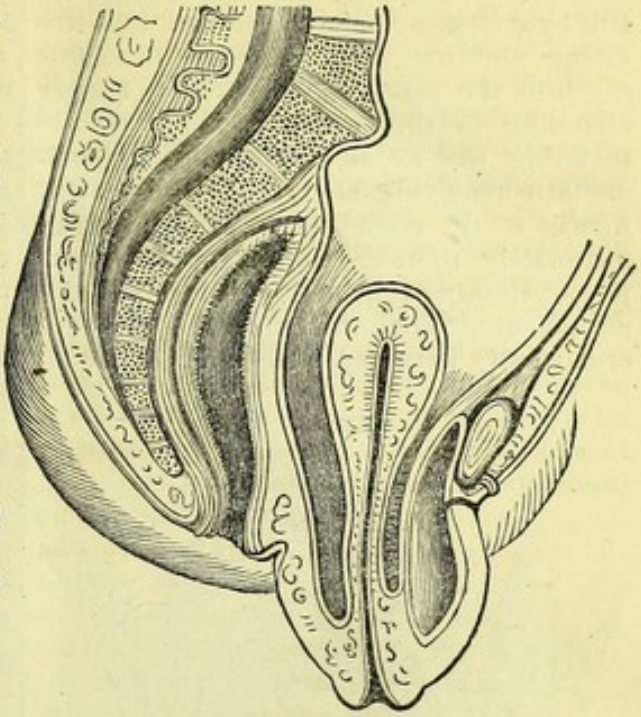
sure to the air, from friction, and from the contact of the urine, which can no longer be projected in a stream, the tumor is the seat of two or more true ulcers, always excavated, sometimes covered by a croupy exudation, and usually liable to bleed. The fundus may, or may not, descend very materially; and upon this circumstance depends the kind of treatment. The sound, by a little coaxing and by raising its handle, will, in the great majority of cases, pass in to a distance of not less than five inches When the protruding mass is pushed back into the vagina, the sound always gives a much shorter measurement. This behavior is worthy of note, because it is one of the proofs that the supra-vaginal portion of the cervix is lengthened out by traction; and that, when relieved of the weight of the bladder and vagina, it shrinks back like an overstretched rubber band.

On sounding the bladder it will be found so greatly prolapsed as to form a large portion of the hernial mass, for the tip of the sound will be felt outside of the vulva, very near to the apex of the tumor. The vagina is turned completely inside out, forming a hernial sac which contains (see fig. 14) the supra-vaginal portion of the cervix uteri, a very large pouch of the bladder, the vesico-uterine and the recto-uterine peritoneal folds, and occasionally a small pouch of the rectum. In exceptional cases the whole womb will, in a state of retroflexion, finally overcome the resistance of its ligaments, and get entirely outside of the vulva and wholly in the vaginal sac. The weight and size of the tumor will then make the woman straddle widely as she walks, and cause her to lead a very miserable life. The appearance of the tumor under such circumstances is so peculiar as to be hardly mistakable. It is very faithfully represented by figure 15, which I have copied from an admirable paper by Dr. Isaac E. Taylor.* The bulge of the retroflexed fundus makes the posterior wall of the vaginal sac hang down below the snout-shaped cervix, like a dewlap.

In this third variety of prolapse pessaries are usually of no avail whatever. They cannot keep up the prolapsed cervix without bending almost double its elongated and stem-like portion, and the pain is, therefore, liable to be unbearable. Even a perineal pad

*On Amputation of the Cervix Uteri; Bellevue and Charity Hospital Reports, 1869.

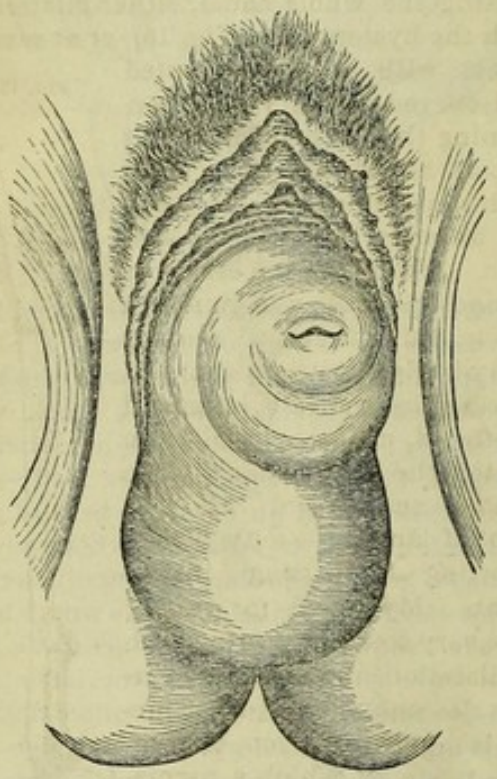
FIG. 14.



is generally insupportable. Rest in bed for a few weeks, by taking off the weight of the prolapsed bladder and vagina, will cause the overstretched cervix to shrink back very materially; and a suitable pessary, such as Hodge's, Cutter's, Spooner's, or a cup-and-stem pessary with an external base of support, might then be adjusted, which would, perhaps, keep the prolapsing organs in their proper position. But at best, the womb is too ductile, the vagina and perineum too relaxed, even when contracted by appropriate operations, to render this treatment other than tedious and unsatisfactory. The desideratum here is something that can furnish a support to the unstable pelvic organs, and, at the same time, consolidate the ductile womb by giving a fillip to the now dormant process of involution. Whenever, therefore, the fundus uteri has barely sagged down, that is to say, the uterine ligaments have been strong enough to resist the traction, a radical cure is attainable by the ablation of the vaginal portion of the cervix, and this should be done either by the wire-écraseur, or by the galvano-caustic loop. The long continued suppuration from the open wound sets up such nutritive changes as permanently contract and consolidate the elongated portion of the cervix, and cause it, by virtue of the uterine stays, to sustain *in situ* the bladder and vagina. Before amputating the cervix, for fear of injury to the bladder, its lower boundary line must be accurately defined.

This can be done by the sound, or better still by stretching open the urethra with the dilator, and then introducing the little finger into the bladder. The chief danger attaching to this operation is the risk of invading the abdominal cavity by accidentally removing, along with the cervix, a piece of the recto-uterine pouch; for unfortunately there are no diagnostic marks for ascertaining the depth of this fold of the peritoneum. When the fundus is low down, or is wholly extruded, as shown in figure 15,

FIG. 15.



then, in addition to the ablation of the vaginal portion of the cervix, must the vulvo-vaginal opening be contracted. This is done by paring from the labia and the vagina a horse-shoe strip of *mucous* membrane, about an inch wide and extending to points a little below the level of the meatus urethræ; and by bringing together the raw surfaces by wire sutures, just as in the secondary operation for lacerations of the perineum. By combining these two operations I have succeeded in finally curing cases which every other method had failed even to relieve.

Fibroid Tumors of the Womb.—The treatment of this class of growths may be divided into the *palliative* and the *radical*. The former aims to accomplish the following ends: 1. To stay the hemorrhage; 2. To allay uterine colic and pelvic pains; 3. To lessen the inconveniences arising from the weight and bulk of these tumors; 4. To check their growth.

To stay the hemorrhage is the most imperative of all the indications in the treatment of these growths, and as such I shall dwell on it at some length. For this purpose, a day or two before the one on which the menses are expected, relieve the precursory engorgement of the pelvic viscera, by a saline cathartic, and put your patient to bed, where she is to stay during her sickness. Such rest, and I mean functional rest as well as physical rest, will alone often check the flow. If it fails, give a teaspoonful of the fluid extract of ergot every two, three, or four hours, according to the urgency of the symptoms. In the long run ergot is, here, our sheet anchor. Next to ergot ranks gallic acid, given in doses of from twenty to thirty grains, repeated every two, three, or four hours. I know nothing better to check the most alarming hemorrhages, either from the womb, as in menorrhagia, or from the bowels, as in typhoid fever. When serious emergencies of this kind arise, to give smaller doses is mere trifling. Any table syrup will disguise its taste and reduce its bulk. Sometimes one will succeed best by combining ergot with gallic acid, to which must often be added morphia enough to allay the severe pelvic and uterine pains. Quite recently Spencer Wells and others have highly lauded a free exhibition of an infusion of Vinca major, the greater periwinkle of our flower gardens, in the proportion of two ounces to twenty of boiling water. I have no experience with it; but such recommendations make it worthy of trial. I have seen an old woman's remedy of cinnamon boiled in milk act like a charm, when other medicine failed. Leeching or scarifying the cervix a day or two before the menstrual flux will relieve the local congestion and very materially lessen the bleeding.

During the intervals between the hemorrhages iron in some form is indicated; not given alone, but in combination with such medicines as lessen the congestion of the womb. For this object ergot and the Indian hemp sustain the greatest reputation. Digitalis and arsenic have many advocates, and so has ipecacuanha. All these remedies must be given in doses as large as can well be borne. A favorite mixture of my own,

which, by the way, I often give in every kind of uterine engorgement, is—

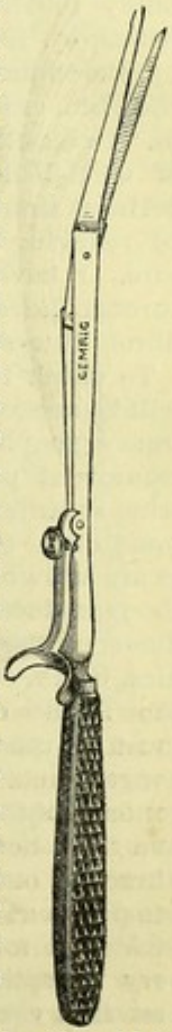
℞ Tinct. ferridi chloridi
Acid. phosphorici dil.
Ext. ergotæ fluid. āā.fl.℥j.
Aquæ cinnamomi fl.℥v. M.

Sig.—One dessertspoonful after each meal, in a wineglassful of water.

If, by these means, the hemorrhage is not checked, then inject subcutaneously a hypodermic syringeful of the fluid extract of ergot, or an equivalent dose of a concentrated infusion of the powdered ergot. Should there be no response, then the physician may proceed in the usual way to tampon the vagina. He will, however, find it a far better practice to plug up the canal of the cervix; for not only will he thus least inconvenience the woman, and also more effectually control the existing hemorrhage, but, further, he will lessen the tendency to future ones. For this purpose squeeze into the os the largest sponge-tent possible. Or else, expose the cervix by a speculum, hook down the anterior lip, and then, with a sound, pack, little by little, into the os and cervical canal all that is possible of a long and narrow strip of lint. First dip the lint into a saturated solution of Monsel's salt, and also, for convenience of removal, leave a short tail outside of the os. Of these two methods, I much prefer the former; because, since some blood will always ooze out by the side of the sponge and through its substance, it can be kept in for two or three days without becoming fetid; and because it is a fact that whatever dilates the cervical canal of a womb containing a fibroid tends to lessen the frequency and duration of the hemorrhagic attacks. Repeatedly, after using a sponge-tent, either for diagnostic purposes or as a tampon, have I seen the hemorrhages much diminished for weeks and even months.

Let me advance a step further; for, to combat this most formidable of symptoms, to confront, what Homer calls, "the purple death," we must be armed at all points. A woman cannot be always kept tamponed, or for an indefinite length of time, and yet, when the tent is removed, she may bleed as badly as ever. Stretch open, now, the cervical canal by the dilator, and after introducing the slender nozzle of the uterine syringe between the open blades, inject into the uterine cavity one or two drachms of the tincture of iodine, or as much of a strong solution of Monsel's salt. Or else push up into the uterine cavity, as far as it can be made to go, a piece of lunar caustic weighing from five to ten grains, and let it dissolve there. Another way is to swab out the uterine cavity with fuming nitric acid, in the manner previously described. Any one of these plans is, for the time being, usually very efficacious. But supposing it fails; or the hemorrhage, after being arrested for a few days, returns with renewed violence. The canal of the cervix must now be so opened as to admit the index finger. This is done by incising the whole canal, either bilaterally with the hysterotome (Fig. 16), or at several points with a probe-pointed and curved bistoury. In performing the latter operation, it is best to expose the cervix with a speculum, and to steady the anterior lip with the volsella. Whenever the cervix is thinned down to a mere rim, a strong pair of curved scissors will readily slit up the margin. In case the cervix is long and uneffaced, my own plan is to stretch the canal open by the dilator, and crowd into it a fagot of laminaria tents, before resorting to cutting instruments. My reason for this is, that, very commonly, after such a dilatation of the os, the further descent of the tumor prevents the opening from closing. The mode by which a permanent expansion of the canal controls the hemorrhagic tendency is not yet clearly understood. It is not the only empirical fact in medicine which has to be taken on trust. But experience teaches, that, after such an expansion, the hemorrhages often remain for months in abeyance.

FIG. 16.



Stripped of its power to bleed, a fibroid is shorn of much of its power to do harm; but there will remain for treatment pelvic pains, and vesical and rectal tenesmus. More commonly at the menstrual periods, but also at other times, the womb is excited to extrude the foreign body. These pelvic pains and these uterine colics will often tax one's skill and tact. Much can be gained

from rest. Frequent warm baths may assuage the vesical and rectal irritation. Anodyne suppositories, either rectal or vaginal, always give much comfort. Two grains of the watery extract of opium will be enough for a rectal suppository; and one grain of morphia with two of the extract of belladonna, for a vaginal one. This method of giving anodynes is better than that by the mouth, which leads sooner or later to the habit of opium-eating.

To lessen the inconvenience arising from the weight and bulk of these tumors, various forms of pessary may be tried. But they are only available when these fibroids are small enough to move about pretty freely in the pelvic cavity. Whenever they are too bulky to sink down very low into the pelvis, or, having been artificially pushed up, the indication is to maintain them above the brim, external support must be resorted to. An elastic broad belt, stiffened by slips of whalebone, and kept in position by a perineal strap, will then give much comfort by relieving the pelvic viscera from pressure. I have been able to send on a jaunt through Europe a patient with a very large fibroid thus supported.

To check the growth of these tumors, it will be necessary to advise total abstinence from sexual intercourse, more or less of the recumbent posture, loose dresses, a somewhat sedentary life, and a spare but wholesome diet. Such medicines must be given as are known to lessen the flow of blood to the reproductive organs. This class of remedies comprises ergot, digitalis, cannabis indica, borax, cinnamon, and the bromide or the iodide of potassium. Every means must be used to prevent portal and pelvic congestion. With this object in view, the contents of the bowels must be kept soluble, and rest strictly enjoined before, during, and after the menstrual flux. Broken down constitutions fearlessly build up by vegetable and mineral tonics; by stimulants very exceptionally. All growths thrive best in a cachectic soil. By these means, and by those previously noted, the physician will very generally succeed in tiding his patient safely over the perils of the menstrual period of her life; and, the climacteric once reached, her future will thereafter be one of comparative comfort.

So large a measure of success cannot be promised of the radical treatment of these tumors. Hitherto very many different remedies have been tried, but with such indifferent success, that it would be a waste of time to enumerate them. The most feasible and rational plan is that proposed by Prof. Hildebrandt, of Königsburg (*Half-Yearly Abstract*, January, 1873, p. 248), which bids fair to prove of great value. He reports that he has successfully treated nine cases of fibroid tumors of the womb by daily injections of the aqueous extract of ergot under the skin around the umbilicus. By this treatment one fibroid, reaching above the navel, entirely disappeared. Another, which so filled the entire abdominal cavity as to press upon the false ribs, was much reduced in volume. In the other cases the tumors were greatly diminished in size; and in each one all the alarming symptoms, such as menorrhagia, metrorrhagia, leucorrhœa, and uterine colics, disappeared. The duration of the treatment was from two to four months, the daily injections being intermitted only during the catamenial period. In one case only did the toxic effects of the ergot compel a discontinuance of the treatment. For these injections, Prof. Hildebrandt uses an ordinary hypodermic syringeful of a solution containing three parts of ergotin to 7.5 parts each of glycerine and water. The mode of action of the ergotin in these cases was, probably, its property of contracting the uterine walls, whereby the nutrition of the tumor was interfered with. It is, therefore, very questionable whether any but interstitial and submucoid tumors can be acted upon. For the subperitoneal fibroid would be outside of the grasp of the uterine fibres. From this treatment so many successful cases have been reported in the journals (See Report on Obstetrics in the *Trans. State Med. Society of Pennsylvania*, for 1873, p. 86), and I have seen such good results from it, that I can confidently recommend its adoption. Headache, severe uterine pains, and a spurious hectic fever evinced the constitutional action of the ergot in the cases of which I have cognizance. The local effects of the injections were at first great pain and redness of the skin at the seat of puncture, and an occasional small abscess. The last, however, can be generally avoided by carrying the nozzle of the syringe deeply down to the level of the muscular parietes of the abdomen. As there is no standard preparation of ergotin at all trustworthy, I should recommend from ten to fifteen minims of the officinal fluid ex-

tract of ergot, diluted with enough of water to fill the hypodermic syringe; or the same amount of a concentrated infusion of powdered ergot, of equivalent strength. Or else, Squibb's solution of ergot, which is double the strength of the officinal fluid extract, may be used. When the subcutaneous treatment cannot be borne, an enema of one, two, or three drachms of the officinal fluid extract, in an ounce of thin starch-water, may be given every night at bedtime. By inspissating the fluid extract by very moderate heat, large amounts can be incorporated with a rectal suppository.

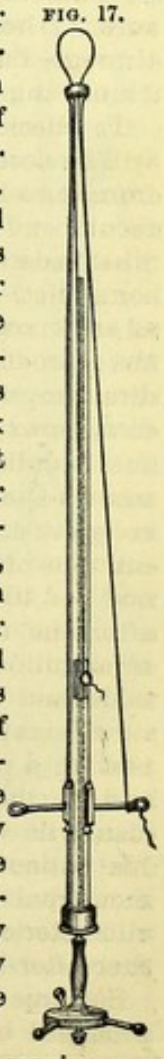
Prof. Hildebrandt's method promises so large a measure of success, that it seems hardly worth while to advert to the surgical treatment of these tumors. Yet time may show that there are interstitial and submucoid fibroids not amenable to the hypodermic treatment. Of course all pedunculated submucous growths are to be treated like polypi. Before the appearance of Prof. H's article, there were reported several successful cases of enucleation of these fibroids by forcible traction with volsellæ and powerful supra-pubic expression, after the division of the capsule. But, more in accordance with nature and less rude, does a partly expectant plan seem to me, viz., after the incision into the capsule, to depend for the further extrusion of the fibroid upon the expulsive action of ergot, and upon repeated attempts with the finger at enucleation, resorting to avulsion only after the fibroid begins to project from the os, or to show other signs of commencing dislodgement.

The treatment by ergot may also in some cases so increase the peristaltic action of the uterine fibres, as to force an interstitial fibroid towards the abdominal cavity, where it becomes subperitoneal, and then loses much of its power to do harm. In this manner, also, an originally interstitial or submucous fibroid may be more and more forced into the uterine cavity, until it is converted into a fibroid polypus, which is amenable to surgical treatment. It is, however, doubtful whether an interstitial fibroid ever becomes polypoid, without first losing its muscular or mucous investment; that is to say, without the process of spontaneous enucleation. The simplest and safest method of effecting such an extrusion is to dilate the os by several incisions, and to keep up a persistent contraction of the uterine fibres by the continuous hypodermic use of ergot. If, however, there should be no disposition on the part of the fibroid to become polypoid, then may its capsule be divided. But not unless the case is an urgent one, the hemorrhage uncontrollable, the bulk-pressure unendurable.

Cancer of the Cervix Uteri.—Whenever the cervix is the seat of a malignant or of a quasi-malignant growth, the indications are to check excessive serous or bloody discharges, to correct the fetor, to allay pain, and to prolong life. Very fortunately, that physician who diligently carries these out will often give a new lease of life to his patient, and sometimes bring about her cure.

A plan which covers these indications is, to remove all of the cervix possible as soon as the disease has been discovered. The best instrument for this purpose is the galvanic battery, with its caustic loop and porcelain burners. Since, however, on account of the expense, the bulk, and the limited range of usefulness of this apparatus, few physicians will care to purchase it, I shall confine my remarks to the wire-écraseur (Fig. 17), which is very generally adopted as its substitute. In the adjustment of the loop of this écraseur certain very necessary precautions must be taken. The cervix should be noosed only while the womb lies in its natural position; for if the latter be first dragged down by the volsella, as is often recommended, the vagina becomes partly inverted, and the cervix is made to appear longer than it really is. Hence the operator is very likely to slip up the wire-loop higher than it should go, and may, therefore, include in its bite a portion of the bladder and of Douglas' pouch. To still further insure their safety, it is advisable to pass up the shaft of the écraseur in front of the cervix, where the insertion of the vagina is lowest, and then, by it to push up the womb before the loop is tightened. On account of the excessive vascularity of a cancerous cervix, the screw of the instrument should be turned very slowly.

FIG. 17.



If, upon the ablation of the cervix, any

portion of the growth remains behind, it should be scraped away or dug out by the finger nails, or by sharply edged curettes or scoops. The instruments that I use have been made after Simon's pattern, but a very efficient curette can, it seems to me, be extemporized by heating red-hot the tip of a long and narrow spatula, and then bending it to a slightly oblique angle. If the surface is a large one, the hemorrhage attending this scraping process is somewhat free until healthy structures are reached, but the risk to life is trifling if care be taken not to encroach upon the peritoneum. Should the womb be movable, this operation will be much facilitated by holding the stump of the cervix steady by means of the volsella forceps. A cotton tampon, such a one as described at page 5, is then charged with the dry subsulphate of iron, or with a glycerole of the same, and pushed up against the raw surface, where it is to remain for twenty-four hours. Vaginal injections of warm and saturated solutions of the chlorate of potassa should be made twice or thrice daily. I prefer warm water to cold, because it dissolves a far greater amount of this salt. During the healing process, any tendency to cicatricial closure of the cervical canal is to be met by the occasional use of the dilator. After one or two weeks have elapsed the speculum should be introduced, and every vestige of the disease thoroughly cauterized with fuming nitric acid. If need be, this application must be repeated over and over again at intervals of about a week. For many consecutive months the patient should be put on the use of iron, arsenic and ergot—the iron to build up the system; the arsenic to repress the tendency to reproduction and to systemic poisoning; the ergot to starve out these growths by shortening their rations of blood-pabulum. From this treatment much cannot be expected in the way of absolute cure. But the immediate effects have been extremely satisfactory to all the parties concerned. Life has been prolonged and rendered endurable; the hemorrhage has been stayed; the fetid discharge arrested; the appetite restored, and a bed-ridden patient once more put on her feet. Even when the womb is firmly fixed, from extension of the disease to points beyond operative reach, yet much will be gained by the removal of all the growth possible.

Whenever the wire-écraseur cannot be made to encircle the diseased structures—as for instance, when the ulcerations are too deeply excavating, or too extensive, or the cervix does not project sufficiently—then the friable portions of the mass should be broken off or scraped away by the finger nail or the curette, and the surface well swabbed with nitric acid. The previously given form of constitutional treatment should be adopted. Sexual intercourse must be absolutely forbidden, for attempts at coitus are frequently followed by serious hemorrhages. From the very repulsive nature of this disease, this caution may seem unnecessary; but the fact is, that the sexual appetite of the woman is often greatly increased by a pruritus vulvæ and by the excessive vascularity of the reproductive organs. With regard to other local treatment besides the nitric acid, Dr. Burow, of Königsberg, has given such unqualified praise to the continuous application of the chlorate of potassa in substance (*Lancet*, April 12th, 1873, p. 525), that I shall certainly give this drug a fair trial, and meantime, recommend it on his authority. He sprinkles the sore with the chlorate, and then covers the whole with a wet compress. As the crystals exert a more powerful action than the powder, he first uses the latter, and replaces it by the crystals when sensibility has abated. With alleged success, pepsin in powder has lately been applied to these cancers in pretty much the same way, but with it I have no experience.

In addition to the means employed by the physician, the patient herself should be taught how to check the constantly recurring hemorrhages. This she will very generally be able to do by injections of ice-water into the vagina, by cotton-wool tampons containing tannin, or the subsulphate of iron, either in the form of a dry powder or in that of a glycerole, or charged with a paste made by thickening a saturated solution of alum with tannin. These tampons or suppositories should, by the way, be removed, as a rule, in from two to three hours; for if left in longer, they may become so adherent to the warty surface of the cancer, as in their removal to tear off the more friable portions; with a renewal of the hemorrhage. Vaginal injections of any of the astringents, as strong as they can be borne, will also prove of service. When pain is present, morphia may be incorporated with any of the above washes and suppositories. A very handy instrument for the woman

to use, in making a prolonged contact of styptic or deodorant fluids to the cervix, is a glass tube like the vaginal portion of a Fergusson speculum, to one end of which is attached a rubber bulb.

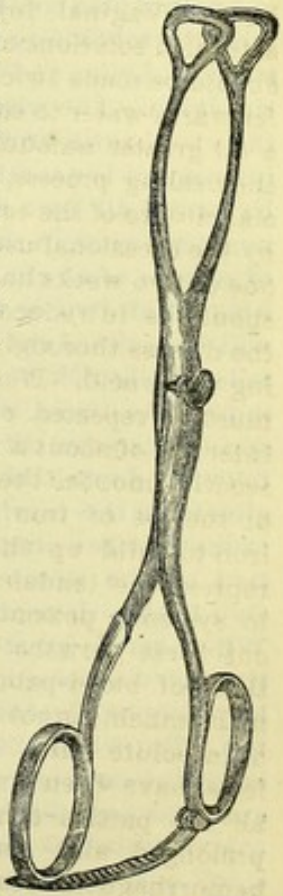
To correct the horrible odor, vaginal washes containing alum or carbolic acid, the hydrate of chloral, or the chlorate or the permanganate of potassa, will be found extremely useful. Of these the hydrate of chloral has my preference, because it is not only an admirable deodorant and antiseptic, but a very prompt local anæsthetic. The plan by which I have best succeeded in making my patient the least disagreeable to herself and to her friends, is the frequent use by day of some one of the above washes, and at night the introduction of a suppository containing a few grains of chloral, or of the chlorate of potassa. Whenever the disease is far advanced, and the patient's sufferings are very acute, her euthanasia is all that is left to the resources of art. Anodynes should, therefore, be given without stint, in any way, shape or form the sufferer may prefer. For the agonizing pains in the back, so common in advanced stages of the disease, the promptest relief will be gained by a hypodermic injection of morphia, but a more permanent one sometimes follows the use of dry or wet cups over the sacrum, or the application of a few leeches. For the suppression of the secretion of urine, occasionally seen in women suffering from this cruel disease, Martin, of Berlin, states that there is nothing better than small doses of the iodide of potassium.

Polypus of the Womb.—For all practical purposes, a uterine polypus may be defined as a stalked or sessile tumor, hanging from the mucous surface of the womb, and partaking of the same histological characteristics as the stroma from which it springs. It usually occurs singly, but I have removed two from the uterine cavity, which, like gall stones, were flattened on the surface of impact. It is most probably the result of a perverted nutrition, brought about by some congestive or inflammatory action of the womb, just as a nasal polypus owes its being to a chronic catarrh.

The most common symptom evoked by a polypus is hemorrhage, but the amount bears no proportion to the size of the tumor. At times the menstrual flux appears at the usual period, but is excessive; more frequently the interval shortens; then, again, blood may dribble away more or less all the time. Other symptoms are leucorrhœa, vomiting, and expulsive pains, the last two as the result of uterine distention.

The polypus ordinarily met with is the small glandular variety, which appears to consist of one ovule or more of Naboth. In size it rarely exceeds a marrow-fat pea, and is found just within the os externum, or hanging out of it. Since it retreats before the finger into the cervical canal, and thus escapes detection, a speculum should always be used. A bivalve is here the best, because, by making the os gape widely open, it may reveal one so high up in the canal as to be beyond the reach of the finger. From its soft and slippery nature, it eludes the grasp of any ordinary forceps, and, therefore, should be either snipped off with a pair of scissors, or twisted off with a fenestrated forceps (Fig. 18.) Any tendency to hemorrhage can be controlled by an application to the stump of fuming nitric acid.

FIG. 18.



Polypi that start from the uterine cavity grow to a much larger size, and, when first discovered by the physician, are rarely smaller than a hickory nut. Varying much in size, they will be found either wholly in the vagina, or partly in the vagina and womb, or wholly within the uterine cavity. Whenever they hang loosely in the vagina, or dangle partly out of the dilated os, like the clapper of a bell, there is no difficulty or hazard in their removal. They can often be twisted off, but no great force must be used for this purpose, lest the root of the stalk should wrench off a portion of the uterine wall. They can be snipped off with a pair of scissors curved on the flat; or the stalk can be first put on the stretch, and then scratched through with the nicked nail of the index finger, just as a blunt knife severs the strands of a rope when tightly stretched. The safest,

and therefore the best plan, is, however, to noose the pedicle with the loop of the écraseur. Should the polypus prove so large as to fill up and greatly distend the vagina, it may be impossible to reach the pedicle. In such a case different plans may be pursued, but the tumor must be got away by hook or by crook. One method is to cut off as large a slice as possible by a very strong wire loop slipped up as high as it will go. On the removal of this slice the rest of the polypus will descend still lower, so that at a second or third trial the pedicle will be reached. The risk from hemorrhage is not very great, even when the tumor is of large bulk. Before the écraseur came into use, I once assisted at an operation in which a very large polypus was removed with a curved pair of scissors. Although the pedicle was not reached until two large slices had been cut off, each after an interval of a week, no hemorrhage requiring a tampon took place.

Another plan consists in seizing the growth with the midwifery forceps, or by two very strong volsellæ, and in dragging it outside of the vulva. The wire loop of an écraseur can then be thrown around the pedicle. If this instrument is not attainable, the pedicle can be sawed off by a fine but strong piece of hempen twine, in the same manner as a bar of soap is often cut into uniform pieces. If knotted at two or three points, the twine will sometimes cut better. Either method reduces the risk of hemorrhage to a minimum. As these very large tumors often spring from the cervix, care must be taken to follow down the reflected fold of the vagina upon the cervix, so as not to apply the twine or wire so high up as to include a portion of the womb or of Douglas' pouch. One hint with regard to the wire écraseur: Whenever no great power is needed to cut through the noosed pedicle, each end of the loop may be fastened to the traveling button. But when the object to be cut off is large, the one end of the loop should be fastened (as represented in figure 17) to one of the immovable bars projecting from the shaft near the handle, and the other end twisted around the traveling button. Since only one end of the loop now travels, the movement is slower, but the half-sawing action thus gained greatly increases the power, and lessens the chance of having the wire snap.

Inversion of the womb being a very rare accident, is for this reason very liable to be mistaken for a polypus. When a polypus, partly projecting from the uterine cavity into the vagina, has contracted adhesions with the margin of the os, the diagnosis between it and an inversion of the womb may be very difficult. Sometimes the womb is partly inverted by a polypus, and the inverted portion may be mistaken for the pedicle. To make out this diagnosis, remember, first, that, unless directly after labor, the tumor of an inversion is scarcely larger than the non-gravid womb. Hence, a voluminous tumor distending the vagina cannot be simply an inverted womb. Next, pass up the sound, and if it indicates a length of two inches and a half, or more, beyond the edge of the os, the tumor is not an inverted womb. If it cannot be made to enter more than an inch, the womb is probably partly inverted. If no cervix and no uterine cavity can be discovered, and the tumor is not larger than the non-gravid womb, it is very likely to prove an inversion of the womb. To confirm the diagnosis, give ether, pass up the index finger, or even half of the hand, into the rectum, and try to reach above the tumor. If inversion be partial, a cup-like depression, like the bottom of a bottle, will be found where the fundal vault should be. If inversion be complete, the womb will be absent from its accustomed site. Sometimes, however, in spite of these methods, the diagnosis will still be doubtful. Stab now the tumor with an acupuncture needle, and if the woman flinches, it is the womb, and not a polypus, for the latter is not sensitive. Again, to make sure of no error in this matter, withhold all anæsthetics, and tighten the loop of the écraseur very slowly. If now the woman complains of great pain, some portion of the womb has been noosed. Hence, in doubtful cases, the inference is plain never to use anæsthetics while the pedicle is being cut through.

When a polypus, starting from the fundus, contracts adhesions with the os, these must be broken up by the fingers or cut through with the scissors, before the true pedicle can be reached. The *tapiroid* cervix, adverted to under the subject of prolapse, may be mistaken for a polypus. But as the remedy in each is the same, no harm will accrue from a false diagnosis. The tale told by the existence of an os externum, and of a uterine cavity, should never permit a completely prolapsed womb to be mistaken for a polypus.

The intra-uterine polypi are by no means so easily disposed of as the other two varieties. The first difficulty in the way is to discover the growth ; for it may be so small as not to enlarge the womb appreciably ; the cervix may not be effaced or the os dilated ; or the sound may impinge upon the polypus and deceive the physician by a false measurement. Since the most prominent symptom is hemorrhage, the first thing to be done, when this persists, is to explore the uterine cavity with the finger. For this purpose the canal of the cervix must be dilated by tents, and in the manner previously described ; due heed being paid to the caution of effecting this dilatation, if possible, with but one batch of tents. This method of gaining the cavity of the uterus will not, however, always be necessary, and here is a hint worth remembering. During the catamenial flux, the temporary increase in the bulk of the tumor, through congestion, together with the resulting labor-like pains, so opens up the canal as often to permit the passage of the finger. This fact should be explained to the woman, else her innate feeling of delicacy would cause her to shrink from an examination at such a time.

An intra-uterine polypus having been discovered, how is it to be removed? By adopting the following plan, somewhat modified from that of Dr. Kidd, of Dublin, I have not yet been foiled : The woman is first etherized, and afterwards brought in the dorsal decubitus to the edge of the bed, where each leg is supported by an assistant. The operator now seizes the anterior lip of the os with a volsella, drags the womb down as low as possible, and then entrusts the instrument to one assistant, with the injunction to hold it steady. Meantime the other assistant renders efficient aid by keeping up a firm supra-pubic pressure upon the fundus. The operator next introduces the index finger of his left hand into the uterine cavity, and by it as a guide seizes hold of the polypus with a second volsella. He now tries to twist the tumor off, but, for reasons previously given, with no great force. Failing in this, he, in order to gain more room in the vagina, removes the first volsella, and then slips the wire loop of an écraseur over the handles of the second. This volsella is now put in the hands of an assistant, who makes firm downward traction with it, while the operator proceeds to slide the loop up beyond its claws and over the polypus. When the pedicle is reached, he draws in the slack of the loop, but, before tightening it, causes the traction of the volsella on the polypus to be relaxed, and then pushes up the fundus of the womb with the shaft of the écraseur. The object of this manœuvre is, not only to restore the vault of the fundus if it has been partly inverted by the traction on the polypus, but also to get the loop close up to the root of the pedicle. A few turns of the windlass in the handle of the écraseur now cuts off the polypus, which, being still held by the volsella, is finally extracted. In like manner may the projecting portion of a submucoid fibroid be shaved off flush with the uterine wall. The remaining portion is then usually expelled later by the process of spontaneous enucleation. Should the physician not possess an écraseur he may, perhaps, be able to scratch through the pedicle with the serrated nail of his index finger, or sever it either with a curved and probe-pointed bistoury, or with a long pair of scissors curved on the flat. Sometimes he may be able to saw through the pedicle by a piece of twine carried up and worked by means of Gooch's double canula.

A polypus once removed never returns, but a second one dwarfed by the pressure of the first may now rapidly grow. There is, however, a sarcomatous growth of peculiar malignancy, hitherto referred to by writers under the name of "recurrent fibroid," which may deceive the physician into the impression that he is dealing with a simple polypus, and lead him to give, as I once did, a favorable prognosis. It bleeds very freely, emits a very bad odor, and feels much like placental tissue. The structure is so friable as to break down under very slight traction. The constriction of the portion protruding from the os gives the idea of a pedicle ; but on following it up with the finger, it will be found to have no circumscribed uterine attachment, but to lose itself in an analogous intra-uterine mass. It invariably returns, and the woman always perishes eventually, but life may be prolonged by scraping and gouging away all of the growth possible, by cauterizing the surface from which it springs, and by using the remedies recommended for cancer of the womb.

In concluding this subject, let me urge the importance of removing a polypus found in the vagina during either gestation or labor, or in the uterine cavity after delivery. For, from the injuries it will sustain, or has

already sustained from labor, it is very liable to become gangrenous and to kill the woman by putrid or purulent absorption.

PART II.

Hitherto the treatment of the more common forms of uterine affections has been briefly considered. I now purpose to suggest some means for their prevention. To stamp them wholly out may be impossible, but the alert physician can do much towards balking their approach. On the one hand, by prudent forethought and by watchful care, he can guard his puerperal patients from disease. On the other, by forewarning, he can forearm.

For the furtherance of these ends, I shall group my remarks under two heads; the first exclusively medical in character; the second less professional than laical. To this division I shall with less scruple sacrifice strict continuity, both because there is no sharp dividing line between that which concerns the physician and that which concerns his patient; and because I humbly hope that my readers may deem the lay-portion of sufficient importance to justify its perusal by their friends, neighbors, and patients.

SPECIAL HINTS.

Puerperal Convalescence.—Let the physician see to it that his patient has a good getting up, as well from a miscarriage as from a natural labor. Lactation should be encouraged, and from the first day the diet should be generous. The canonical purge on the third day should be dispensed with; it weakens the body needlessly, and tends to promote the absorption of septic matter. Premature exertion must not be allowed. On the other hand a recumbent posture ought not to be too rigorously enjoined. I feel persuaded that this tradition of the lying-in chamber does more harm than good, for nothing so relaxes muscular fibre as a confinement in bed. In my experience, women feel stronger on the fifth day after labor than they do on the ninth or fourteenth, if kept in bed. Among the ancient Greeks, those models of physical strength and beauty, the women took a bath on the fifth day. That this was also a custom of the Romans is evident from a play of Plautus, entitled "Truculentus, or the Churl." Since labor is in general a strictly physiological process, there can be no sound reason why a woman should not sit up in bed, or even slip into a chair, whenever she feels so disposed. These are not idle phrases, but the conclusions of a long and well-sifted experience. Such movements excite the womb to contraction and empty it and the vagina of putrid lochia which may be incarcerated by a clot or by the swollen condition of the soft parts. When, therefore, the lochia are offensive, these upright positions should be insisted upon, as being, in fact, better deodorants than any detergent vaginal injections. By equalizing the circulation and by increasing its force, they also tend to lessen the passive congestion of the womb as a whole, the engorgement of the placental site, and especially that blood-stasis kept up by the dorsal decubitus in its now thickened posterior wall, which is, in my opinion, a very common cause of posterior displacements.

The prolonged use of the obstetric binder is another factor in the production of female complaints. The binder may be useful for the first four-and-twenty or forty-eight hours after labor; for it fills up the void left by the emptying of the womb; it gives a grateful feeling of support; it hinders the occurrence of a concealed hemorrhage, and presents a bar to the ingress of air into the uterine cavity. But when kept on simply for the purpose of preserving the shape, by paralyzing those abdominal muscles which it is intended to strengthen, it not only defeats the object so dear to the heart of every woman, but it weakens the retentive power of the abdomen. It also does harm by crowding the intestines upon the womb, and the womb down into the pelvic cavity. Again, by forcing backward upon the vena cava and upon the pelvic veins so hard a body as the womb, making it, in fact, the pad of a tourniquet, it impedes the freedom of the circulation in that organ, and greatly impairs the process of involution. Pharaoh could have devised no surer way of overcoming the fruitful health of his Hebrew subjects, than by an edict enforcing the prolonged use of a tight obstetric binder.

The lochia must be watched. If, in the third week after delivery, they still linger on, the inference may safely be made either that the cervix is the seat of unhealed lacerations, or that the process of involution is interrupted; or that both conditions may co-exist, for the former usually determines the latter. Astringent vaginal injections or

suppositories will now prove to be important therapeutic agents. To this local treatment may be added a constitutional one of iron and quinia, the former according to previously given formulæ, the latter in suitable doses, amounting in the twenty-four hours to from eight to twelve grains. Apart from its undisputed tonic properties, quinia firmly constringes uterine fibre, and, therefore, greatly aids the process of involution. Ergot and strychnia are also useful remedies to fall back on ; wine or beer must not be forgotten. If, after the puerperal month, pains in the back, leucorrhœa and other well-known symptoms indicate the presence of some uterine disorder, it is evident that involution has been retarded. The speculum must then be used, and the usual uterine applications made, beginning with the milder ones, for now, if ever, is the time by such means to treat the condition of subinvolution, or to cure other puerperal lesions. If a patient has previously suffered from uterine disease, she should, after delivery, be at once put on a treatment of ergot and quinia. By shortening the excursions of uterine fibres in their alternate contractions and relaxations, these medicines proportionately lessen the diastolic engorgement of the womb. I am not sure but Credé's method of placental delivery, by supra-pubic expression, acts in an analogous manner. It certainly empties the womb of all clots and squeezes it down to its mininum capacity. Such a patient also needs the timely aid of the forceps. For it prevents that laxness of uterine fibre following a long and weary labor, and hence provokes a more complete involution. But for that matter, no lying-in-woman should be allowed to linger on in the expulsive stage of labor, when her physician possesses the requisite skill to shorten it.

Lacerations of the Perineum.—The immediate closure of the rent in lacerations of the perineum ought by this time to be fully recognized by the profession as a very important means for the prevention of future mischief to the reproductive organs. As I have elsewhere shown (*Trans. of the State Med. Society of Pennsylvania, for* 1873), and here take the liberty of repeating, the loss of every fibre of muscle in the perineum entails a corresponding loss of power in the floor of the pelvis, and a consequent impairment of support to the reproductive organs. The sustaining power of the vaginal column depends upon the integrity of its perineal abutments. It is the tonicity of the vaginal walls, and the pelvic connections of the womb that mainly keep it in place. These, in a case of torn perineum, may not at once yield, but will sooner or later; for air gains access to the womb, irritating and congesting it to such a degree that it ultimately prolapses from an acquired hypertrophy. Unless, therefore, the rent is simply cutaneous, or very slight indeed, it should not be left to nature. Further, it is far more rational to take advantage of the necessary confinement in bed after delivery, and to close the wound at once, while its surface is raw and the maternal soft parts are comparatively numb and insensible, than to postpone the operation to a time when the woman shall be nursing, when the cicatrized flaps shall demand quite a formidable operation for their denudation, and when a special confinement in bed for two weeks or more will be needed.

My own method is, immediately after the delivery of the placenta, to pass deeply two or more wire sutures, securing each one by merely twisting its ends together. In bad rents, the first stitch is entered not quite half an inch below the lower angle of the wound, and about an inch from its margin. When the sphincter ani is torn, the cutaneous points of entrance and of exit of the first needle should then be nearly on a level with the lower margin of the anal orifice, and the suture should pass around the whole wound. This purses up the tissues from below upward, and secures complete coaptation. Enough opium must be daily given to keep the bowels quiet for a week.

In severe lacerations the woman's knees must be kept bound together for a week, and her urine drawn off for three or four days. On the third or fourth day, but not earlier, lest the process of immediate union should be interrupted, vaginal injections of weak solutions of carbolic acid, or of the permanganate of potassa, are made twice in the twenty-four hours. These soothe the parts and correct the bad odor of the discharges. Without reference to any special time, the sutures are removed as fast as they become loose, usually from the seventh to the ninth day. On the eighth or tenth day a seidlitz powder, or one dessert-spoonful of castor oil, is given every four hours until an inclination to go to stool is urgent; then an injection is given in order to liquify the con-

tents of the lower bowel. This method of uniting the parts, both in the immediate and in the secondary operation, after the cicatrized surfaces are denuded, I can warmly recommend, as I cannot recall but one case, and that a very unruly one of puerperal mania, in which there was failure in obtaining a very good union. It ought, however, to be stated, that in secondary operations superficial sutures should be placed between the deep ones, and that the latter should be clamped with perforated shot. In order also to pare each side of the rent with unerring uniformity, after freshening the surface of one side, its exact print in blood can be got on the other by pressing the nates together for an instant. A very troublesome symptom in these cases is flatus. If it does not yield to valerian, a gum catheter should be very carefully passed up into the rectum.

Many lacerations are, in my opinion, owing to the common mistake of making so firm a pressure upon the perineum as to prevent it from undergoing an equable dilatation. The portion thus compressed cannot take its share of the general tension, and the strain is thrown on the fourchette. Further, the pressure of the hand, by obstructing the free circulation of blood, impairs the vitality of the perineum. Bruised and benumbed, it is no longer a living tissue, capable of responding intelligently, so to speak, to the requirements of the occasion—when to repel, when to solicit the advance of the head—and this nice point nature can very generally determine far better than the physician. Again, the word "*support*," as applied to the perineum, is a misnomer. No "support," in the ordinary acceptation of the word, is afforded to the perineum by direct pressure. If such a method ever accomplishes any good, it is by retarding the advance of the head, in other words, by *supporting* the head through the interposed perineum, and not by supporting the perineum itself. Why not then support the head by pressure directly applied to it, instead of through a medium which requires perfect freedom from all restraint in order to undergo the requisite and inevitable amount of dilatation? Finally, a majority of the advocates of "support" contend that it is most needed at the very moment of expulsion. But the woman, in the agony of the final throes, is very likely to jerk herself away from the hand of the accoucheur. Of course, then, the perineum, being abruptly released from the counter-pressure, is more liable to yield to a strain suddenly sustained for which its fibres are unprepared. Obstetric teachers recognize this danger, and in vivid language caution the student against it.

Although I believe that in the vast majority of labors the perineum does best when let alone, yet cases do undoubtedly arise which demand an intelligent assistance, nor can the line of demarcation be always drawn between natural and morbid conditions. Whenever the head in an occipito-anterior position is too much flexed and the vertex bears on the perineal centre, threatening perforation; whenever, in an occipito-posterior position, the head is too little flexed, the forceps is urgently needed. For cases of extreme rigidity, or of an under-sized vulval opening, ether will be found a potent remedy. Apart from a direct and retarding pressure upon the presenting part itself, the only manual aid that I permit myself to render is as follows:—Insert one or two fingers of the hand into the rectum, the woman lying indifferently on her side or on her back, and hook up and pull forward the sphincter ani towards the pubes. The thumb of the same hand is then to be placed upon the fœtal head, scrupulously avoiding all contact with the fourchette. For this method I claim the following advantages:—(*a*) By pulling up the sphincter ani toward the pubes not only is nature imitated, which always dilates the anal orifice, but the perineum is brought forward without direct pressure, and its dilatation is diffused over its entire surface, causing a corresponding relaxation of the strain on the posterior commissure in the line of its raphé. In addition, its muscular fibres are crowded up to, and consequently strengthen, the line of greatest tension; just as a prudent general hurries up reinforcements to the point of attack. (*b*) The same force which dilates the sphincter ani compels the occiput to hug the pubes and favors extension, especially if the fingers in the rectum are hooked over the prominences of the fœtal face or over the chin. (*c*) This aid is not liable to sudden interruption from the movements of the woman. (*d*) The thumb of this hand, together, if necessary, with the fingers of the free hand, can, by direct pressure upon the presenting part, restrain its too rapid advance, without exciting that reflex uterine action which is so frequently evoked by the irritation of contact with the perineum. (*e*) The

circulation of the blood remains free; the nerves are not benumbed by a double pressure, and the perineum, therefore, continues in its natural condition, that of a living, elastic and sentient tissue. This method I have more fully described in an essay published in the *American Journal of the Medical Sciences*, January, 1871, p. 75. To it I beg leave to refer those of my readers who are interested in the subject of the management of the perineum during labor.

Misdirected traction on the after-coming head, viz., too much in a downward direction as the head is about to emerge, is very commonly followed by a very bad rent of the perineum. Even in head-presentations, requiring apparently but slight traction, the use of the forceps will often occasion a slight tear in the vagina, which the passage of the shoulders prolongs into the perineum. From too hurried a delivery, or from faulty traction, I have seen so many bad lacerations following the use of this instrument, even in practiced hands, that I cannot withhold the opinion that, in the majority of cases, nature can accomplish the final delivery of the head through the soft parts much better than the physician. In the essay previously adverted to, I use the following language, which the riper experience of three years more has not induced me to change:—"Delivery by the forceps, even in skilful hands, will often produce laceration; for the head is liable to be brought down too quickly upon the unprepared soft parts, and it becomes a very nice point indeed to determine the exact moment when delivery may be ended with impunity. The cautious physician is liable to be caught, as it were, 'on the centre.' He sees the perineum stretched out to a perilous thinness, and the fourchette almost cracking under the strain. In doubt whether the moment has arrived to raise the forceps-handles and turn out the head, or to depress them and thus restrain its advance, he wavers, and in a twinkling the fibres part. On the other hand, the impatient physician is tempted to turn out the head before the parts are sufficiently dilated. Finally, what is still more frequent, at the last moment the physician's courage fails him, and he depresses the forceps-handles just as the head has begun to emerge; a course equally fatal to the integrity of the perineum." My advice is, therefore, that, other things being equal, as soon as the perineum is well dilated, the forceps should, as a rule, be removed, unless the blades are so firmly imbedded in the child's tissues that their withdrawal requires a force which might hasten the delivery of the head. This practice, if not so brilliant, will, I believe, in the long run be found much the safer.

At the risk of becoming prosy on this subject, I wish to add my conviction that, through sentiments of delicacy, many lacerations of the perineum escape the notice of the physician. After the delivery of the placenta, he should, therefore, make it a rule to introduce the index-finger into the rectum and the thumb into the vagina. By bringing them together he can estimate the thickness of the intervening tissue, and thus determine whether any extensive laceration has taken place. If a rent be discovered he should decently inspect the parts. By daylight this examination can usually be made without the knowledge of the patient. When candle-light is needed, he will be compelled either to make some excuse or boldly explain his object.

GENERAL HINTS.

One potent cause of invalidism in our women is that keeping up of appearances which infects every class of society. In other countries, where the wall of exclusiveness is insurmountable, each class accepts the situation, and lives and moves in accordance with the requirements of its position in life. Here, every one feels, or tries to feel, "as good as" one's neighbor; but this feeling of equality, in one sense a virtue, is such no longer when the poor ape the extravagances of the rich. The man asserts his equality by his ballot; the woman, by her needle. In the one this self-assertion is a periodic explosion, and he feels the better for it. In the woman it is a life-long, heart-wearying struggle. Hence that endless cutting, and basting, and turning; that perpetual needle-plying, which is the canker of so many of our households. Our very servants catch the folly, and spend all their wages and all their leisure in vying with the toilets of their mistresses. By this foolish rivalry the mothers and daughters of this land destroy the little health that a false system of education has left to them. What physician is there who has not seen ambitious mothers break down under the burden; or who does not expect some of his patients to be at least laid up by their spring and autumn dressmaking? One word here

about the sewing-machine. While I do not believe all that is laid to its charge, yet its treadle motion does undoubtedly lead to pelvic and portal congestions. In spite of myself I have become convinced that no woman who operates on this machine as a trade can long escape from some uterine derangement. Even its family use is not unattended with risk, because, although intermittent, it is liable to be too prolonged.

Were not the subject already too hackneyed, I might enlarge, as other causes of ill-health, upon late hours and social dissipations, upon that false and restless philanthropy which neglects home, and upon that unhappy discontent which forgets that to be loved one must be loveable. Woman shines best and thrives best, not in the adulation of society, not in obtrusive self-assertion, but in the quiet and faithful performance of her home duties. The heat and stir of life is food for man's more rugged nature. The wholesomest passages of her life are those which, like the thesis of a symphony, are unpercussed and unaccented.

The banishment of the corset from the waists of those who have attained to years of discretion would be a great boon to the sex; but the profession is powerless against the Moloch of fashion. Their disinterested warnings in that direction are like those of Cassandra, truthful, but unheeded. The family physician can, however, do the nex best thing, and that with some show of success. He can solemnly adjure the tightly harnessed mothers of the land not to allow their growing and romping daughters to put on the maternal armor. He can earnestly plead for the support of their underclothing by the use of shoulder-straps or of "skirt-supporters." This advice is not untimely, for I am assured, on the good authority of a fashionable corset-maker, that even the school-girl of the period has an ideal waist. A waist to which she squeezes, and laces, and tortures herself down, for the simple reason that it is always more slender than her own.

Too much brain-work, too little housework, is another crying evil of our land. Precocious cleverness is attainable only at the cost of physical and sexual development. Manifold diseases, many of them of a uterine complexion, date from the recitation room. Under the high pressure system of our public schools, even a class which ought to live by manual labor is made unfit for it. Hence an inability to work attaches degradation to domestic labor, and town and city teem, therefore, with pale-faced and flat-chested women, who seem to have no other hold on life than a capacity for momentary enthusiasm; no other aim in life than the absolute Nothing, the Nirvana of the Buddhist. Our great-grandmothers got their schooling during the winter months, and let their brains lie fallow for the rest of the year. They knew less about Euclid and the classics, than they did about housekeeping and housework. But they made good wives and mothers, and bore and nursed sturdy sons and buxom daughters, and plenty of them at that. From the age of eight to that of sixteen our daughters spend most of their time either in the unwholesome air of the recitation-room, or in poring over their books when they should be at play. As a result the chief skill of the milliner seems to be directed towards concealing the lack of organs necessary alike to beauty and to maternity, and the girl of to-day becomes the barren wife or the invalid mother of to-morrow. Surely a civilization that stunts, deforms, and enfeebles, must be unsound! To reform these abuses, to reclaim woman to womanhood, to make wives *helpmates* in the true sense of the word, is then one great mission of the physician, a mission which he must cheerfully and dutifully accept.

Marcus Aurelius, St. Augustine and other great and noble men wrote with tender affection of what they owed to a mother's love, to a mother's care. If that imponderable essence, the mind, can be moulded and shaped by a mother's heed, why not the body? Why should not the culture of the one be as much an object of maternal solicitude as the culture of the other? To preserve, then, the priceless gem of health, let the physician teach mothers how to preside over the physical education of their daughters, how to pilot their frail bodies safely through the shoals and quicksands of girlhood; for at this time of life an ounce of mother is worth a pound of doctor. To this end, girls should be early made to throw back their shoulders, to maintain an erect carriage, and to walk with toes pointed outward. This attitude puts into action muscles which increase the obliquity of the pelvis to the trunk, and consequently lessens the downward pressure of the abdominal viscera upon the pelvic organs. Their clothing

should be thick and warm; their shoes stout and roomy; their brains not overtaxed. Candies, doughnuts, and hot biscuits must be struck out from their fare; such trash has made our dentists world-renowned. Habits of regularity in sleep, as well as in the evacuations, should be scrupulously enforced. Over-work in a constrained position, especially that at the sewing-machine, must be forbidden. Let them daily take sunshine and exercise in the open air. But, on the other hand, let them, during their monthly sickness, avoid picnics, sleigh rides, dancing parties and other like imprudences. The risks from suppression should be vividly pointed out, else they could hardly be persuaded to forego pleasures which, at such times, are fruitful sources of mischief. Mothers should, therefore, diligently supervise the catamenial week of their daughters, and at that time forbid all over-work of brain and body. Would that all women could be taught to look upon the law of periodicity in their nature not as an affront to womanhood, not as the mark of a curse, but as a dower of health and beauty if respected, as the leaven of life-long invalidism when abused!

Let mothers select the books which their daughters read. None of the namby-pamby trash of our circulating libraries, none of the prurient literature of the day, should cross the threshold of a well-ordered home. It heats the blood; it inflames the passions; it goads on to precocious pubescence; it throws a halo of false and sickly sentiment around the day-dreams of youth. Let mothers themselves be implored neither to buy nor to borrow those vile pamphlets which flood the length and breadth of this land; a literature which, while professing in good faith to treat of the conjugal relations, covertly panders to our worst instincts, and defiles with the slime of an impure fancy. While on the subject of books, let me here urge upon my readers the perusal, and the circulation among their patients, of two most excellent works; the one, "Wear and Tear," by Dr. S. Weir Mitchell; the other, "Sex in Education," by Dr. E. H. Clarke. A timely essay by Dr. Nathan Allen on "Physical Degeneration" (*Psychological Journal*, October, 1870), can also be read with much profit. To these authors I am indebted for some of the thoughts embodied in this paper.

Certain causes of uterine diseases there are, which I would gladly leave unnoticed, for it is hard, in acceptable language, even to allude to them. But so wide-spread are the evils resulting from them, that to pass them by would be a flagrant sin of omission. "Two things come not back," said the Caliph Omar, "the sped arrow and the spoken word." Deeply impressed by the wisdom of this saying, I shall try so to write on these delicate subjects, as never to regret what I have written.

Arguing from a strictly practical and not from a sentimental point of view, but with all reverence, the love interchanged between man and woman is no mere operation of the mind, no sheer intellectual process. However pure this passion may be, it is necessarily twofold in its nature. It is an alloy, made up, like ourselves, of body and mind; the grosser mould so interfluxed with the more ethereal, that the one finds its most passionate expression in the fruition of the other. Abstract love between the sexes cannot, therefore, exist in any other sense than that engendered by blood ties. Forgetful of this absolute law of our being, sentimentalists have judged too harshly of Abelard, and lavished too one-sided a sympathy upon Heloise. Without further comment, the antenuptial relations, at least such as custom commonly sanctions in this land—and, I believe, in no other—are therefore, when prolonged, very disturbing elements to a young girl's health. Long engagements, by keeping up a wearing nervous erethism, are not only recognized, but even classified, by alienists, as one of the causes of insanity in women. Much more frequently the nervous exaltation is spent upon the reproductive organs; for there follows an awakening of sense which is not, as in man, appeased by the distractions of business pursuits. Uterine trouble from this source any open-eyed physician will over and over again see. Now, it is true that in love affairs the physician must be no meddler; match-making is certainly not his business. But, as a tried and valued friend, as a brother beloved, he can speak out when others may not even hint. Or, when consulted by the anxious mother about symptoms in her daughter plainly referable to the reproductive organs, he can disclose the cause, and thus be the means of hastening on the cure.

If the caresses of lovers are prejudicial to good health, every like relation between the sexes must be exposed to like dangers. In

too many rural districts, and in the lower classes of citizens, such license is tolerated in the social intercourse between the youth of each sex as must be destructive both to good health and to good morals. But, since it is not to my present purpose to appear as a social reformer, I shall confine my remarks to the hygienic aspect of the subject. The "old folks" are shelved too soon. Young people are left too much to themselves, and thrown too much together. Their social gatherings are too rarely presided over by their mothers or their seniors. As a very natural consequence, their games become coarse, their forfeits immodest, and little by little this freedom from restraint is liable, finally, to degenerate into such gross familiarities as would be improper between even affianced lovers. An unnatural sexual excitement is thus kept up, which must do physical harm. Of the moral harm I say nothing; the fathers who read these lines must draw their own conclusions. In this matter I am plainly at a loss to see how a physician can interfere in any other way than by setting a good example in the order and decorum of his own household. A nimbler wit than mine may work out some better way; if so, his be the credit; I do but throw out hints.

The excesses of the honey-moon journey, conjoined with its fatigues and its discomforts, are too often the starting-point of uterine disease. Here, again, will the family physician delicately proffer his counsel. In chosen words he can hint at moderation in all things, and suggest the avoidance of the usual exhausting round of travel and of sight-seeing. Such words will then, indeed, be words spoken in season. He must, still further, take cognizance of the sexual relations between husband and wife, relations which, when abused, are productive of much mischief. All excess in that direction he will discountenance. Unmastered importunity and too submissive an affection must be met by separate beds, by uncommunicating rooms, and if need be, by strong expostulation. Criminal abortion he must denounce, and that boldly, if he values the health and happiness of his fellow-creatures, and a clear conscience before God and man. The evils of incomplete coitions and of other detestable arts practiced to frustrate conception, he will paint in no neutral colors. Space forbids more than a brief allusion to these secret sins, which, like the plague of the frogs, creep into our "houses, and bedchambers, and beds." Suffice it to say that outraged Nature is resentful, and makes fierce reprisals whenever woman receives "the seed of another life" in any other way than that by which it tends to become fruitful. As West has pointed out (*Diseases of Women*, Lect. VI.), and as I have tried to show (*Philadelphia Medical Times*, February 1st, 1872, p. 16), no woman who deliberately thwarts the plain intention of the institution of marriage can long escape from the very worst forms of uterine disease. There is, moreover, a disastrous connection here between these sinful practices and immorality. Dishonor the body, the temple of the soul, and you dishonor the soul. The artifices and accoutrements borrowed from the brothel inevitably do damage, not only to good health but to good morals. Blunted pleasures lead to estrangement, to unfaithfulness, to divorce; the wife lapses, so to speak, into a mistress; and the marriage tie is degraded into a carnal contract which regards alone the necessities of the flesh. Much sad experience, alas! has proved irrefragably two axioms: that pregnancy is a necessary condition to healthful and happy marriages; and that there is no innocuous expedient whereby maternity can be shunned; no safe stratagem by which man can balk God's first blessing and first command to man.

The sympathy between the mammary glands and the uterus is so close as to have, in the treatment of post-partum hemorrhages, a positive therapeutic value. By condensing the womb and diverting the blood from it, lactation up to a certain point acts beneficially. But by exhausting the woman's strength and producing morbid impressions upon the womb, over-lactation becomes in itself a cause of uterine disease. It also very seriously compromises the health of the sucking child. Whenever, therefore, a nursing woman finds that the act of suckling is followed by a pain in the back, or by other symptoms of uterine irritation; whenever she suffers from dizziness, dimness of vision, sore mouth, shortness of breath, palpitations of the heart or night-sweats, she should be urged by her physician to wean her child. I use the word *urged* designedly, because lactation is often prolonged beyond all reason, simply as an antidote against conception.

Nothing so certainly undermines the ute-

rine health as the wear and tear of nursing the sick. The unwholesome air of a sick chamber, the close confinement, the selfish exactions of the patient, the broken rest, all tend to enfeeble the system. Then the undue exertions made at arm's length, such as in lifting or in turning a helpless invalid, so violently strain the diaphragm and the abdominal muscles as to force down and permanently displace the womb. Forewarned by the physician, the nurse, be she kin or stranger, will daily take a stroll in the open air, and in some way make up for loss of sleep.

The proverbial constipation of the poorer class of women in our cities, and of those women who live in the country, is another cause, and an exceedingly common one, of uterine disease. Such defective sewerage of the body, by the resorbtion of foul gases and of effete matter, degrades the blood, starves nerve-centres, breeds dyspeptic ailments, and begets pelvic and portal congestions. In this chain of sequences there is no missing link. Uterine congestions are also produced mechanically by the irritation or the pressure from hardened fæces; uterine flexions and displacements brought about by the straining efforts to empty the bowels. Over-distention of the bladder, by drawing up the cervix and thrusting the fundus over backward, is, undoubtedly, a very important factor in the production of retroflexions and retroversions of the womb. Yet what poor woman is there who is not thus daily exposing her womb to these displacements?

These irregularities of habit in our sallow-hued women are in a great measure owing to the discomfort, inconvenience and indecent exposure of their closet accommodations. Where is the privy that invites, rather than repels an operation of the bowels? When is it ever sheltered from the rude blasts of winter; or not poisoned by noisome stenches, acrid vapors, and unclean flies? Where is the privy that is not overlooked by the back buildings of all the neighboring houses, or not placed at such an embarrassing distance from the house as to be, in bad weather or in dark nights, absolutely inaccessible? Where, in the country, and for that matter, in cities also, is not to be found the privy made up of rough boards rudely spiked together, with cracks wide enough to destroy all privacy, with a door without a bolt, and generally hanging by one hinge, with a crescent-shaped hole for a window, and with its sole article of furniture a barrel of rasping corn-cobs? After such an unsightly but truthful picture, can we wonder that the calls of nature are looked upon as grievous dispensations of Providence, as hateful duties which are to be put off as long as possible, and obeyed as seldom as possible? To a delicate woman the exposure to the weather is a serious risk; to one who is menstruating it is a constant menace; while to the refined woman the exposure to view compels the postponement of her physical duties to night-fall, or until driven to them by a sheer necessity which knows no law.

Now, what is the remedy? Clearly such closets as civilized Christian beings, living in the nineteenth century, are not degraded by using; closets that are decent, comfortable and accessible. To educate the community up to the reception of this wholesome truth is the duty of the physician. He must tilt his lance against everything in the shape of a privy, and set a good example himself, by using, when water closets are not available, an earth closet in his own family. Such a closet, not larger than an old-fashioned arm-chair, can be moved about from room to room, or be put where it will be both private and accessible. Nor will its presence poison the surrounding air, for there is no better deodorizer of organic refuse than the dry earth contained in its hopper.

As a fit ending to this series of papers, justice to myself prompts me to remind the reader that, as the title indicates, I have thrown out mere hints, which he must develope; bare outlines, which he must fill up The fullness of a great and important subject cannot be compressed within even the generous space allotted to me in this Journal. The most that I have attempted has been to "vulgarize" what has hitherto been monopolized by specialists. Nor have these papers pointed out all the sources of mischief to the female reproductive organs. Other unsuspected correlations undoubtedly exist, for life is complex, and woman "fearfully and wonderfully made." These every physician will search out for himself, and when discovered, wage an unending war against. To heal sickness is noble, to prevent sickness is nobler, for thereby is suffering most lessened, and thereby does our profession best show its disinterestedness.

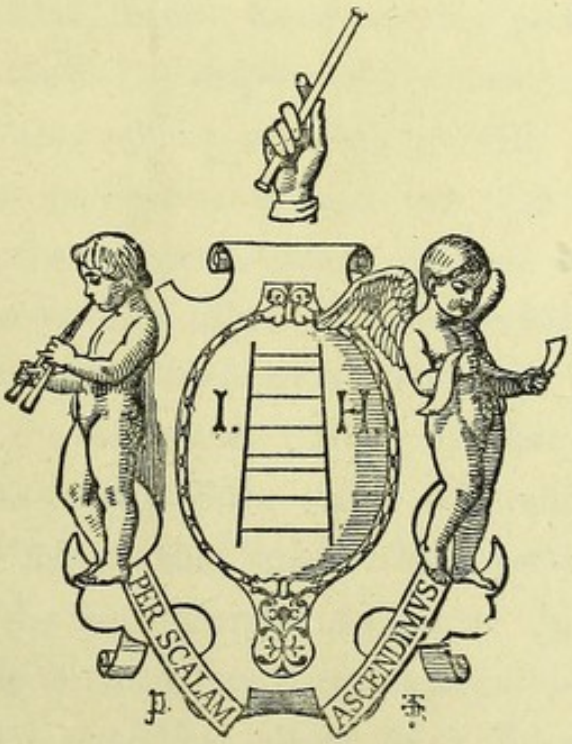
RUDIMENTS OF MUSICAL GRAMMAR.

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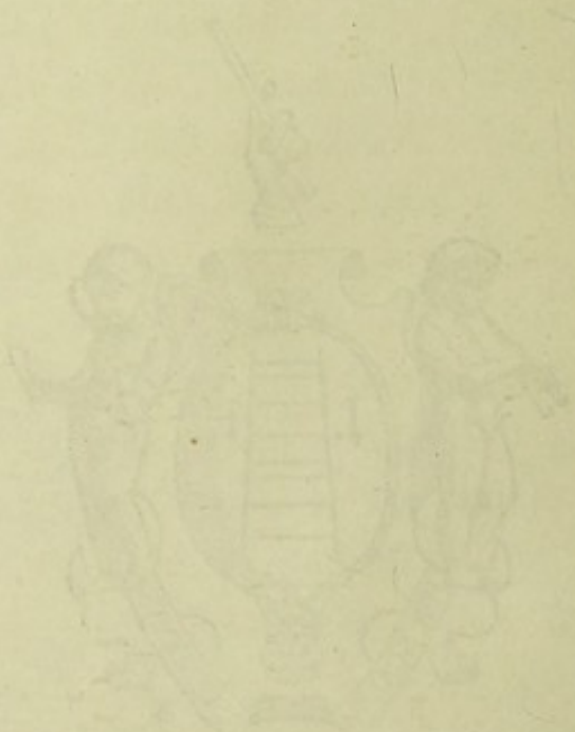
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PREFACE.

THE title of the following work will, it may be hoped, render any explanation of its aims unnecessary. The mode of treatment of the subject, and the order in which the different branches of it are brought before the student, differing essentially from those adopted in most other works of the same kind, require, however, a few prefatory remarks.

We often find the earlier chapters of rudimentary treatises, whether on music or any other subject, occupied, not with attempts to convey ideas of the *things* to be first studied, but with explanations of the *symbols* which represent them,—many of these latter, perhaps, not being called into requisition till an advanced period in the study, when they have to be learned a second time. Thus the beginner in music is made to exhaust the subject of the stave before he is in the least informed as to the nature of the scale; or is called upon to consider the peculiarities of five-crotchet time, while as yet he has no practical acquaintance with the first principles of rhythm. In the following work no attempt is made to introduce the student to the alphabet of music till he has learned something about *music*, or, more properly, the musical *system* itself; nor is he instructed in the different kinds of measure, nor even made aware of the existence of bars, until he has acquired some idea of the limits of a musical *phrase*, and the nature of a musical *foot*,—things altogether independent of any forms by which they may be represented, and which, as they certainly existed ages before the invention of the present musical alphabet, will as

certainly exist ages after that ingenious contrivance has become matter of history, or even of speculation.

The history of an art or science may often be brought to bear practically on the process of teaching it; and the order in which discoveries or improvements have been made will often suggest that in which a knowledge of them may best be communicated. So that the consideration even of exploded theories and obsolete forms may not be without its use, as keys to those which have superseded them. The musical student, for instance, will never appreciate the special merits of modern, unless he have learnt something of ancient, tonality; nor would it be easy to devise any shorter or more simple method of explaining the nature of a *mode*, than through acquaintance with the fact that, though but two modes are used by modern musicians, the number of modes possible is only limited by that of the sounds of the natural scale. This latter fact is briefly alluded to in an early chapter, and more fully treated in a later one the object of which has been rather to excite than to satisfy curiosity on a very interesting branch of musical science.

The chapters on the *Alto and Tenor Staves*—part of a subject treated elsewhere* by the writer more fully—will, it is hoped, be found sufficient to meet the practical wants of the student. The practice of writing alto and tenor parts an octave higher than they are to be sung has no doubt largely superseded the older and more simple one of writing them at their proper pitch. Whether this practice prove permanent or not, the student may rest assured that, unless he make himself familiar with at least two of the four different staves headed by the C clef, a very large proportion of the works of the greatest writers must remain unintelligible to him.

It can hardly be necessary to say, that the following work, though

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* A Short Treatise on the Stave. Longmans & Co.: London.

dealing for the most part with first principles, is not adapted to the use of beginners, save in connexion with musical practice of some kind, under the direction of a teacher. Music is an art as well as a science; and no art can be learned wholly from books. Nor is it likely that even first principles should ever be so simply stated, or so clearly expounded, as to be intelligible to those who make no attempt to turn them to account. To two classes of persons such a book as this may be of use (1) To those who, having attained some skill in the practice, and acquired some knowledge of the theory of music, may desire to have a connected view of those parts of the latter which are indispensable to the former:—and (2) to those—a very large and increasing class—who, familiar with other subjects, and accomplished in other ways, with little hope of becoming skilled musicians, may still desire to make some acquaintance, if not with the syntax, at least with the orthography, etymology, and prosody of the only grammar which can fairly be called universal. "Were I to begin life again," said the late Sydney Smith, "I would devote much time to music:" and "not six months before the death" of Samuel Johnson, he said to Dr. Burney, "Teach me at least the alphabet of your language." The following pages, it may be hoped, may in some degree enable those who have not had the advantage of early training to devote, with pleasure and profit, some time to music, without "beginning life again," and to acquire something more than the alphabet of the language of musicians.

J. H.

December, 1856.

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RUDIMENTS OF MUSICAL GRAMMAR.

CHAPTER I.

Musical Sound.

1. Sound is the result, or effect on the ear, of motion communicated to the air by some disturbing force. Such motion is called *vibration*, or undulation.

2. When the vibration of air is *regular* (*isochronous*, or equal-timed) the result is *musical* sound; when it is *ir*regular the result is *un*musical sound, or noise.

3. In the regulated production, by voice or instrument, of musical sounds consists the *art* of music; in a knowledge of the laws which govern the succession and combination of musical sounds consists the *science* of music.

4. The art and science of music involve the consideration of *four* properties of musical sounds, their *pitch*, *duration*, *intensity*, and *timbre*.

5. The *pitch* (acuteness or gravity, height or depth) of a musical sound depends on the *number* of vibrations communicated to the air *in a given time*. As this number increases or diminishes so does the sound become more *acute* (higher), or more *grave* (lower).

6. The *duration* of a musical sound depends on the *time* during which the air continues to vibrate *at the same pace*.

7. The *intensity* (loudness or softness) of a musical sound depends on the *extent* of the vibrations by which it is caused.

8. The *timbre* of (quality by which we are enabled to recognise) a musical sound is supposed to depend on the *forms* of the vibrations from which it results.

Timbre (French) literally, *stamp*. No English word has yet been adopted to express the same property of sound.

9. These properties are, for the most part, *relative*. Every sound is assuredly of a *definite* and *appreciable* pitch and duration; but the musical student is chiefly concerned with the pitch or duration of sounds *as compared with one another*—technically, *tune and time*.

The ultimate source of the pleasure afforded by musical sounds is *time*; since *tune* entirely depends on the order, or *regular succession* of the vibrations which affect us as sound. As a matter of practice, however, time and tune must be considered separately,—the latter first.

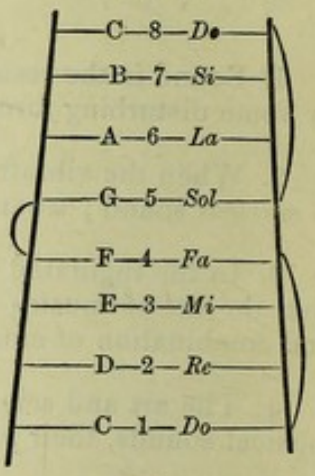
CHAPTER II.

Tune. The Scale.

10. Different sounds (sounds of different *pitch*) produced at the same instant, form *harmony*. *Melody* results from a succession of different, or even a repetition of the same, sounds.

11. Harmony or melody can be produced from the combination or succession of such sounds only as are found in the *same musical system*.

Fig. 1.



12. The basis of the modern musical system is the connexion of a given sound with another, standing in the relation to it of 2 : 1, by means of intermediate sounds also related, though less simply, to that (given) sound and to each other.

13. Such sounds presented in regular succession, form a *scale*, of which the topmast step is the 8th, or *octave*, from the 1st. (*Fig.* 1.)

14. The sounds of that scale which begins on the *central* sound of the modern musical system, are named by *letters* of the alphabet, or by *syllables*, as follows:—

1	2	3	4	5	6	7	8
C	D	E	F	G	A	B	C
Do	*Re*	*Mi*	*Fa*	*Sol*	*La*	*Si*	*Do*

The alphabetical names will be used exclusively in this work.

The student should sing, or play (on a piano-forte or other instrument) the scale of C, until he is thoroughly familiar with the sound of it.

15. With a little attention, even from an uncultivated ear, it will be perceived that the successive steps of this "natural" scale are not all *equal*, and that some adjacent sounds are *less unlike* one another than others; also, that the smaller steps lead to, or immediately precede, places in the scale at which the voice easily *pauses*, and on which the ear is willing to *dwell*. These are the 4th sound, F, and the 8th, C, the sounds immediately *leading* to which, E and B, are severally less unlike F or C than any two other adjacent sounds are to each other.

16. Moreover, further observation will prove that, notwithstanding the difference of *pitch*, the musical effect of C, D, E, F, heard in succession, is strik-

ingly like that of G, A, B, C; in fact, that the *melody* or *tune* of both series is *the same.*

The student should satisfy himself of the truth of this by singing or playing the two series, or any portions of either in immediate succession.

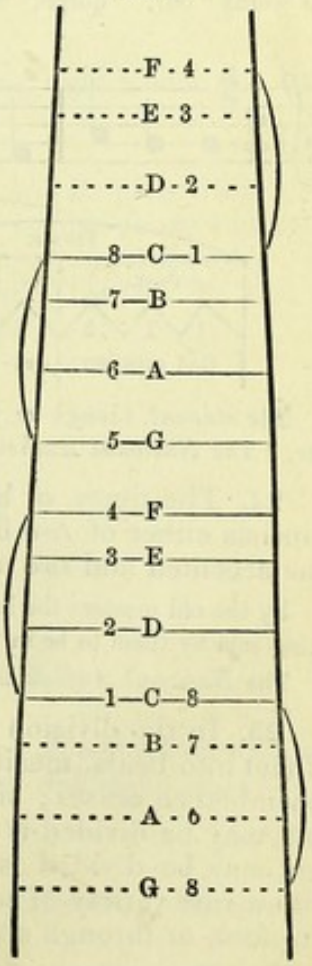
17. The cause of this similarity is to be found in the fact that melody, or tune, does not depend on the absolute, but on the *relative*, pitch of sounds—on their distances apart. F the 4th sound of the natural scale, stands in the same relation to C the 1st, as C the 8th sound, does to G the 5th; while E the 3rd, is to F the 4th, as B the 7th, is to C the 8th.

18. The relation of (difference or distance between) two musical sounds is called an *interval.* The intervals found in passing up or down the natural scale are *tones* and *semitones;* the (two) semitones falling between the 3rd and 4th sounds (E and F), and the 7th and 8th (B and C); the (five) tones falling between *every other two* adjacent sounds. Each *half* of the scale, therefore, consists of *four* sounds separated by *two* tones and *one* semitone.

19. A succession of four sounds separated by two tones and a semitone is called a *tetrachord.* The natural scale, therefore, is divisible into *two* tetrachords, the 1st sound of the *upper* of which (two tetrachords) is separated by a *tone* from the 4th sound of the *lower.*

In fig. 1, the several intervals between the different sounds are expressed by the greater or lesser distances between the lines which represent them. The division into two tetrachords is also shown, and the tone which separates them specially indicated.

Fig. 2.



20. The modern musical system consists in a succession of scales of like construction, the highest or lowest sound of each of which is identical with the lowest or highest of the one immediately above or below it. (*See fig.* 2.) The 8th sound of one scale is therefore the 1st likewise of another, and the 1st of one scale the 8th likewise of another. This similarity in the conditions of the 1st and 8th sounds of a scale is the cause of their bearing the same names, and, ultimately, of *all* sounds bearing the *same names as their octaves.* For as the upper C of fig. 2 is the octave to the lower C, so the D immediately above the former is the octave to the D immediately above the latter. And so of all the other sounds. Thus by a repeated application of the seven letters, C, D, E, F, G, A, B, to the seven corresponding sounds 1, 2, 3, 4, 5, 6, 7, in each successive scale, names are found for all the sounds of the entire musical system, and would still be found could that system be extended *ad infinitum.*

CHAPTER III.

Time. Rhythm.

21. Time and tune, ultimately so closely connected (Chap. I.), may exist, and are often found, independently. Neither, however, can *alone* give perfect satisfaction to the musical sense, which is incapable of appreciating any prolonged succession of musical sounds the proportionate durations of which are not regulated by some law. The result of this kind of law is *rhythm*.

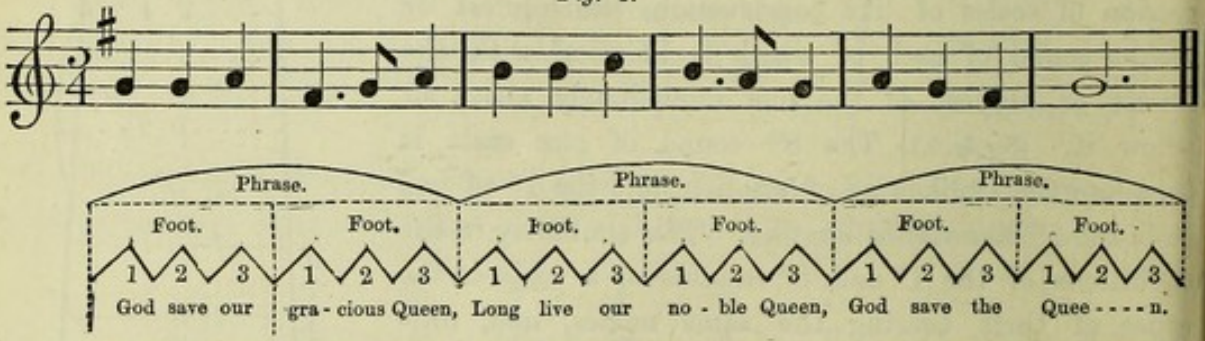
22. Every rhythmical passage or strain of music is divisible into *phrases*—successions of sounds dependent for their meaning on each other, and presenting a certain completeness.

The first strain of the *National Anthem* consists of *three* phrases, each ending in the word "queen." (*See fig.* 3.)

23. Every phrase is further divisible into *feet*, and every foot into *times* or *beats*

Each phrase of the first strain of the *National Anthem* consists of *two* feet, ending severally in the words "our," "queen," "the," &c. (*See fig.* 3.)

Fig. 3.



The student, though as yet unacquainted with musical notation, may be supposed to know, by ear, "The National Anthem." Otherwise, he must take some means of learning it.

24. The times, or beats, of a musical foot are *accented* or *un*accented. A foot consists either of *two* beats, one accented the other unaccented, or of *three* beats, one accented and *two* unaccented.

By the old masters the latter form of foot was held in the highest estimation; a foot of *three* beats being said by them to be in "perfect" time, and a foot of *two* beats in "*im*perfect" time.

The *National Anthem* is in "perfect" time.

25. In the division of musical passages into phrases, of phrases into feet, and of feet into beats, musical rhythm resembles poetical rhythm. Here, however, the resemblance ceases; since while the number of *syllables* into which the *poetical* foot may be divided is very limited, the number of *sounds* into which the *musical* foot may be divided is very great. And not only may any one foot be divided into a vast variety of sounds, but any one *sound* may be prolonged through an entire foot, or through any number of feet.

E.g. The sound sung to the word "queen," in fig. 3, is to be prolonged during an entire foot.

CHAPTER IV.

Notation.

26. The musical alphabet is chiefly composed of characters called *notes*, the relative *positions* of which on a *stave*, or staff, indicate the relative *pitch* of the sounds they represent, and the different *forms* of which indicate their relative *length*.

Fig. 4.

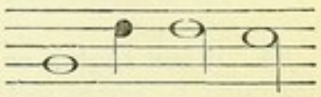


Fig. 4 is a stave, on which are placed four notes, of which the second is *higher* in pitch (and in position) than the first, the third is of the *same* pitch as the second, and the fourth is *lower* in pitch than the third. Moreover, the first is a *longer* note than any of the others, the second a shorter note than any of the others, and the third and fourth are of the same length.

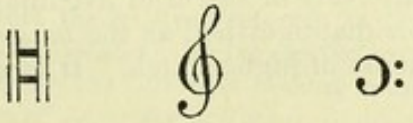
27. But neither the *absolute* pitch of sounds, nor even their *exact* relation to each other in that particular, can be indicated *by notes alone*. A *clef*, or key (to their meaning) is wanted at the beginning of the stave on which they stand.

28. A clef is the *only* character by which a musical sound can be *absolutely* represented.

29. There are *three* clefs, and therefore three sounds only which can be absolutely represented—C, G, and F.

30. The C clef represents the C which occupies the *middle* place in the system of musical sounds,—it having about an equal number of sounds above and below it. It is the C nearest the middle of a piano-forte, called therefore *middle* C. The G clef represents the 5th sound of that scale of which middle C is the 1st; and the F clef the 4th sound of that scale of which middle C is the 8th.

Fig. 5.



C G F

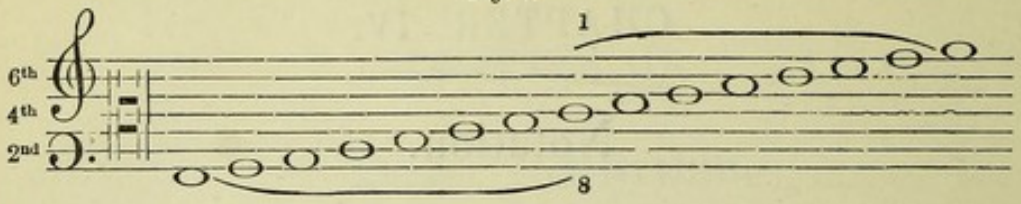
These three clefs are corruptions of old forms of the letters C, G, F.

31. Notes may stand in the *spaces between* the lines of a stave as well as upon them. (*See fig.* 4.) The notes of the *natural scale* occupy *following* lines and spaces of a stave alternately, without exception.

32. The lines and spaces of a stave are called indifferently *degrees*, or positions, and *adjacent* lines and spaces, *following degrees*.

Fig. 6 consists of two successive scales of C. The 1st note of the upper scale is identical with the 8th of the lower. (*Compare par.* 20.)

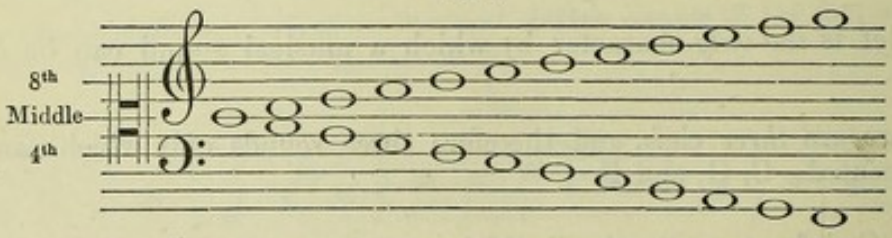
Fig. 6.



33. The note on the 2nd line (from the lowest) of fig. 6 is known as F, because the F clef stands upon it. The note on the 4th line is known as C, and that on the 6th line as G, for a similar reason. Moreover, the notes above and below those designated by the clefs are recognised by their positions *in relation* to the latter; the note in the space immediately below F being E, that in the space immediately above it, G; and so on.

34. When higher or lower notes than those in fig. 6 are to be expressed, *more* lines must be added to the stave. *All* the notes (twenty-three) required for *average* vocal music can be placed on a stave of *eleven* lines, on the *middle* line of which would stand "middle" C—having the same number of notes (eleven) above as below it; and on the 4th and 8th lines F and G.

Fig. 7.



35. No *individual* voice can utter *all* the sounds represented in fig. 7. Consequently, in writing music for individual voices, a smaller number of lines suffices. Practically, whether for vocal or instrumental music, a stave of *five* lines is generally adopted; the *particular sets*, or staves, most used being the five highest and the five lowest of the *Great Stave* above. (*See fig.* 8.)

36. The *lower* one of these sets or *staves* of five lines is used for voices and instruments of low *pitch*. It is distinguished as the *bass* stave. The *upper* stave is used for voices and instruments of higher pitch. It is distinguished as the *treble* stave. 𝄞 is also called the *treble* clef, and 𝄢 the *bass* clef.

Fig. 8.



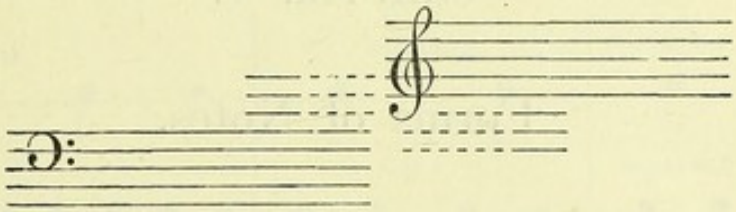
37. The two staves are joined by a *brace*, when used together for *piano-forte* or *harp* music; the upper stave being chiefly devoted to the notes to be played by the *right* hand, the lower to those played by the *left*. (*See fig.* 8.)

38. When the middle line of the Great Stave is required, it is introduced as a *leger* line. (*Compare figs.* 7 *and* 8.)

Léger (French) means *light*.

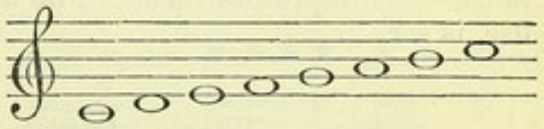
39. Music for the *lower* voices of women, and the *higher* voices of men, demands other staves which are, equally with the treble and bass staves, extracts from, or parts of, the Great Stave. Of these we shall speak fully, later. For the present, the *treble* and *bass* staves will be used exclusively, such *leger* lines being added to them as may be required. When *more than one* leger line has to be added to the top of the bass stave, it must be considered as an *extract* from the treble stave: *vice versa*, when more than one leger line has to be added to the *bottom* of the treble stave it must be considered as an extract from the bass stave. (*See fig.* 9.)

Fig. 9.



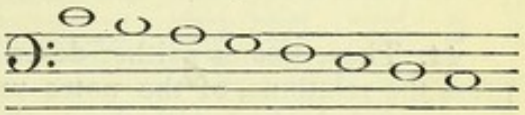
40. The ascending natural scale which begins on *middle* C, will appear on the *treble* stave as in fig. 10. The 1st or *lowest* sound stands on the leger line identical with the middle line of the Great Stave. (*Par.* 38.)

Fig. 10.



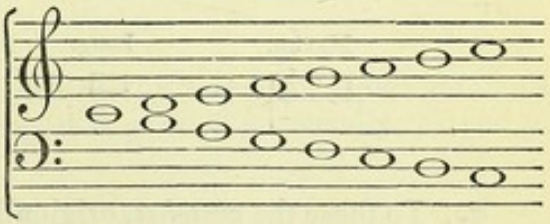
41. The *descending* natural scale which begins on middle C, will appear on the *bass* stave as in fig. 11. The 8th or *highest* sound stands on the leger line identical with the middle line of the Great Stave. (*Par.* 38.)

Fig. 11.



42. By joining together (with a *brace*) the staves on which these two scales are placed, the relation between them will be made plainer. The *lowest* note of the one scale is *identical* with the *highest* of the other, and the leger line on which it stands is common to both staves.

Fig. 12.



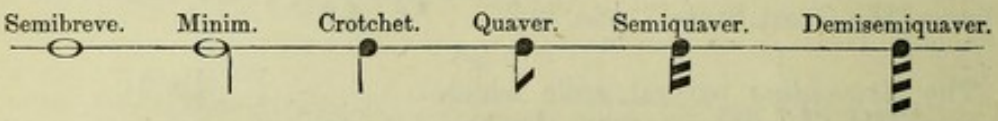
It will have been seen already that the variety of intervals in the natural scale (*Par.* 18) is not made manifest by the ordinary musical alphabet. *To the eye*, the *relation* between E and F is the same as that between G and A. (*See fig.* 12.) There is nothing in the arrangement of the lines of a *stave* analogous to that of the lines of the *ladder* in Chap. I.—reminding us always, by the different distances between them, that E and F, and B and C are severally a *semitone* apart, and that the other sounds which follow one another *scalewise*, are separated by tones. On this fact, however, *depends the modern musical system;* and of all things the student has to learn and to keep in mind, it is incomparably the most important. It will receive further illustration as we proceed.

CHAPTER V.

Forms of Notes.

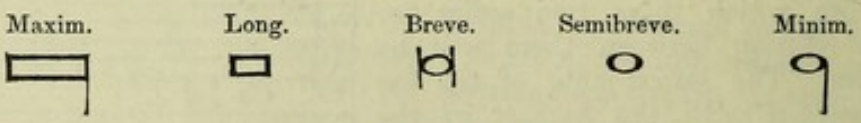
43. The relative *duration* of sounds is known by the different *forms* of the notes which represent them. The number of these forms, at present in common use, is *six*.

Fig. 13.



44. These names neither describe the forms, nor even for the most part express the relations, of the notes under them. The two first have been retained from a period when, with three others, they were the only notes in use.

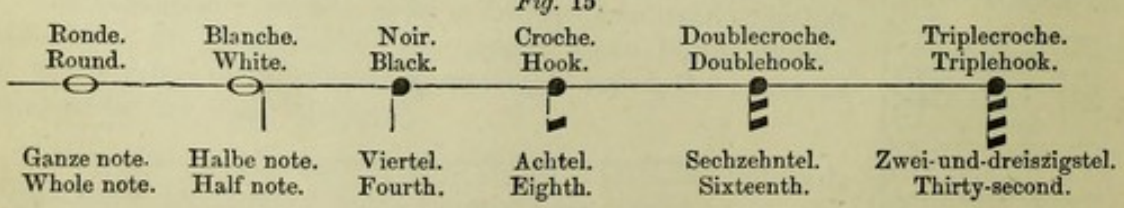
Fig. 14.



45. To these the *crotchet*, originally a *hooked* minim  was afterwards added. When the crotchet took its present form the *hook* was transferred to the *quaver*. The *maxim* and *long* are obsolete, and even the *breve* (short note) is now rarely used; while the *minim* (*least* note) is often with us, practically, the *maxim* (*greatest* note).

46. The modern forms are well described by the French names, and their relations one to another by the German.

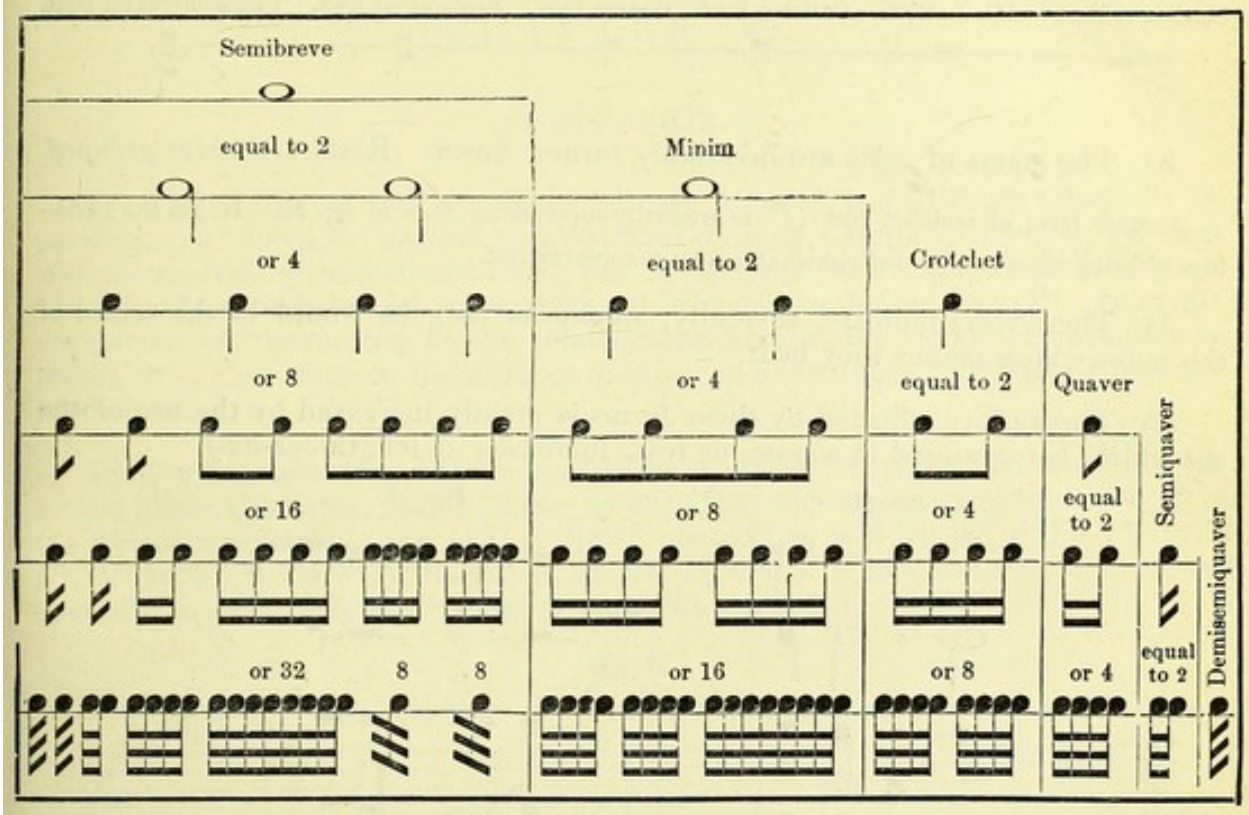
Fig. 15



47. The *stems* of notes may be turned up or down indifferently. The *hooked* notes are frequently grouped and contracted. (*See fig.* 16.)

48. These notes, as respects their length, stand in the most simple relations to each other, each note being *half* the length of the one before it.

Fig. 16.



Exceptions to the rule whereby these notes are proportioned to each other are presented in the occasional compression of more than its proper complement of notes into a single time, or beat. Of these the only instance which need be mentioned here is the *triplet*.

49. A triplet is a group of three notes, which (by licence) is performed in the time of two notes of *the same form*. A triplet is generally specially marked 3.

Fig. 17 (*a*).

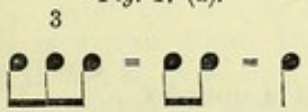
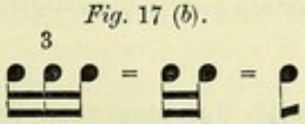
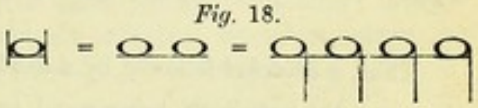


Fig. 17 (*b*).



50. The *breve*, 𝅜, often found in old music, and occasionally in modern, is equal to *two* semibreves, *four* minims, and so on.

Fig. 18.



51. *Shorter* notes even than the demisemiquaver—the *semi*demisemiquaver and the *demi-semi*demisemiquaver—have been used in modern instrumental music. In *choral* music even the demisemiquaver is of rare occurrence.

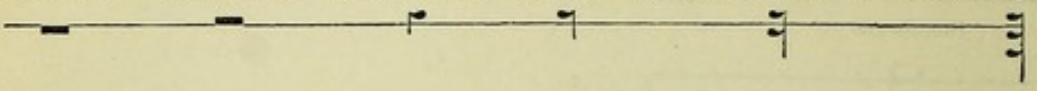
Fig. 19.



52. As musical sounds are represented by *notes*, so are the interruptions, or *cessations*, of musical sound represented by *rests*, the different forms of which indicate the relative duration of such interruptions, or cessations.

Fig. 20.

Semibreve Rest. Minim Rest. Crotchet Rest. Quaver Rest. Semiquaver Rest. Demisemiquaver Rest.



53. The stems of rests are invariably turned down. Rests are never *grouped*.

Another form of crotchet rest  is gradually superseding that in fig. 20. It has the advantage of being more readily distinguishable from the quaver rest.

54. These rests indicate, severally, *silence* as long as would be the sound of the notes whose names they bear.

55. The variety afforded by these forms is greatly increased by the use of the *dot* which, being added to a note, or rest, increases its length *one-half*.

Fig. 21.

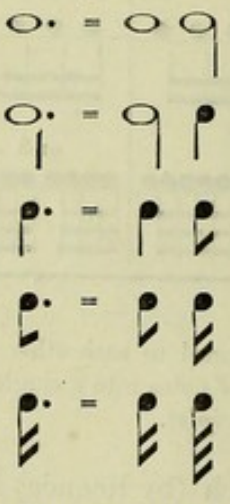
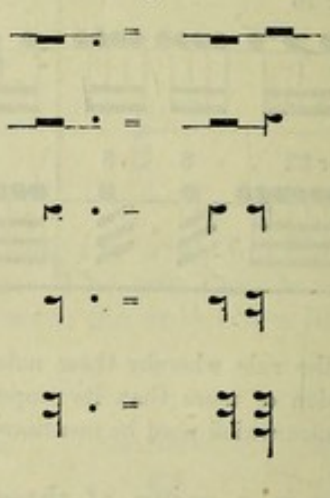


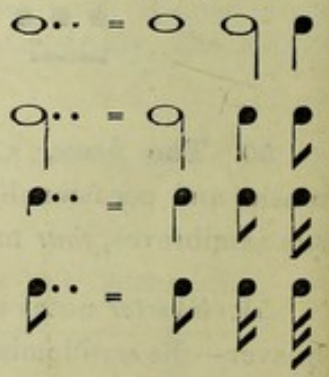
Fig. 22.



The dotted *rest* is little used; the last form in fig. 22 is the more common one.

The dot was called by the old masters "the point of perfection," because it brought the note to which it was added into *perfect* (*i.e.*, triple) time—making it divisible by *three*.

Fig. 23.



56. The *double* dot increases the length of a note by *three-fourths*; the *second* dot standing in the same relation to the *first* as the first to the note it follows.

Thus, a *crotchet* followed by a *double* dot is equal to *seven* semiquavers—the *note* itself being equal to *four*, the *first* dot to two, and the *second* to one. (*Fig.* 23.)

CHAPTER VI.

Intervals.

57. The relation of two sounds in respect to *pitch* is called an *interval*. In passing up or down the natural scale without missing a step (by *degrees*), we meet with no interval greater than a *tone;* but in *skipping* from one sound to another *not* next above or below it, we traverse, or measure, a larger interval. Intervals are named—1st, according to the relative positions of the notes which compose them; 2ndly, according to the number of tones and semitones into which they can be divided.

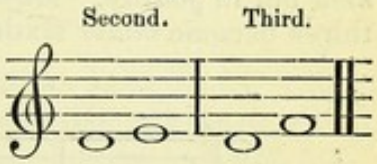
58. For example, D and C are said to be a *second* apart, or D is said to be the second above C because, taking those notes as they appear in the natural scale, D is the 2nd sound from C. And as D is the 2nd above C, so is E the 3rd, F the 4th, G the 5th, A the 6th, B the 7th, C the 8th or octave, D the 9th; and those pairs of notes, severally, are said to form a *second*, a *third*, &c. (*Fig.* 24.)

Fig. 24.



By the same rule, E is the 2nd to D, F the 3rd, &c.; and so with all the other notes.

Fig. 25.

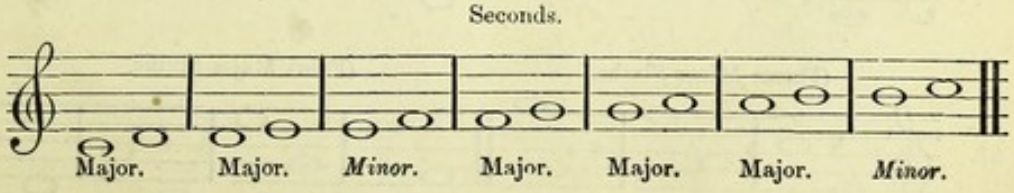


59. But intervals admit of, and require, another and more exact kind of measurement. (*Par.* 57.) E is the 2nd to D, and F the 2nd to E. But it has been shown (*Par.* 18) that E is a *tone* above D, and F only a *semi*tone above E. Therefore the *second* between D and E, must be a second of *different quality* from that between E and F. The two qualities of second are distinguished as *major* (greater) and *minor* (lesser).

60. The natural scale includes *five* major, and *two* minor, seconds; *major* second being but another name for *tone*, and *minor* second but another name for *that kind of semitone* which is found in the natural scale. (*Compare par.* 18.)

There is another kind of semitone, which will be explained hereafter.

Fig. 26.

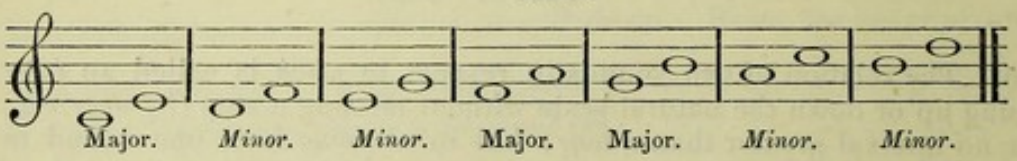


61. As there are major and minor *seconds,* so there are major and minor *thirds.* The *major* third is composed of (or divisible into) *two tones;* the *minor* third, of one *tone* and a *semitone.*

62. From C to E there are *two* tones; from D to F, only *one tone* and a *semi*tone. Consequently, C—E form a *major* third, D—F a *minor* third. The natural scale presents examples of *three* major and *four* minor thirds.

Thirds.

Fig. 27.



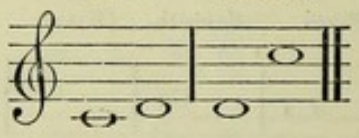
63. The intervals produced by the *inversion* of seconds and thirds are called *also* major and minor.

64. By the *inversion* of an interval is meant the placing the *lower* note an octave *higher,* or the *higher* note an octave *lower;* thus producing a *different* interval by notes of the *same* name.

65. Two notes a *second* apart form, on inversion, a seventh; two notes a *third* apart form, on inversion, a sixth.

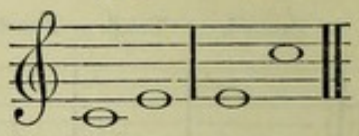
Second. Seventh.

Fig. 28.



Third. Sixth.

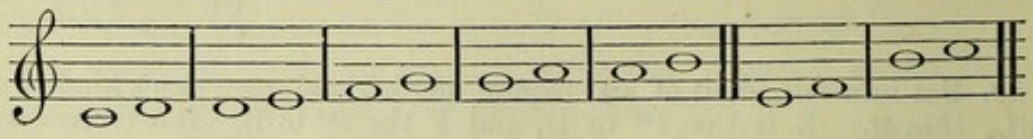
Fig. 29.



66. On inversion, two notes form an interval which is not only different in *kind* but in *quality. Major* seconds become *minor* sevenths, and *vice versa; major* thirds become *minor* sixths, and *vice versa.*

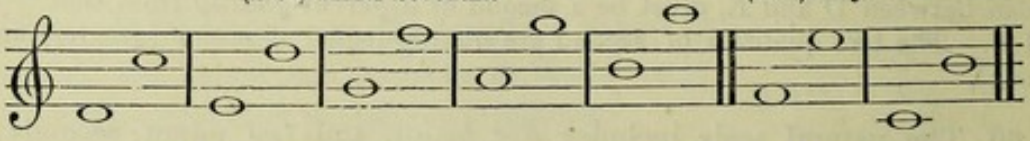
(Five) Major Seconds. (Two) Minor Seconds.

Fig. 30.



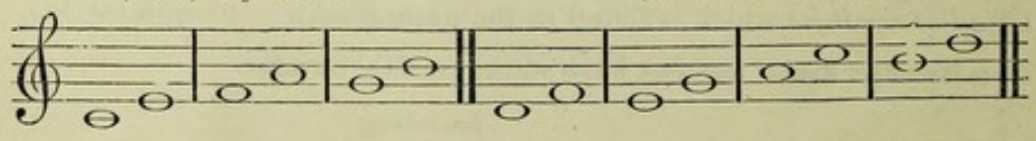
(Five) Minor Sevenths. (Two) Major Sevenths.

Fig. 31.



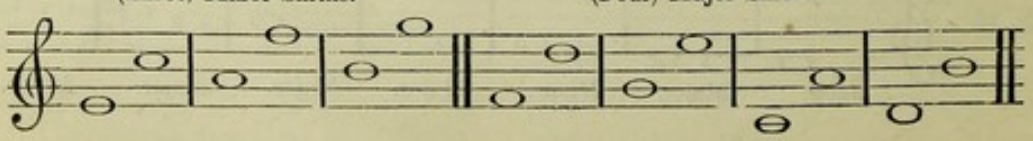
(Three) Major Thirds. (Four) Minor Thirds.

Fig. 32.



(Three) Minor Sixths. (Four) Major Sixths.

Fig. 33.

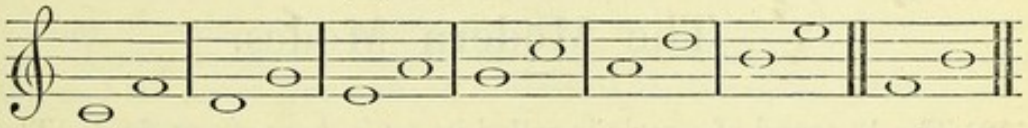


67. The *fourth* and its inversion the *fifth*, together with the *octave* which is the inversion of the *unison*—not properly an interval—are called, for the most part, *perfect*; the only exceptions found in the natural scale being *one plu*perfect fourth and *one im*perfect fifth. The *octave* is, in every case, *perfect*.

68. The *perfect* fourth is composed of *two* tones and a *semi*tone, the *perfect* fifth of *three* tones and a *semi*tone. The (one) *plu*perfect fourth is composed of *three* tones, wherefore it is called also *tritone*; the (one) *im*perfect fifth, of *two* tones and *two* semitones.

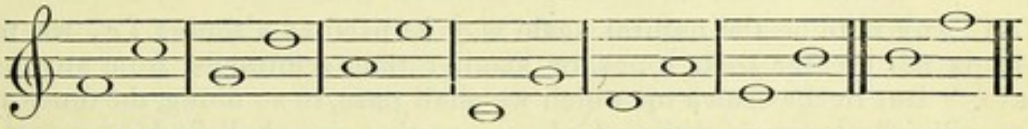
(Six) Perfect Fourths. (One) Plup. Fourth.

Fig. 34.



(Six) Perfect Fifths. (One) Imp. Fifth.

Fig. 35.



69. On inversion perfect intervals *remain* perfect, but *plu*perfect intervals become *im*perfect, and *vice versa*.

70. Intervals *greater* than an octave are generally to be regarded as mere re duplications of those formed by notes of the same name *within* the octave. Thus fig. 36, practically a *tenth*, is still considered as a third; fig. 37, practically an *eleventh*, as a fourth; fig. 38, practically a *twelfth*, as a fifth, and so on.

Fig. 36.



Fig. 37.

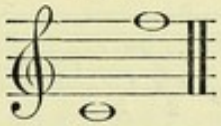
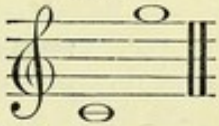


Fig. 38.



Intervals of this extent are of rare occurrence in *melody*.

71. An exception, however, is presented in the case of the *ninth*, which is not *always* to be regarded as an octave, or *compound*, *second*, but often as a distinct interval. The ninths (like the seconds and sevenths) are called *major* and *minor*.

Ninths.

Fig. 39.



Major. Major. *Minor.* Major. Major. Major. Minor.

72. Intervals greater than an octave do not admit of inversion. The ninth, therefore has no inversion.

The pluperfect fourth and imperfect fifth are less often found in *melody* than the *perfect* intervals of the same kind; whereas the major and minor intervals are used with equal frequency and freedom; presenting no difficulty in execution nor, in ordinary cases, any striking difference in effect.

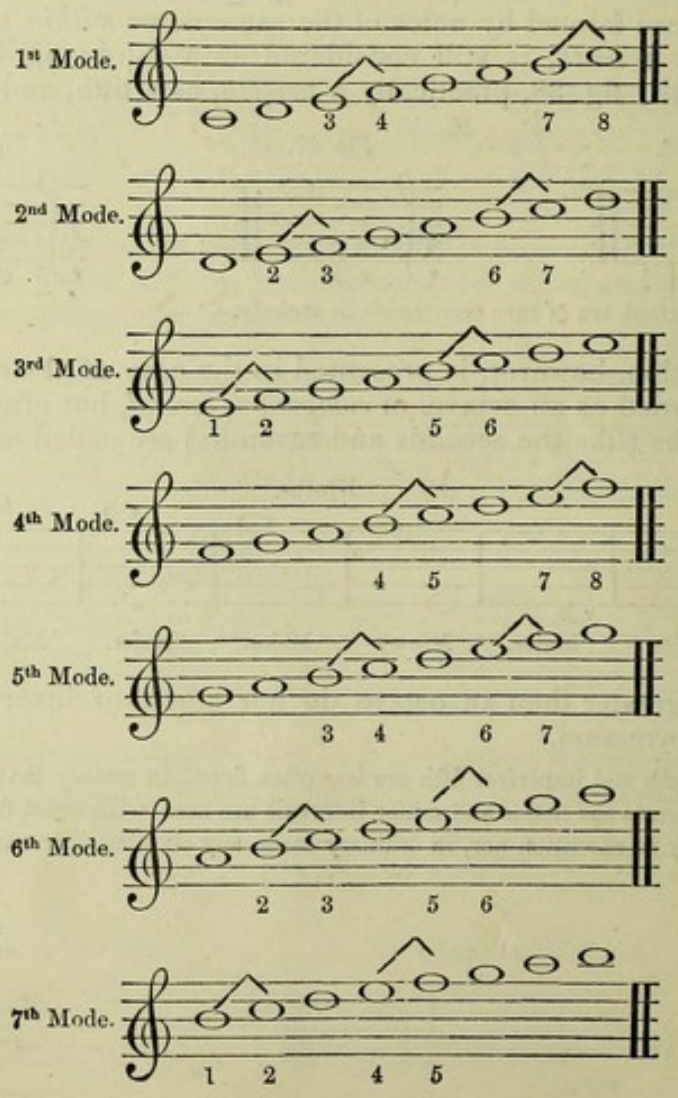
CHAPTER VII.

The Modern Modes.

73. The 1st sound of a scale is called its *tonic*, *key note*, or *final*. The tonic of the natural scale is C.

74. Any note of the natural scale *may* be used as a tonic; *i.e.*, we may pass, by steps not greater than tones, or smaller than semitones, from any note to its octave. But in the scales up which we shall pass, in so doing, the tones and semitones will fall always *in different places;* so that we shall find as many *different kinds* of scale, in respect to the succession of tones and semitones, as tonics, viz., *seven*. (*Fig.* 40.)

Fig. 40.



75. In these seven scales the semitones fall as follows:—

In the 1st, between the 3rd and 4th and the 7th and 8th sounds.
— the 2nd, —— 2nd and 3rd —— 6th and 7th ——
— the 3rd, —— 1st and 2nd —— 5th and 6th ——
— the 4th, —— 4th and 5th —— 7th and 8th ——
— the 5th, —— 3rd and 4th —— 6th and 7th ——
— the 6th, —— 2nd and 3rd —— 5th and 6th ——
— the 7th, —— 1st and 2nd —— 4th and 5th ——

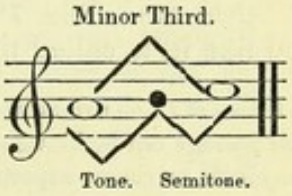
76. The *order* of tones and semitones in a scale is called a *mode*. *Seven* modes, or forms of scale, are therefore possible; and at least that number was once in use. Among modern musicians only *two* modes are used, the 1st and 6th (of fig. 40), and the latter not without occasional modifications which tend to assimilate it to the former.

77. The former of these (modern) modes is called the *major* mode, the latter, the *minor* mode; because the 3rd sound of the one is distant from the 1st *two* tones, or a *major* third; and because the 3rd sound of the other is distant from the 1st only *one* tone and a *semi*tone, or a *minor* third. (*Compare Pars.* 61 *and* 62.)

Fig. 41.



Fig. 42.



From C to D is a tone, and from D to E another; therefore from C to E is a *major* third. From A to B is a tone, and from B to C a *semi*tone; therefore from A to C is a *minor* third.

78. As respects the relation between their 1st and 3rd sounds, *all* the modes are either major or minor; the 1st, 4th, and 5th being *major*, and the 2nd, 3rd, 6th, and 7th being *minor*. The positions of the tones and semitones are however, in some way, different in all the modes; and without some contrivance by which they could be assimilated, only two sounds, C and A, could be used as tonics at all, and the latter only under certain conditions.

79. For, the modern musical system demands that the 7th of a scale be followed by the 8th at the smallest recognised distance; in other words, that the 7th and 8th sounds of an ascending scale be separated by a *semi*tone, the 7th in this case being called the *leading* note; also, that the 4th and 5th sounds form, respectively, a *perfect* fourth and a *perfect* fifth with the tonic.

80. On the first of these conditions, the 2nd, 3rd, 5th, 6th, and 7th modes (of fig. 40) are inadmissible; and on the second, the 4th and 7th. The five former are deficient in *leading notes*, and of the two latter, one (the 4th) has a *plu*perfect fourth, the other (the 7th) an *im*perfect fifth.

The reasons for this rejection of all but the 1st and "under certain conditions," 6th modes, will appear as the student becomes better acquainted with the science of music; the *fact* of their rejection is indisputable. Use is second nature. The modern musician is *used* to the modern system; it is the idiom in which composers have, for at least a century past, expressed their thoughts; and every mode but that of C or A, with the modifications alluded to, is, to the modern ear, if not disagreeable, certainly quaint and unsatisfactory. The modern composer can no more express himself with freedom in the obsolete 2nd, 3rd, 4th, and 5th (the 7th has never been used) modes, than the modern poet in the language of Chaucer. Indeed, it is a question how far music, *professedly* in these modes, was ever *practically* performed, even in the ages when their existence was recognised, without such modifications as must have assimilated them, in most essential particulars, to those with which we are familiar.

CHAPTER VIII.

The Natural Scale.

81. "The 1st sound of a scale," as also the 8th, "is called its *tonic*, *key note*, or *final*." (*Par.* 73.) The 7th sound of the natural scale, and of every scale constructed like it, is called the *leading note*. (*Par.* 79.)

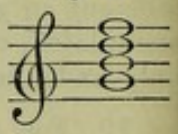
The fitness of these names needs no demonstration. The 1st and 8th sounds are those on which alone a musical passage can be brought to an *end* with perfect satisfaction to the ear; the 7th sound is that which *suggests*, or causes expectation, that the 8th will follow it.

82. Every *other* sound of the natural scale has a like name, *i.e.*, a name due to its position in, and relation to the other sounds of, the scale.

83. The 5th sound of a scale is called the *dominant*, and the 4th the *sub*dominant.

"Dominant" is one of many old musical terms which have altogether lost their original meaning. The dominant is properly the *reciting* note, and therefore the principal, or *governing*, note of the ecclesiastical chant. It is applied by modern musicians to the 5th of a scale, because that sound will bear a combination which, as it can only exist in one scale, *governs*, or decides, it beyond the possibility of doubt.

Fig. 43.



For further explanation of the properties of the dominant, the student is referred to the Author's "Grammar of Musical Harmony," Chap. XVII.

84. The 3rd sound of a scale is called the *mediant*, and the 6th the *sub*mediant. The 2nd is called the *super*tonic.

85. "Mediant" and "submediant" are used in reference to the positions of the 3rd and 6th of a scale, as the inner, or intermediate, sounds of the *triads* of the tonic and of the subdominant.

86. The *triad* to any given note is formed by the addition to it of its 3rd and 5th.

87. E, the 3rd of the scale of C, is the inner or intermediate sound of the triad of C, the tonic (*Fig.* 44); A of the triad of F, the subdominant. (*Fig.* 45.)

Fig. 44.



Fig. 45.

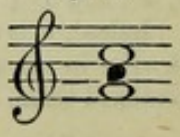


Fig. 46.

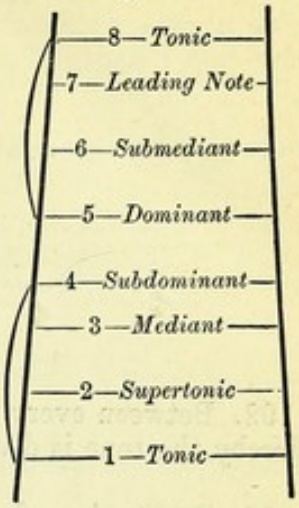


Fig. 46 shows the name which each sound of the scale derives from its position in, and relation to the other sounds of, it.

"A succession of four sounds separated by two tones and a semitone is called a *tetrachord*." (*Par.* 19.)

88. The upper of the two tetrachords, into which a scale is divisible (*par.* 19) *begins* on the dominant, and the lower *ends* on the subdominant. The mediant holds the same place *in relation to* the subdominant, as the leading note does to the tonic: and the supertonic holds the same place in relation to the tonic as the submediant does to the dominant.

On this account the submediant is sometimes called the *super-dominant*.

89. As the leading note has a tendency to rise to the tonic (*par.* 79), so the supertonic, the subdominant, and the submediant have each a tendency to rise, or fall, to that note of the *triad* of the tonic which is *nearest* to them: *e. g.* that of the supertonic is to fall to the tonic (*fig.* 47), or to rise to the mediant (*fig.* 48); that of the subdominant to fall to the mediant (*fig.* 49); that of the submediant to fall to the dominant (*fig.* 50).

Fig. 47.

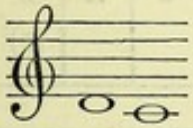


Fig. 48.

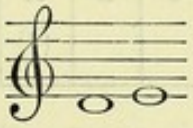
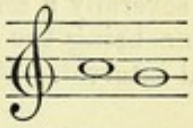


Fig. 49.



Fig. 50.



90. Thus the triad of the tonic (the 1st, 3rd, and 5th of the scale) has an absorbing or attractive force, fully justifying the importance attached to it in the modern system.

91. The progressions treated in par. 89 are all parts of one or other of those *closes* or *cadences* so familiar to the modern musician. They are distinguished as the *perfect* cadence (*fig.* 51 *a and b*) and the *plagal* cadence (*fig.* 52). The former is the more modern and familiar form. Fig. 49 appears in both.

See also the Author's "Grammar of Musical Harmony," Chap. 30. *XXVII.*

Fig. 51 (*a*).



Fig. 51 (*b*).



Fig. 52.



The student should take pains to familiarize his ear to these progressions, playing them on the piano-forte, or hearing them played, and, at the same time, singing *first one, then another, of the individual parts.*

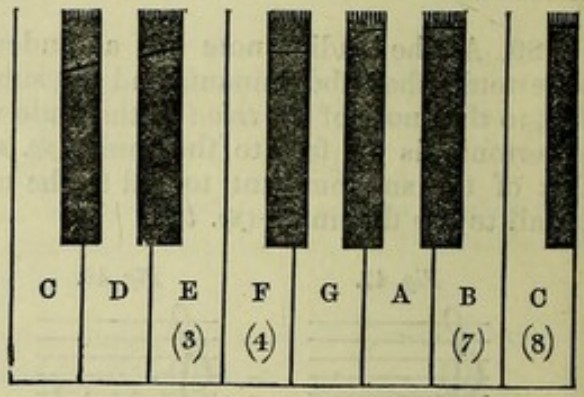
CHAPTER IX.

Altered Notes.

92. Between every two sounds separated by a tone another sound may be placed, whereby the tone is divided into *two semi*tones.

93. On a piano-forte, the natural scale is produced by striking a succession of *white* keys exclusively. Most of these white keys are separated by *black* keys—the intermediate sounds spoken of above; the exceptions being the keys representing E and F and B and C in each octave, which have no black key between them,—those sounds being severally a *semitone* apart, and a semitone being the smallest recognised musical interval. (*See fig.* 53.)

Fig. 53.



94. These intermediate sounds take their names either from the upper or the lower sounds adjacent to them; or, more properly, they are regarded as *elevations* or *depressions* of the latter, and are called such and such notes *sharp* or *flat*, accordingly.

In fig. 54, the *ruled* lines represent the sounds of the natural scale (as in fig. 1), and the *dotted* lines the sounds which divide each tone into two semitones. Each of the latter, it will be seen, has two names, *e.g.*, C *sharp* and D *flat*. Strictly speaking, C sharp and D flat are *not* identical, *i.e.*, it is not mathematically true that they are the same sounds—produced by the same number of vibrations in a second. (*Par.* 5.) For all practical purposes, however, they may be considered as such; as, indeed they are on the piano-forte. (*See fig.* 55.)

Fig. 54.

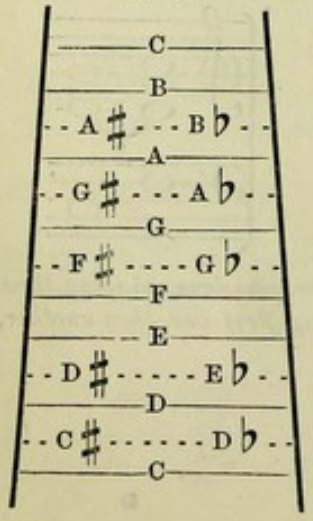
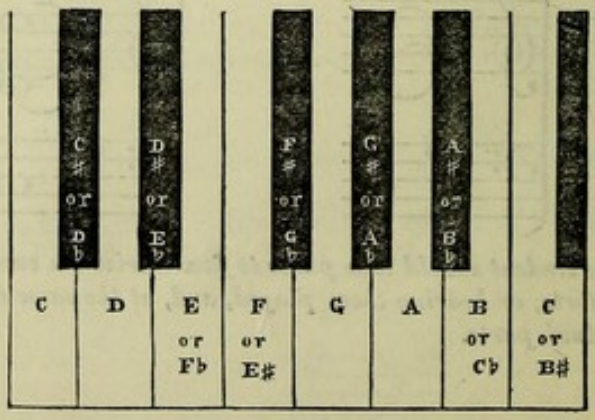


Fig. 55.



95. The depression or elevation of one of the sounds of the natural scale a semitone, or, in other words, the *substitution* of a *flat* or *sharp* sound for a *natural* sound, of the same name, is indicated by placing ♯, called a *sharp*, or ♭, called a *flat*, before the note which represents it.

The substitution of F sharp for F natural, or of B flat for B natural, would be expressed as in figs. 56 and 57.

Fig. 56.

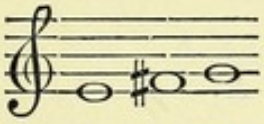
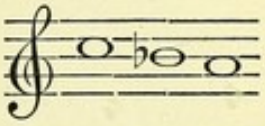


Fig. 57.



96. A natural note is *specially* indicated by placing ♮, called a *natural*, before the note which represents it.

The substitution of F natural for F sharp, or of B natural for B flat, would be expressed as in figs 58 and 59.

Fig. 58.

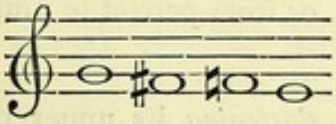
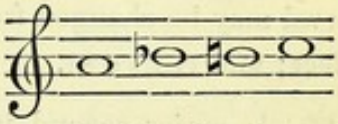


Fig. 59.



A natural is only called into requisition when it is necessary to *contradict* a foregoing sharp or flat.

97. Sharps, flats, and naturals are placed *before* the notes they alter. We *say* "F sharp, B flat," &c., but *write*, "Sharp F, flat B," &c.

CHAPTER X.

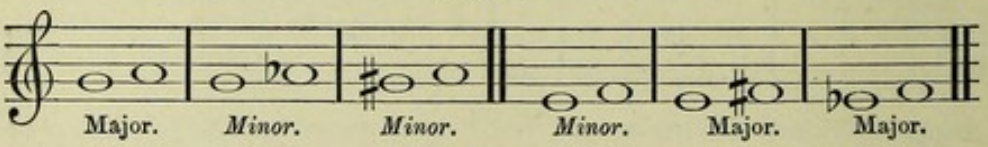
Altered Intervals.

98. By the *alteration* of one of the two notes composing it, the *quality* of an interval may be changed from major to minor, or from perfect to pluperfect or imperfect; and *vice versa*.

99. A *major* second is made *minor* by *flattening* its upper or sharpening its lower note; and a *minor* second is made *major* by *sharpening* its upper, or flattening its lower, note. (*Fig.* 60.)

Fig. 60.

Seconds.



100. A *major third* is made *minor* by flattening its upper, or sharpening its lower, note; and a *minor* third is made major by sharpening its upper, or flattening its lower, note. (*Fig.* 61.)

Fig. 61.

Thirds.



101. A perfect *fourth* is made *plu*perfect by sharpening its upper, or flattening its lower, note; and *vice versa*. (*Fig.* 62.)

Fig. 62.

Fourths.



102. So also the *inversions* of these several intervals (the seventh, the sixth, and the fifth) admit of alteration; the two first from major to minor, and the last from perfect to imperfect, and *vice versa*.

CHAPTER XI.

Altered Scales.

Fig. 63.



103. By the *alteration* of *one* note in each, the scales of F and of G may be arranged in the same (major) *mode* as that of C. (*Compare fig.* 40.)

Fig. 64.



From A, the 3rd of the scale of F, to B ♮ would be a *major* second (or *tone*); in flattening B (the 4th) the interval between it and A is reduced to a *minor* second. (*Fig.* 63.)

From G (the 8th of the scale of G) to F ♮ would be a *major* second; in sharpening F (the 7th) the interval between it and G (the 8th) is reduced to a *minor* second. (*Fig.* 64.)

Fig. 65.



104. By a similar alteration, the scales of D and E can be arranged in the same (*minor*) mode as that of A. (*Compare fig.* 40.)

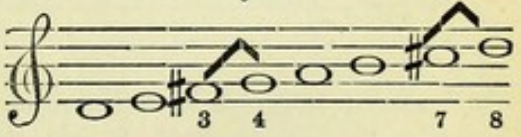
Fig. 66.



From A (the 5th of the scale of D minor) to B ♮ would be a *major* second; in flattening B (the 6th) the interval between it and A (the 5th) is reduced to a *minor* second. (*Fig.* 65.)

From G (the 3rd of E minor) to F ♯ would be a *major* second; in sharpening F (the 2nd) the interval between it and G (the 3rd) is reduced to a *minor* second. (*Fig.* 66.)

Fig. 67.



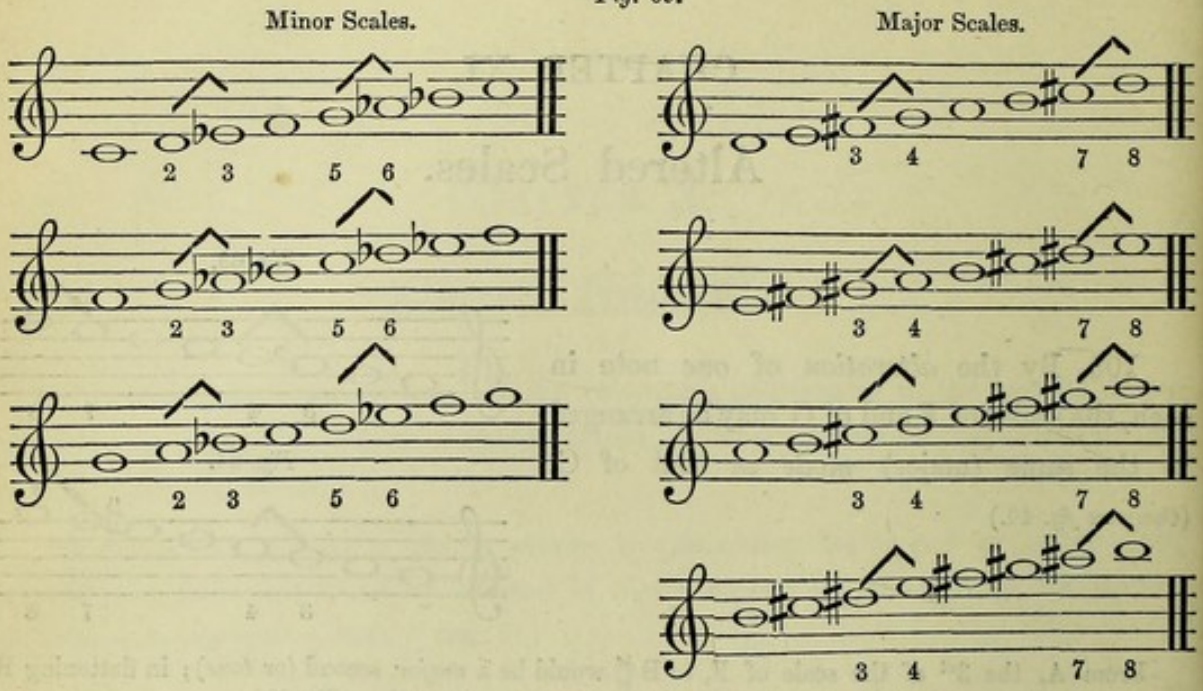
105. The scales of D and of B require, each, *two* alterations to assimilate them, severally, to those of C and of A. (*Compare fig* 40.)

Fig. 68.



106. Moreover, by still further alteration, the three *major* scales in fig. 40 (those of D, F, and G) can be made *minor*, and the four *minor* scales (those of D, E, A, and B) *major*. (*Fig.* 69.)

Fig. 69.



107. In fact, by the alteration of a sufficient number of notes, both a major and a minor scale may be constructed, not only on every one of the *natural* notes, but on every one of the *altered* notes. So that *any* note, natural, sharp, or flat, may be used as a tonic.

CHAPTER XII.

Scales in Actual Use.

"Any note, natural, sharp, or flat, may be used as a tonic." (*Par.* 107.)

108. There are *seven* natural notes, and each of these is alterable *both* by a sharp and by a flat. It follows, therefore, that no fewer than *twenty-one* major, and *twenty-one* minor, scales *could* be expressed in musical characters,—*seven* beginning on *natural* notes, *seven* on *flat* notes, and *seven* on *sharp* notes.

109. It has been shown, however (*Chap. IX.*), that every sound raised by a sharp is, *practically*, identical with the sound a tone above it lowered by a flat; *e.g.*, that C *sharp* is produced by the same piano-forte key as D *flat*, G *sharp* by the same key as A *flat*, &c. (*Fig.* 55.)

110. The number of major and minor scales, therefore, *in actual use* is much smaller than the number possible: it rarely exceeds *twelve*, and never, except transiently, *fifteen*. In only one instance, C, is the same note, made sharp *as well as* flat, used as a tonic; the remaining six notes being used as tonics when made sharp *or* flat,—not both.

111. The *sharp* tonics are C ♯ F ♯.

— *natural* tonics are C, D, E, F, G, A, B.

— *flat* tonics are C ♭, D ♭, E ♭, G ♭, A ♭, B ♭.

In fig. 70, the series of tonics in actual use is given in musical notation. The notes connected by ⌒ are identical.

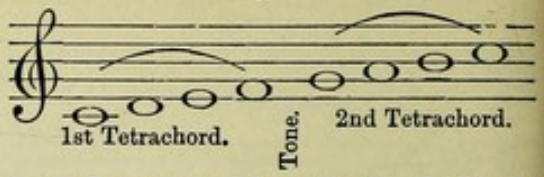
Fig. 70.



112. Each of these scales requires for its completion a *different number* of sharps or flats; *e.g.*, the scale of D requires *two* sharps, that of E ♭ *three flats*, &c. Were the number and order of these sharps or flats irregular, or without system, they could only be retained by a very laborious act of memory. Such, however, is not the case. The scales grow out of one another, and add to their number of sharps and flats, according to a simple rule which admits of no exception.

113. "The natural scale is divisible into *two* tetrachords, the 1st sound of the upper of which is separated, by a tone, from the 4th sound of the lower." (*Par.* 19.)

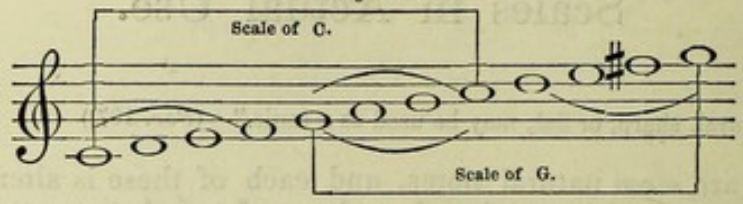
Fig. 71.



114. What is true of the *natural* scale is true of *every* scale constructed like it, *i.e.*, of *every* major scale.

115. If the second (or upper) tetrachord of any one scale be taken as the first (or lower) tetrachord of another, the *new* upper tetrachord added to complete the latter scale will demand a *new sharp*,—*i.e.*, a sharp not found in the scale to which its lower tetrachord is common. (*Fig.* 72.)

Fig. 72.



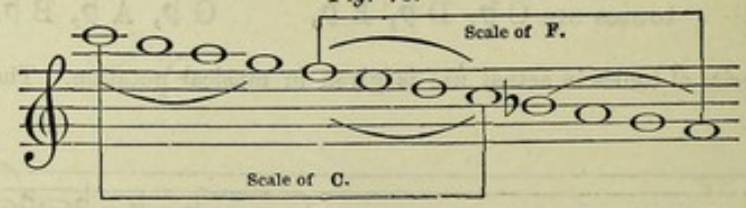
The upper tetrachord of C (*fig.* 72) consists of G, A, B, C. Let these four notes be taken as the *lower* tetrachord of a scale of (*i.e.*, beginning and ending on) G. A new upper tetrachord is required to complete this (new) scale of G, in which the F must be made *sharp*;—otherwise, the semitone will not fall between the 3rd and 4th sounds, but between the 2nd and 3rd; since F *natural* and G are separated by a *tone*, and E and F natural by a *semi*tone. In fact, without the F *sharp*, the scale of G will be imperfect for want of a *leading note*. (*Compare par.* 79.)

This experiment repeated in any other part of the musical system will be attended with a similar result,—the *upper* tetrachord of the *new* scale will, *in every case*, require the introduction of a *new* sharp.

116. A similar process applied in an opposite direction, will be attended by a similar result,—in the production of a series of scales with *flats*.

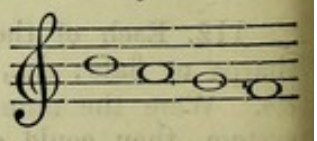
117. If the *first* (or *lower*) tetrachord of any one scale be taken as the *second* (or *upper*) tetrachord of another, the *new lower* tetrachord added to complete the latter scale will demand a *new* flat,—*i.e.*, a flat *not* found in the scale to which its lower tetrachord is common. (*Fig.* 73.)

Fig. 73.



The lower tetrachord of C (*fig.* 73) consists of F, E, D, C. Let these four notes be taken as the *upper* tetrachord of a (descending) scale of F. A new lower tetrachord is required to complete this (new) scale of F, in which the B must be made *flat*; otherwise, the four notes will *not include a semitone* (*fig.* 74), and will, therefore, not form a tetrachord; for a tetrachord is a "succession of four sounds separated by two tones *and a semitone*." (*Par.* 19.)

Fig. 74.



This experiment, again, repeated in any other part of the musical system will be attended with a similar result,—the *lower* tetrachord of the new scale will, in every case, require the introduction of a *new* flat.

118. The second tetrachord of every scale begins a *fifth above* the first; *vice versa*, the first tetrachord of every scale begins a *fifth below* the second. *Sharps*, therefore, are generated in an order of *ascending*, and *flats* in an order of *descending*, fifths. (*See figs.* 75 *and* 76.)

From fig. 75 it will be seen that—

119. In a series of scales, the tonics of which are perfect fifths *above* one another, each scale requires a *sharp* more than the one before it. This additional sharp is always the *leading note*, and consequently always a perfect fifth above the sharp last added to form the preceding scale.

120. The tonics, perfect fifths *above* each other, are,—

C, G, D, A, E, B, F ♯, C ♯.

F *natural* is an *im*perfect fifth above B.

121. Of these scales the *leading notes* (also perfect fifths above each other) are,—

B, F ♯, C ♯, G ♯, D ♯, A ♯, E ♯, B ♯.

From fig. 76 it will be seen that—

122. In a series of scales the tonics of which are perfect fifths *below* each other, each scale requires a *flat* more than the one before it. This additional flat is always the subdominant (4th sound) of the scale, and consequently always a perfect fifth below the flat last added to form the preceding scale.

123. The tonics, perfect fifths *below* each other, are,—

C, F, B ♭, E ♭, A ♭, D ♭, G ♭, C ♭.

B *natural* is an *im*perfect fifth below F.

124. Of these scales the subdominants (also perfect fifths below one another) are,—

F, B ♭, E ♭, A ♭, D ♭, G ♭, C ♭, F ♭.

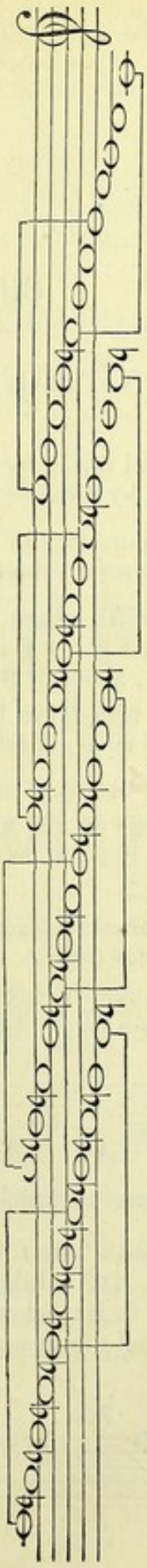


Fig. 75.

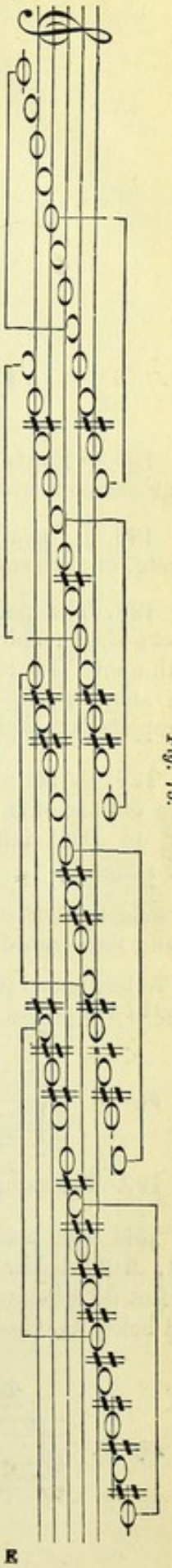


Fig. 76.

CHAPTER XIII.

The Chain, or Circle, of Scales.

125. "Every sound raised by a sharp is practically identical with the sound a tone above it lowered by a flat." (*Par.* 109.)

126. By availing ourselves of this circumstance *once* we may form a *chain*, or circle, of scales, *connected* on the system explained in the last chapter.

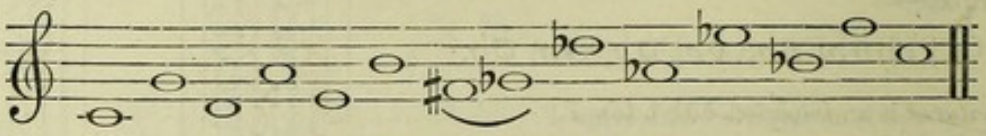
127. The perfect fifth above C is G; above G, D; above D, A; above A, E; above E, B; above B, F♯. F♯ is identical with G♭. (*Figs.* 54 *and* 55.) The perfect fifth above G♭ is D♭; above D♭, A♭; above A♭, E♭; above E♭, B♭; above B♭, F; above F, C—the note from which we started, and in returning to which we complete the chain, or circle, of scales. (*Fig.* 77.)

128. A transition like that from F♯ to G♭ is called an *enharmonic* change. The enharmonic change in the above series could be made from B to C♭, or from C♯ to D♭; indeed, it *could* be made, though not so conveniently, in any part of the series.

Enharmonic (from the Greek) is a word having reference to a musical system in which intervals smaller than semitones formed part.

To keep within the limits of the treble stave every alternate note in Figs. 77 and 78 is placed a *fourth below* instead of a fifth above. The fourth is the *inversion* of the fifth. (*See par.* 64.)

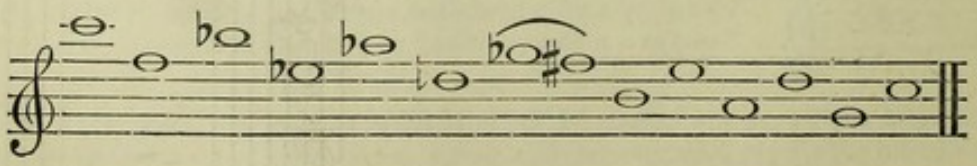
Fig. 77.



129. The same process reversed will be attended by the same result.

130. The perfect fifth below C *is* F; below F, B♭; below B♭, E♭; below E♭, A♭; below A♭, D♭; below D♭, G♭. G♭ is identical with F♯. The perfect fifth below F♯ is B; below B, E; below E, A; below A, D; below D, G and below G, C—the note from which we started. (*Fig.* 78.)

Fig. 78.



131. The sharps or flats *essential* to the scale in which a musical composition is said "to be," are not placed before *every individual* note which may require *alteration*, but *together*, at the beginning of each stave. In this collected form they are called the (scale) *signature*.

The signature of every major scale is exhibited in fig. 79, which will further illustrate the contents of the preceding paragraphs. A ♯ is placed a *fourth below* D ♯, instead of a fifth above, to keep within the limits of the treble stave.

132. In the signatures, the *order*, whether of the sharps or flats, is never changed. If there is *one* sharp in a signature, it is F♯; if there are more sharps than one, F♯ is always the *first*, C♯ the *second*, and so on. The same rule holds in respect to the flats.

The note after each signature (in fig. 79) is the tonic indicated by it. Observe that—

133. The last added sharp is always the *leading note*, or 7th of the scale—a minor *second* below the tonic; and that the last added flat is always the *subdominant*, or 4th of the scale—a perfect fifth below the tonic. Therefore—

134. The tonic of the major scale is always to be found a minor *second above* the last added *sharp* of a signature, or a perfect *fourth below* the last added *flat*.

E.g. If the last sharp is D ♯, the tonic is E. If the last flat is A ♭, the tonic is E ♭.

135. The signatures over and under each other (*in fig.* 79) are those of tonics practically identical: viz., B and C ♭, F ♯ and G ♭, C ♯ and D ♭. Without the enharmonic change, the next tonic of the ascending series would be G ♯ —of which the *leading note* would be F *double* sharp; and the next of the descending series, F ♭—of which the *subdominant* would be B *double* flat.

136. A double sharp, formerly written ♯♯, is now commonly abbreviated thus ×. There is no contraction of the double flat, which is expressed thus, ♭♭.

137. A double sharp raises a note, and a double flat lowers a note, *two* semitones. F × is therefore identical with G ♮, and B ♭♭ with A ♮,—*practically*, but not theoretically. (*Compare Chap.* IX.)

138. It it most important, in respect to the theory of scales and intervals, that the distinction *in name* between notes having the same sound be always observed

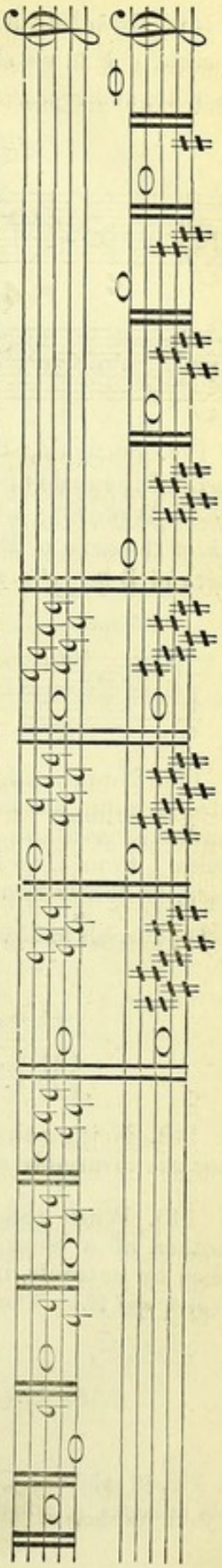


Fig. 79.

139. By substituting G ♮ for F × in the scale of G ♯, or A ♮ for G 𝄫 in the scale of F ♭, we should interrupt the succession essential to a scale, by *omitting* one note, and *repeating* another. (*Compare fig.* 80 *with fig.* 81, *and fig.* 82 *with fig.* 83.)

Fig. 80.

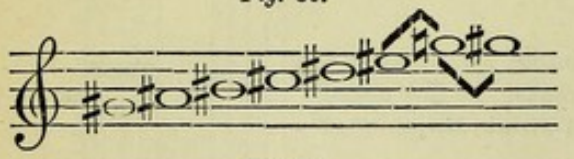


Fig. 82.

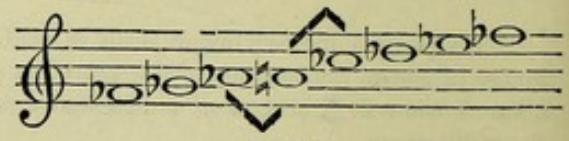


Fig. 81.

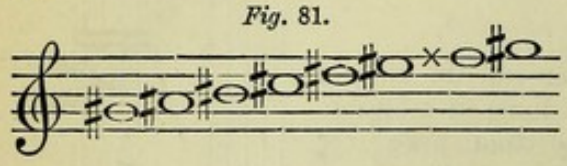
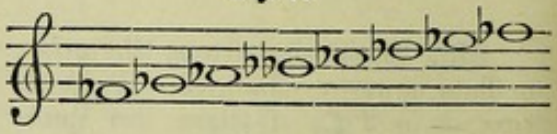


Fig. 83.



140. So again, the interval formed by C ♯ and F × is the one pluperfect *fourth* of the scale of G ♯ (*fig.* 84); that formed by C ♯ and G ♮, the one imperfect *fifth* of D (*fig.* 85); while the interval formed by E ♭ and B 𝄫 is the one imperfect *fifth* of the scale of F ♭ (*fig.* 86); that formed by E 𝄫 and A ♮, the one pluperfect *fourth* of B ♭. (*Fig.* 87.)

Fig. 84.

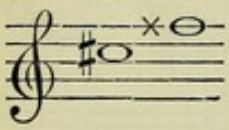


Fig. 85.

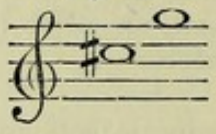


Fig. 86.

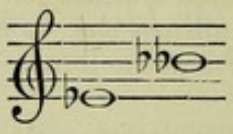
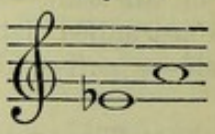


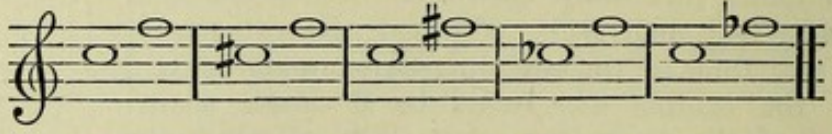
Fig. 87.



141. No *alteration*, by whatever number of sharps or flats, of either of the two notes forming an interval, can change its name and kind—which depend on the number of *positions* of the stave, *not* on the number of tones or semitones, it includes. From C to F is a *fourth*, whether the C or the F be natural, sharp, double sharp, or double flat.

The intervals in Fig. 88 are all fourths, though of different *qualities*—some as yet unexplained.

Fig. 88.



142. Neither the double sharp nor the double flat ever appear in a signature; they are invariably *accidentals*.

143. When the signature is changed, *in the course* of a piece of music, for another of a lesser number of sharps or flats, the places of the latter are sometimes taken by *naturals*, in order that *special attention* may be directed to the change. (*Figs.* 89 *and* 90.) The naturals should never appear but *once* in each part.

Fig. 89.

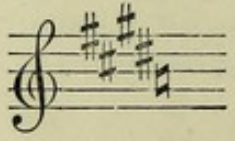


Fig. 90.

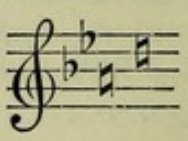


Fig. 89 exhibits a change of signature from B to E; fig 90 from A ♭ to F. The naturals in both instances indicate the former, as well as the present, scale.

CHAPTER XIV.

The Minor Mode.

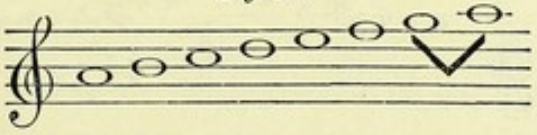
144. "Among modern musicians, only two modes," or forms of scale, "are used," the major and the minor; "and the latter not without occasional modifications which tend to assimilate it to the former." (*Par.* 76.) As the scale of C is the type, or model, of all *major* scales, so is the scale of A the type of all *minor* scales.

145. A minor scale differs from a major scale *chiefly* in the circumstance to which each owes its name;—the 3rd sound of the former is a *minor* third from the 1st, the 3rd sound of the latter, a *major* third from the 1st. (*Compare par.* 77.)

146. This, however, is not the *only* difference between the two modes. A major scale is not liable to change in the quality of its intervals; a minor scale *is*,—its *upper* tetrachord assuming no less than *three* different forms.

147. The natural minor scale (that of A) is deficient in a leading note; the 7th sound being a *tone*, not a semitone, below the 8th. (*Fig.* 91.

Fig. 91.



148. Now, a tetrachord in which the semitone is not the interval *last heard*, leaves no impression of completeness on the ear. The upper tetrachord of the natural minor scale is, to a certain extent, satisfactory *in descending*, because the semitone *is* then the interval *last heard*; but it is very unsatisfactory *in ascending*, because this condition is not then observed. (*Compare figs.* 92 *and* 93.)

Fig. 92.

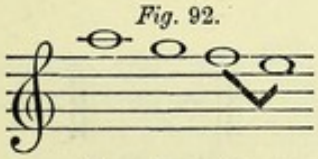
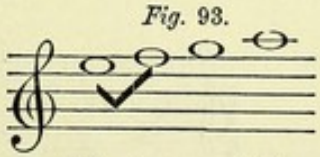


Fig. 93.



149. In *ascending* the minor scale, the last sound but one of the upper tetrachord is usually *raised* a *semitone*, whereby the scale is furnished with a *leading note*.

Fig. 94.

Thus the upper tetrachord of A minor would appear as in fig. 94.

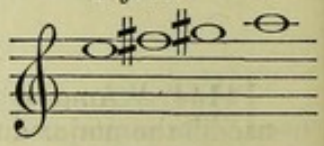


150. This elevation of the 7th sound of the minor scale induces generally, though *not always*, that of the 6th also. For, in diminishing the interval between the 7th and the 8th sounds, that between the 6th and 7th is, of necessity, *augmented* to the same extent.

From F to G♯ is an interval *greater than a tone*, and its introduction renders the upper tetrachord of *La chromatic*. (*See Chap.* 20.) Chromatic intervals are, in modern music especially, by no means forbidden, but their presence essentially alters the character of a passage and, generally, renders it more difficult of execution.

151. In *ascending* the minor scale, the 6th sound, as well as the 7th, is usually raised a semitone, whereby the interval between the two sounds is reduced to a tone.

Fig. 95.



See fig. 95, the common form of the upper tetrachord of *La* minor.

152. Thus the upper tetrachord of a minor scale admits of *three* forms—two diatonic, one chromatic. (1) The *natural* diatonic form, rarely used but in descending (*fig.* 96); (2) the *altered* diatonic form, used in ascending (*fig.* 97); (3) the *chromatic* form, used both in ascending and descending (*fig.* 98).

Fig. 96.

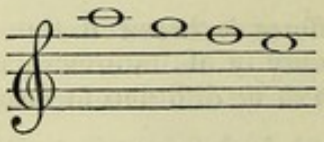


Fig. 97.

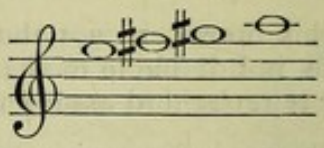
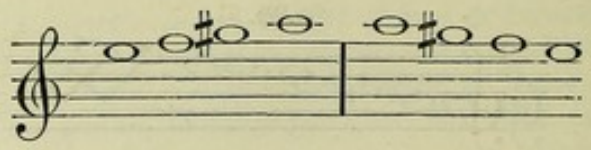


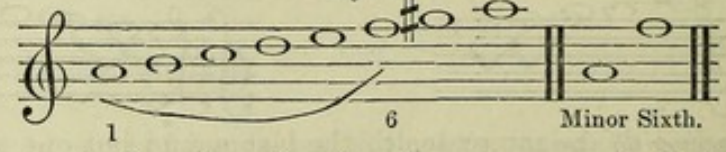
Fig. 98.



153. The third of these forms (*fig.* 98) has the advantage that while, equally with the second, it presents a *leading note*—so satisfactory to the modern ear—its 6th (to the tonic) remains minor (*fig.* 99).

154. The quality of the 6th of a scale is hardly less characteristic of its *mode* than that of the 3rd.

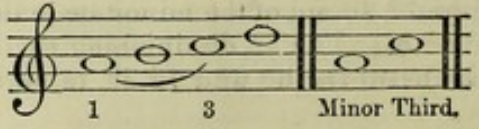
Fig. 99.



155. The chromatic form has also the advantage over both the others, that it is equally practicable (though somewhat difficult) to the voice, and satisfactory to the ear, ascending or descending.

156. Whatever form be adopted for the *upper* tetrachord of the minor scale, the *lower* tetrachord is *invariable*, so far as the place of the semitone is concerned, —the 3rd is *always* minor. Hence the term *minor* mode.

Fig. 100.



CHAPTER XV.

The Signatures of Minor Scales.

157. Scales which result from different *modes* of arranging the *same* sounds are said to be *relative*. The natural scales of C and A are therefore relative; and as the one is major and the other minor, the scale of A is said to be the *relative minor* of C, and the scale of C the relative *major* of A.

158. *Every* major scale has a relative minor, the tonic of which (as in the case of the natural scale) is the 6th sound of its relative major scale.

The 6th sound of the scale of C is A; A, therefore, is the relative minor to C.

159. "The sharps or flats, essential to the scale in which a musical composition is said to be," placed "together at the beginning of each stave," "are called the (scale) signature." (*Par.* 131.)

160. Every minor scale bears the *same signature* as its relative major; the 6th and 7th sounds being altered, if necessary, by *accidentals*.

In fig. 101 the signature of every major scale, *and of its relative minor*, is exhibited. It will be seen that—

161. The minor, like the major, tonics follow one another in an order of ascending and descending perfect *fifths*.

Fig. 101 is a transcript of fig. 79, with the 6th to each major tonic added (in small black notes) above it. The 6th of a major scale is the *tonic* of its relative minor. The black notes, therefore, in fig. 101 are the relative minors of the white notes beneath them, and the signatures belong equally to both. (*Compare par.* 160.)

The table may be *read* thus:—The relative minor of C is A; signature, neither sharp nor flat. The relative minor of G is E; signature, F ♯. And so on.

162. The signatures of minor scales being identical in every case with those of their relative majors, it is of course impossible to decide, *from the signature alone*, in what scale a piece of music may be. A slight inspection and a moment's consideration will, however, generally remove all uncertainty on the matter. With rare exceptions, every piece of music *ends* with a combination formed of the tonic, its 3rd and 5th—the *triad* of the tonic—to which the 8th is as often added; the whole combination forming the *common chord* of the tonic. (*Fig.* 102.)

Fig. 102.



The relative *positions* of the notes of a common chord admit of great variety; *e.g.*, sometimes the 8ve is uppermost, sometimes the 3rd and sometimes the 5th (see fig. 102, *a*, *b*, *c*.); but the notes form always the same intervals with the tonic, *viz.*, the 3rd, 5th, and 8th.

163. Thus if a piece of *modern* music has for signature *two* sharps, it will certainly be *either* in the scale of D, or in that of its relative minor, B. If it is in D, the last combination will be that of D with its 3rd, 5th and (perhaps) 8th, *viz.*, D, F ♯, A, and D: if it is in the scale of B *minor*, the last combination will be that of B, *viz.*, B, D, F ♯, and B. Moreover, in the majority of modern movements the last chord of the tonic is immediately preceded by that of the *dominant*. The dominant (5th) of D is A; the triad of A is A, C ♯, E. The dominant of B is F ♯; the chord of F ♯ is F, A ♯ and C ♯— which A ♯, not being in the signature, will be specially marked.

The dominant chord is *always major*.

Fig. 103 is the ordinary ending of a piece in D major; fig. 104 that of a piece in B minor. The *signatures* of both are the same.

Fig. 103.

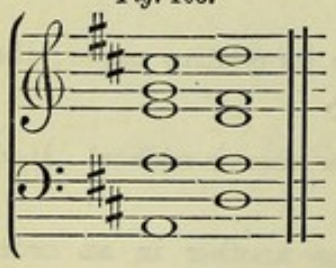


Fig. 104.



Both figures are *perfect cadences*. (*Compare par.* 91.)

164. A certain index of the minor mode is the frequent recurrence of the sharpened 7th and, with it, that of the sharpened 6th. The sharpened 7th of B minor is A ♯, the sharpened 6th, G ♯. In a piece of music bearing *two sharps* for its signature, the presence of A ♯, especially near the beginning or the end, would indicate the scale of B minor.

165. The sharpened 6th is *of itself* (as will be shown hereafter) by no means so certain an index of the minor mode as the sharpened 7th. This, however, is attended with little inconvenience, since the former is generally followed immediately by the latter.



Fig. 101.

CHAPTER XVI.

Bars and Measures.

166. "Every rhythmical passage or strain of music is divisible into *phrases.* (*Par.* 22.) "Every phrase is further divisible into *feet,* and every foot into *times,* or *beats.*" (*Par.* 23.)

167. The times or beats of a musical foot are *accented* or *un*accented. A foot consists either of *two* beats, one accented and one unaccented, or of *three* beats, one accented and *two* unaccented." (*Par.* 24.)

168. A musical passage composed of the former kind of feet is said to be in *duple* time; of the latter kind, in *triple* time. No kind of time *essentially* different from these two is used or, perhaps, possible.

169. The places of the accented beats in musical feet are indicated by lines drawn at right angles with the stave on which the notes composing them are placed. Such lines are called *bars.*

170. The group of notes enclosed by two bars is called a *measure.* The term *bar* is sometimes improperly applied to the measure itself.

171. The measures in the same musical passage are all of the same value; *i.e.* each measure takes the same time to perform.

If one measure consists of a minim, each of the other measures will also consist of a minim, or of something equal to it;—*e.g.* two crotchets, four quavers, one crotchet and two quavers, eight semiquavers, &c. &c.

Fig. 105 is in duple time; fig. 106, in triple time.

Fig. 105. HANDEL.



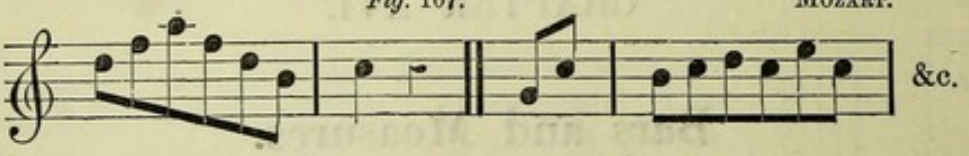
Fig. 106. PURCELL.



172. The *end* of a movement, or *section* of a movement, is usually marked by a *double* bar. When the last measure of the movement, or section, is *complete* the double bar takes the place of the single bar. When it is *in*complete, the double bar serves simply as a sign that the movement or section is ended—having no effect on the time whatever. (*Fig.* 107.)

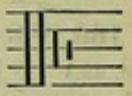
Fig. 107 consists of the end of one section and the beginning of another. The measure in which the double bar falls is to be performed at the same pace as those measures which precede and follow it.

Fig. 107. MOZART.



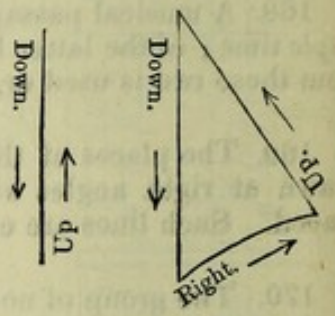
173. The *last* double bar of a piece of music is generally increased by the addition of two or three bars diminishing towards the end.

Fig. 108.



174. In practical music time is conveniently marked, or measured, by *beats* made with the hand, or a stick—in *duple* time, *down* and *up* (*fig.* 109), in *triple* time, down, *right* and up. (*Fig.* 110.)

Fig. 109. *Fig.* 110.



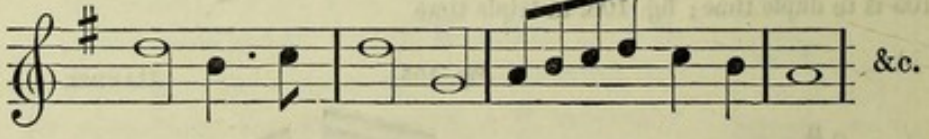
In figs. 109 and 110 the *lines* indicate the spaces traversed by the hand (or stick) in beating time, and the *arrows*, the directions in which it moves.

175 It matters not by what *form* of note each beat of a musical passage is represented, provided that the other notes are properly *proportioned* to it, and to one another, and that the beats are made throughout at the *same pace*.

Fig. 105 might, with equal propriety, be written like fig. 111, each beat being a *minim;* and fig. 106 like fig. 112, each beat being a *quaver:* provided only that each *minim* in fig. 111, and each quaver in fig. 112 was performed at the same pace as each crotchet in figs. 105 and 106.

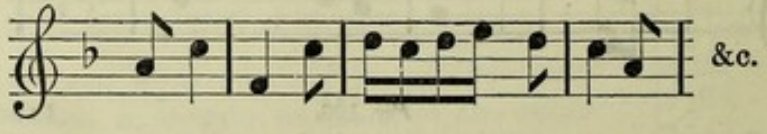
HANDEL.

Fig. 111.



PURCELL.

Fig. 112.



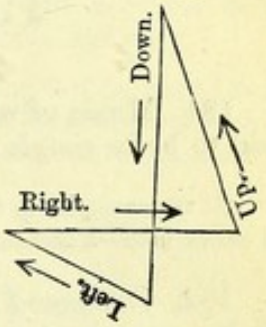
176. The monotony arising from a too frequent recurrence of accented notes, together with other practical inconveniences, has given rise to another form, in which *two* measures are thrown into one,

Fig. 113. MOZART.



177. This form is called *common* time; and, as its name would imply, it is the kind of time most frequently used.

Fig. 114.



178. In common time the beats are made,—*down*, *left*, *right*, *up*; the note performed when the *down* beat is made receiving a strong accent, and that on the *right* beat another accent, somewhat less strong.

179. The *down* beat in *every* form of measure is *naturally* the accented beat. Accentuations at variance with the natural (and ordinary) form are, however, occasionally made.

180. For example; notes lasting longer than one beat are sometimes *begun* on an *un*accented part of a measure (*Fig.* 115), or are *prolonged* from the *end* of one measure to the *beginning* of another. (*Fig.* 116.) In either case the natural and ordinary accent is disturbed.

Fig. 115. MENDELSSOHN.



Fig. 116. GREEN.



The form in fig. 116 is generally expressed by modern musicians in another way. (*See Par.* 277.)

CHAPTER XVII.

Time—Simple and Compound.

181. Music of which the times or beats can be divided, *ad infinitum*, by *two*, is said to be in *simple* time.

All the examples in the last chapter are in simple time; for the value of each beat is in every case an *entire* note—a crotchet, a minim, or a quaver—divisible by two, *ad infinitum*.

182. *Compound* time arises from a mixture of the two species, duple and triple; each beat, in a measure of compound time, being a *dotted* note—divisible by *three*. (*Figs.* 117 *and* 118.)

Fig. 117.

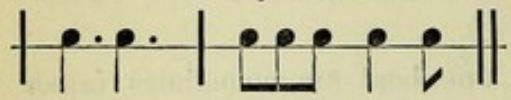
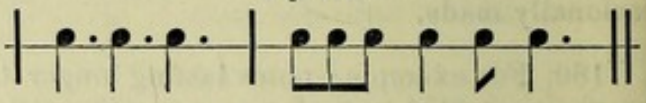


Fig. 118.



183. A measure is said to be in *duple*, or in *triple*, time according to the number of *beats* into which it is divisible; it is said to be in *simple* or in *compound* time, according to the *sub*division (duple or triple) of which each beat is capable.

Figs. 119 and 120 are *both* in *duple* time, because each measure consists of *two* beats; but fig. 119 is in *simple* duple time, because each beat is a *whole* note (divisible *ad infinitum* by *two*); and fig. 120 is in *compound* duple time, because each beat is a *dotted* note (divisible by *three*).

Fig. 119.

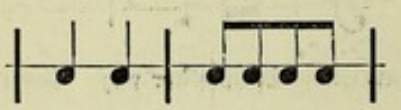
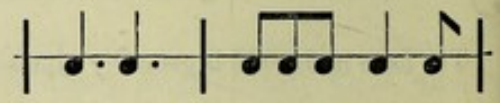


Fig. 120.



Figs. 121 and 122 are both in *triple* time, because each measure consists of *three* beats; but fig. 121 is in *simple* triple time, because each beat is a *whole* note; and fig. 122 is in *compound* triple time, because each beat is a *dotted* note.

Fig. 121.

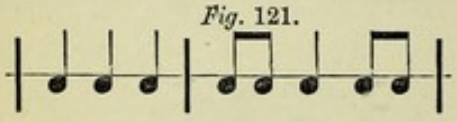
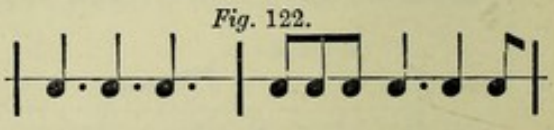


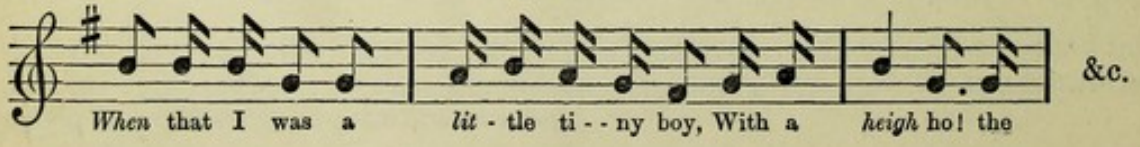
Fig. 122.



184. In a measure of *simple* time there is but *one* principal accent—that on the first *beat;* in a measure of *compound* time there is often (and always *may* be) a *subordinate* accent—on the first *note* of each *beat*.

In fig. 123 the accent falls on but one note and syllable (the first) in each measure—*when, lit, heigh,* &c.

Fig. 123. Old English Air.



&c.

In fig. 124, besides the principal accents (on *songs* and *rus*), there are subordinate accents (on *shep* and *round*), necessitated by the triple division of the *beats* to which those notes belong.

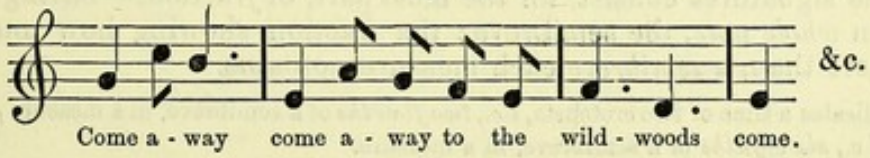
Fig. 124. Old English Air.



185. When a beat, in a measure of compound time, consists of a *single note* the subordinate accent is not felt; the time being compound *to the eye* only.

In the *first* measure of fig. 125 the subordinate accent is not expressed, seeing that the second beat is entirely filled by the one note over the syllable *way*. In the *second* measure, the subordinate accent is indispensable, because the second beat consists of *three* notes. The *third* measure is *practically* in simple time, since both the beats consists of *single notes*.

Fig. 125.



186. The beats, as well in compound as in simple time, are sometimes (more especially when the *pace* is very slow) subdivided.

Thus four beats might be made to each measure of fig. 123, or six to each measure of fig. 124, were they to be sung at a slow pace. This, however, is a matter simply of practical convenience, in no way interfering with the real divisions of the measure. Fig. 124 could, by no possibility, be regulated by *four* equal beats, nor fig. 123 by *three*.

CHAPTER XVIII.

Time Signatures.

187. The number, accent, and kind, of the notes contained in each measure of a musical movement are indicated by the *time signature*, placed at the beginning, immediately after the *scale* signature.

188. Time signatures consist, for the most part, of *fractions*—having reference to the modern *whole note*, the semibreve; the fraction showing how much of, or how much more than, a *semibreve* each measure contains.

Thus $\frac{2}{4}$ indicates a time of two crotchets, *i.e.*, *two fourths* of a semibreve, in a measure; $\frac{6}{8}$, a time of six quavers, *i.e.*, *six eighths* of a semibreve, in a measure.

189. Quadruple, or *common*, time of four crotchets in a measure is specially indicated by a character, C

C is not, as might be supposed, the initial of the word "common," but properly a half circle (, the symbol of what the old masters held to be *imperfect* time,—in contradistinction to *perfect*, or triple time, indicated by an entire circle ○. (*Compare par.* 24.)

190. *Units* are occasionally, though not commonly, used as time-signatures. 1 indicates a time of *one semibreve* in a measure (common time); and 2 the older form of two semibreves.

191. Thus at the opening of a movement we find commonly three characters, or groups of characters—the clef, the essential sharps or flats, and the time signature. The first two are usually repeated at the beginning of *every* stave of each part; the last is never expressed *but once* in each part—at the beginning.

Fig. 126.



Fig. 126 is the commencement of a (piano-forte) movement (*compare par.* 37) in the *scale* of E ♭ (*see fig.* 79), and in "three four" time; *i.e.*, triple time of three *crotchets* in a measure.

In fig. 127 all the time signatures in common use are exhibited and explained.

The *number* of the notes following each signature shows the *number of beats* in each measure; the *form* of each note shows the *value* of each beat.

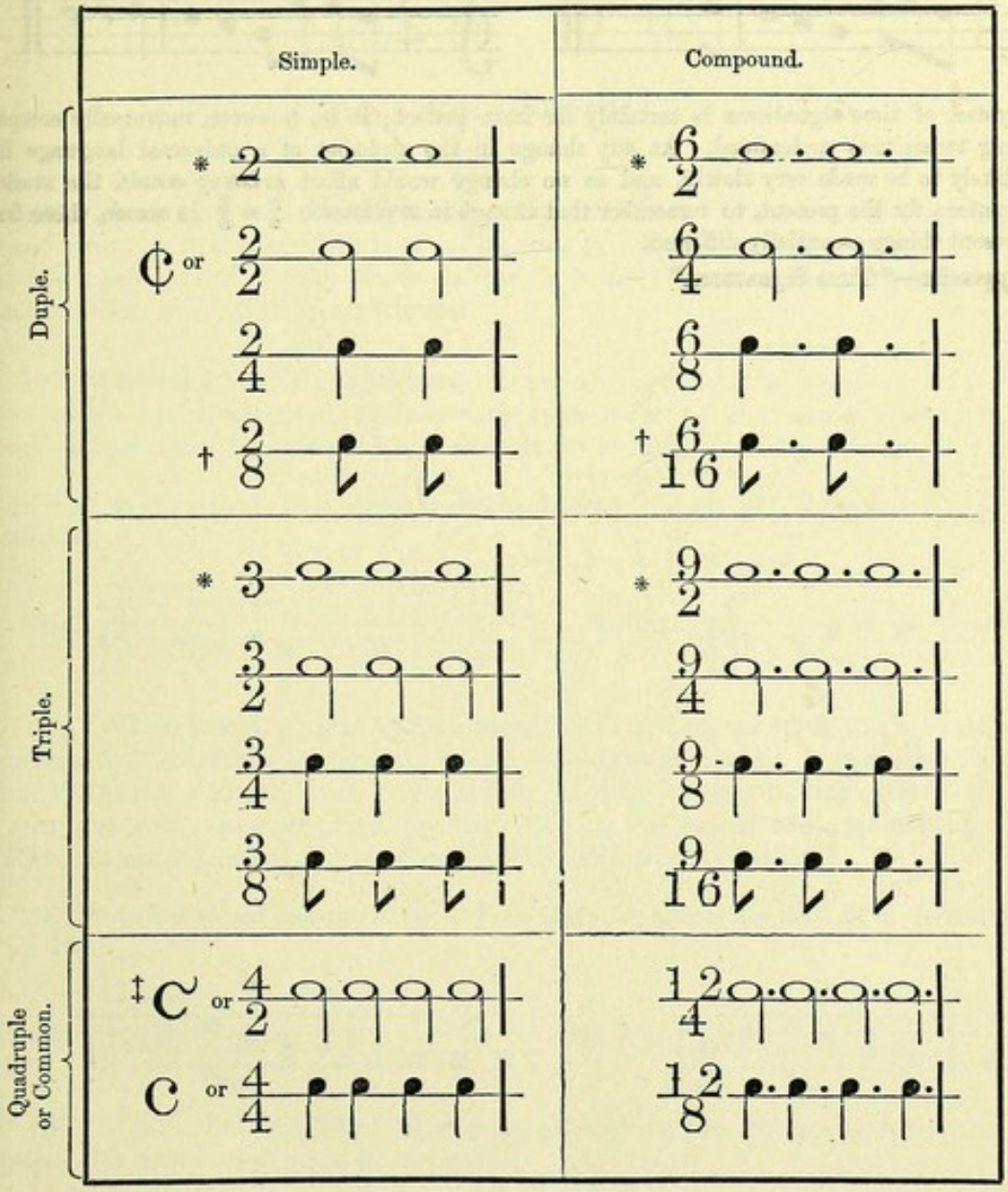
The forms marked * are only found in ancient music; those marked † are modern, but rarely used.

Musical practice is not consistent in regard to the character marked ‡; some composers designating $\frac{4}{2}$ time by ¢ and others by C·, or even C (the sign of $\frac{4}{4}$ time), restricting ¢ to $\frac{2}{2}$ time. It is greatly to be wished that all three characters were banished from the time table, and that the signatures were confined to numbers.

192. The numerator in *triple* time signatures is always an *odd* number—in *simple* triple time, *three*, in compound triple, *nine*. The numerator in *duple* and *quadruple* time signatures is always an *even* number—in *simple* time, two or four, in *compound* time, six or twelve.

Fig. 127.

Table of Time Signatures.



193. The fractions in time signatures are not always expressed in their simplest or lowest forms, *i.e.*, reduced to their lowest terms. Nor could this reduction be made in every instance with safety; seeing, for example, that $\frac{3}{4}$ and $\frac{6}{8}$ are the signatures of two kinds of time *differing in every essential particular*.

194. $\frac{3}{4}=\frac{6}{8}$. A measure with the former signature may, and often does, contain the same *number* of the same *kind* of notes as a measure with the latter signature, *viz.*, *six quavers*. Yet $\frac{3}{4}$ being the signature of *simple triple*, and $\frac{6}{8}$ of *compound duple*, time the *accentuation* of those six quavers will be altogether different.

195. The natural divisions (times or beats) of a measure of $\frac{3}{4}$ time are *crotchets*, of which it will contain *three*, or their value. The natural divisions o a measure of $\frac{6}{8}$ time are *dotted* crotchets, of which it will contain *two*, or their value. These divisions are generally expressed by the *grouping*. (*See figs.* 128 *and* 129.)

Fig. 128.

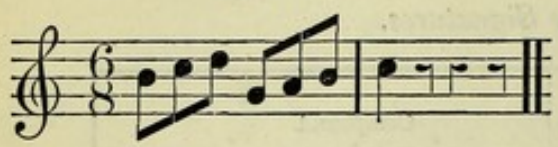


Fig. 129.



The system of time signatures is certainly far from perfect; it is, however, universally accepted and (among musicians) understood. As any change in the alphabet of a universal language like music is likely to be made very slowly, and as no change would affect *existing music*, the student must be content, for the present, to remember that though in *arithmetic* $\frac{3}{4} = \frac{6}{8}$ in ***music***, those fractions represent things essentially different.

See Appendix—"Time Signatures."

CHAPTER XIX.

Accidentals.

196. Sharps or flats which, being over and above those in the *signature* of a piece of music, are placed before *individual* notes, are called *accidentals*. Under this term are included also those *naturals* which *contradict* foregoing sharps or flats, whether essential or accidental.

197. The effect of an accidental lasts *throughout the measure* in which it is once used; *i.e.*, it alters *every* following note in it of the same name as the one which it *immediately* precedes,—unless it be contradicted by another accidental.

In fig. 130, the second F is *sharp* as well as the first. In fig. 131, the second B is *flat* as well as the first.

Fig. 130. 

Fig. 131. 

198. When the *first* note of one measure is *unisonous* with the *last* note of the measure immediately preceding it, an accidental placed before the latter note affects *also* the former, and any number of like notes in immediate succession. When the two notes are *tied* (*see Chap. XXVI.*), the accidental is usually repeated before the *second* of the "like notes in immediate succession."

The Fs in the second measure of fig. 132 are sharp; so also is the *first* F in the second measure of fig. 133.

Fig. 132. 

Fig. 133. 

199. When the repetition of a note altered in the foregoing measure is *interrupted*, the accidental *must* be repeated. (*Fig.* 134.)

Fig. 134. 

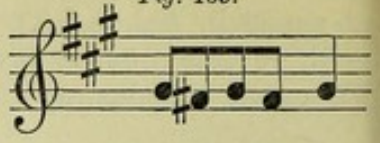
The student must be prepared to meet with many inconsistencies in musical practice as respects accidentals—more especially *double* sharps and flats.

200. "A double sharp raises, and a double flat lowers, a note *two semitones*,"—not a tone. (*Compare par.* 137.)

Every tone may be *divided* into two semitones, but every two semitones do not *make* a tone.

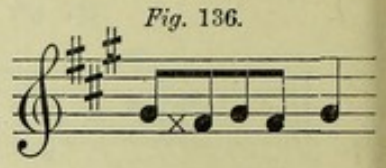
201. When a note *essentially* sharp or flat is required to be raised *another* semitone, a *single* sharp or flat, *in addition to* that already in the signature, makes it, assuredly, *doubly* sharp or flat. (*Fig.* 135.)

Fig. 135.



202. This rule is observed by some composers. Others, however, desirous of avoiding ambiguity, invariably precede double sharp or flat notes by × or 𝄫, without reference to the single sharp already marked in the signature. (*Fig.* 136.)

Fig. 136.



Theoretically, the Fs in fig. 136 are certainly *treble* sharp.

203. Again. When a double sharp or flat note is followed, in the same measure, by a *single* sharp or flat note of the same name, some writers precede the latter by a single sharp or flat, and others by a natural, *as well as* a sharp or flat.

Fig. 137.



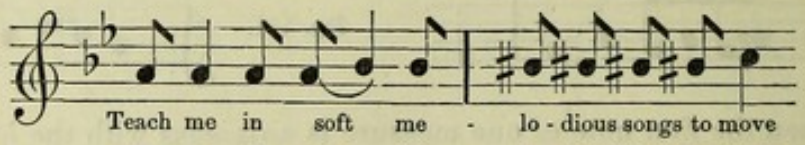
Fig. 138.



The form of fig. 138 is the more common. The natural is of more recent invention than the sharp or flat; and in music printed as late as the beginning of the last century the sharp is often used, as the natural is now, to restore a flat note to its original pitch.

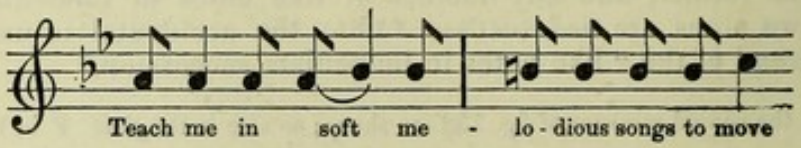
The following is from Purcell's *Orpheus Brittanicus.* Third Edition, 1721.

Fig. 139.



In modern notation the passage would stand thus:—

Fig. 140.



CHAPTER XX.

Chromatic Intervals.

204. The epithet *diatonic* (from the Greek) is applied to the natural scale (and to all scales of like *construction*) because, in singing it, we pass principally *through tones*. A scale *purely* diatonic would be inconsistent with the modern, or perhaps with any, musical system; it would certainly be intolerable to the modern ear.

205. By a diatonic scale is *now* understood a series of eight different sounds, the extremes of which are octaves to each other, separated by *five* tones and *two* semitones.

The scales in fig. 40 are all diatonic.

206. The two semitones essential to the (modern) diatonic scale are called *diatonic* semitones. Two notes separated by a diatonic semitone are invariably of *different* names.

207. A *chromatic* semitone is the interval between two proximate notes of the *same* name, *one* of which is altered by a sharp or flat.

208. "Between every two sounds separated by a tone, an intermediate sound may be placed, whereby the tone is divided into two semitones." (*Par.* 92.) *One* of these two semitones will, of necessity, be *chromatic*.

Fig. 141.

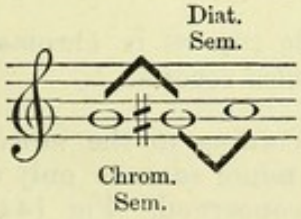
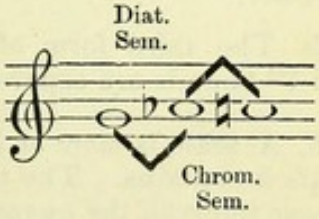


Fig. 142.



In fig. 141, the first semitone (G-G ♯) is *chromatic*, the second (G ♯-A is diatonic. In fig. 142, the first semitone (G-A ♭) is *diatonic*, the second (A ♭-A ♮) is chromatic.

209. Intervals resulting from *any* arrangement or juxtaposition of notes found in the *same diatonic* scale are called *diatonic* intervals.

210. Diatonic intervals (*compare Chap. VI.*) are major and minor seconds and thirds, and their inversions minor and major sevenths and sixths; perfect fourths, and their inversions perfect fifths; pluperfect fourths, and their inversions imperfect fifths (of each of which the same diatonic scale never includes but *one*); and the octave, of which the inversion is the *unison*—not properly an interval.

211. Certain intervals of which the upper notes are raised, or the lower depressed, a *chromatic* semitone, are said to be *augmented*. Certain intervals of which the upper notes are lowered, or the lower notes raised, a chromatic semitone, are said to be *diminished*.

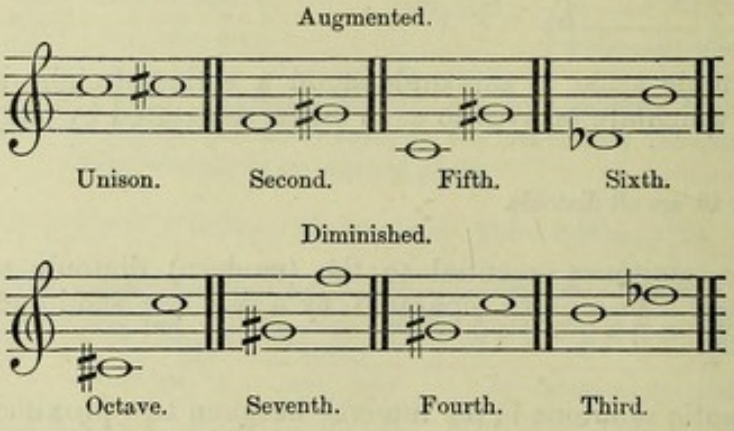
212. The unison, major second, perfect fifth, and major sixth admit of *augmentation* only; and their several inversions, the octave, minor seventh, perfect fourth, and minor third, of *diminution* only.

The unison, though "not properly an interval," is, for the sake of system, often classed as such. The *augmented* unison, *i. e.*, chromatic semitone—the agent of all augmentation and diminution—is one of the most important of intervals.

213. The *augmented* unison, second, fifth, and sixth, and their inversions, the *diminished* octave, seventh, fourth, and third, are classed under the general name of *chromatic intervals*.

Fig. 143 contains an example of each of the chromatic intervals.

Fig. 143.



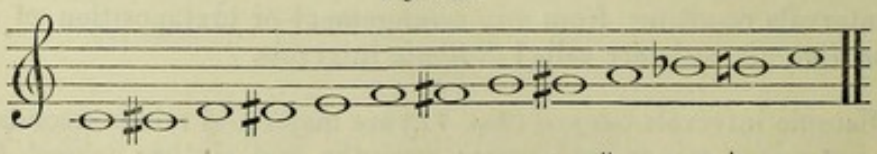
The word *chromatic* (from the Greek, *χρωμα, colour*), originally had reference to the ink (of different colour) used to express altered notes; it has been retained possibly on account of the peculiar effect (figuratively, *colour*) which such notes gave to passages in which they were introduced.

214. A scale which contains one or more chromatic intervals is called a *chromatic scale*.

215. The third form of the minor mode (*Fig.* 98) is chromatic, because its 6th and 7th sounds are separated by an *augmented* second.

216. A scale is *more or less* chromatic, according to the *number* of chromatic intervals it contains. The third form of the minor scale is only chromatic in so far as *one* interval, the *augmented* second, is concerned. Fig. 144, the *most* chromatic form of scale possible, is generally called *the* chromatic scale. It consists exclusively of semitones—in all, *twelve;* seven diatonic, and five chromatic.

Fig. 144.

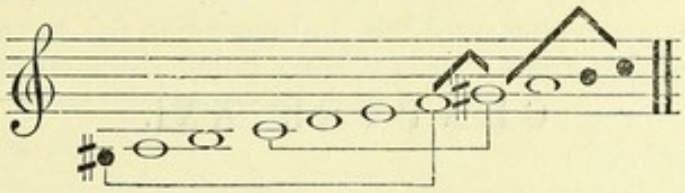


As every sound is *practically* identical with another (C ♯ with D ♭, &c.), there are many different ways of expressing the chromatic scale, the choice among which will be governed by circumstances. Fig. 144 is the commonest form.

217. Of the chromatic intervals (*Fig.* 143) the augmented *second* and diminished *fourth* are more frequently used, especially in *melody*, than any others,—because they can be produced by the juxtaposition of notes which form part of the same (minor) scale.

Scale of A minor.

Fig. 145.



F and G ♯ form an *augmented second;* G ♯ and C a *diminished fourth.* The latter interval includes the two most characteristic notes of the scale in which it is found—the leading note and the 3rd.

Fig. 146.



218. The inversion of the first of these intervals, the diminished seventh, is more sparingly, and that of the latter, the augmented fifth, hardly ever used in melody.

Fig. 147.



219. The diminished third and the augmented sixth are of still less frequent occurrence; the former being, by some theorists, considered altogether inadmissible in *harmony*, the latter in *melody*.

CHAPTER XXI.

Modulation.

220. Accidental sharps, flats, or naturals may arise, as we have seen, from either of two causes,—the introduction of the altered 6th or 7th of the minor mode (*Chap.* 14), or a change of *genus*, from diatonic to *chromatic*. The sharpened 6th and 7th of the minor scale, never being marked in the signature, are of necessity expressed by accidentals (*Par.* 160); and no chromatic interval can be formed without at least *one* altered note.

221. To these two causes of accidentals is to be added a third which, though partially connected with the first two, must be considered separately—*modulation*.

222. Every musical movement is said to be *in some particular scale*. This expression, though true in the main, must be understood with some qualification. Since, though in every well constructed movement "some particular scale" *prevails*, or furnishes the majority of the notes of which it is made up, few movements, however short or simple, remain *throughout* in *one* scale; on the contrary, most movements present points of deviation into *other* scales, and even contain passages the scales of which are equivocal.

223. This deviation, when made into scales *connected* with the original scale and with one another, is called *modulation;* when made, at once, into scales not so connected, it is called *transition*.

224. Modulation is much more frequently used than transition; and the most common modulations are between scales which contain the greatest number of *common notes*, and which are therefore most intimately "connected."

225. Thus the scale of C differs from that of G only in one note, F, which is *natural* in the former scale, and *sharp* in the latter,—from that of F only in one note, B, which is *natural* in the former scale and *flat* in the latter. While the connexion between the scale of C and that of A minor is still closer—the latter, in its original unaltered form, consisting of the *very same* notes as the former. (*Par.* 157.)

226. The commonest modulations, therefore, are from any given scale to that of the perfect 5th above it—requiring but *one* additional *sharp* (*Par.* 119); to that of the perfect 5th below it—requiring but *one* additional *flat* (*Par.* 122); to that of its relative minor; and to that of the relative minors of the 5th above, and of the 5th below.

The recognition and consciousness of the tonic, under whatever variations of *tonality* (changes of scale), is indispensable to the intelligent and *certain* performance especially of *vocal* music; and its frequent modulation constitutes one of the principal difficulties of modern music. This difficulty is

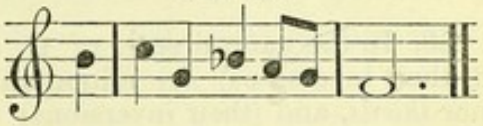
especially felt in performance from *single parts*, wherein the modulations are often but imperfectly expressed. Indeed, without examining a *score*, it is often difficult, and sometimes even impossible, to tell *by the eye*, into what scale a composition has wandered. Two or three rules will however serve to meet cases of ordinary difficulty, and enable the vocal performer to ascertain the tonic for the time being.

227. The tonic of the new scale (*i.e.*, the scale into which the last modulation has been made) is generally found a *minor second* above the *last* added *sharp*, or a (perfect) *fourth below* the last added *flat*.

Fig. 148.



Fig. 149.



The F ♯ in fig. 148 indicates a modulation into G: the B ♭ in fig. 159, a modulation into F.

228. The new scale is unmistakeably indicated by the presence of a *pluperfect* fourth, or an *imperfect* fifth; since there is but *one* of either in every scale. These intervals may appear either between two notes following in immediate succession or produced simultaneously; *i.e.*, either in melody (*fig.* 150) or in harmony (*fig.* 151).

Fig. 150.

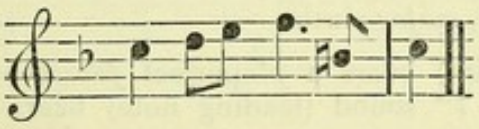


Fig. 151.



Fig. 150, an extract from a movement in F, ends with a modulation into C. *Either* of the two notes (F or B ♮) which mark the modulation might belong to many different scales, but *both together* can only be found in C. So G ♮ and C ♯ (*fig.* 151) can only *be combined* in D.

229. The *mode* (major or minor) of a new scale can only be determined by the presence of the 3rd from the tonic. (*Par.* 145.)

In fig. 152, there is a modulation from C into D; whether it is into D *minor* or D *major* is uncertain, seeing that F (the 3rd to D) is not expressed. The addition of the (major) 3rd, F ♯, to the last chord of fig. 153 decides the mode.

Fig. 152.



Fig. 153.



CHAPTER XXII.

Transposition.

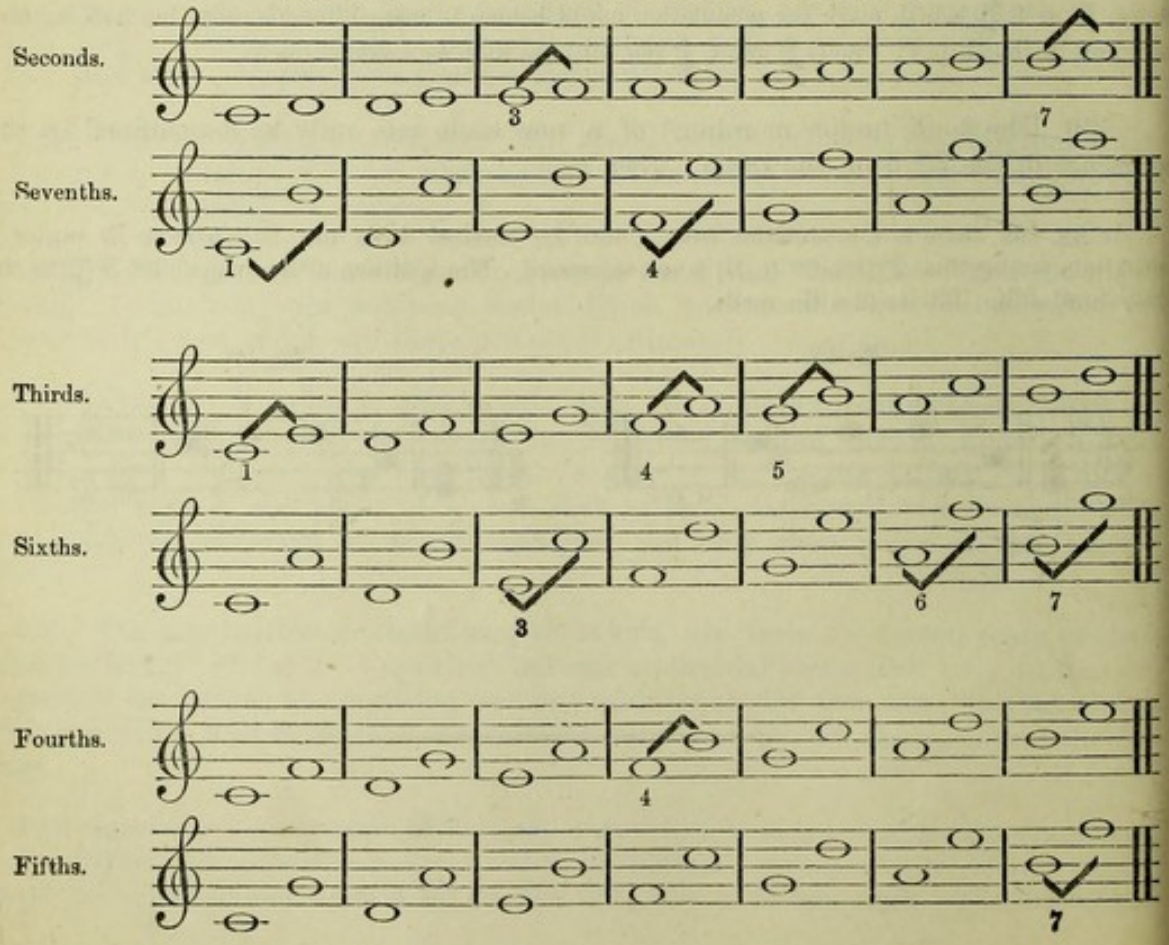
230. In the natural scale of C are found *five* major and *two* minor *seconds*, and (their inversions) *five* minor and *two* major *sevenths; three* major and *four* minor *thirds*, and (their inversions) *three* minor and *four* major *sixths; one* pluperfect and *six* perfect *fourths*, and (their inversions) *one* imperfect and *six* perfect *fifths*. (*Compare Chap. VI.*)

231. The 3rd and 7th sounds (mediant and leading note) bear *minor* seconds—*all the other* sounds bear *major* seconds; the 1st and 4th sounds bear *major sevenths*, and all the others, *minor* sevenths. (*See fig.* 154.)

232. The 1st, 4th, and 5th sounds (tonic, dominant, and subdominant) bear major thirds—*all the other* sounds bear *minor* thirds; the 3rd, 6th, and 7th sounds bear *minor sixths*, and all the others, *major* sixths.

233. The 4th sound (subdominant) bears a *plu*perfect *fourth*—all the other sounds bear *perfect* fourths. The 7th sound (leading note) bears an *im*perfect *fifth*—all the others, *perfect* fifths.

(*Fig.* 154.) Intervals found in the Natural Scale.



The two minor seconds and the two major sevenths, the three major thirds and the three minor sixths, and the one pluperfect fourth and the one imperfect fifth, being severally *inversions* of each other, are found between notes of the *same name*.

The two minor seconds are E-F and B-C, the two major sevenths are F-E and C-B; the three major thirds are C-E, F-A, and G-B, the three minor sixths are E-C, A-F, and B-G; the one pluperfect fourth is F-B, the one imperfect fifth is B-F. (*See fig.* 154.)

234. The natural scale of C is the type, or model, of *all* major scales, in the modern system. In all major scales, therefore, the several sounds (1st, 2nd, &c.) bear the same intervals as in the scale of C; for the sharps or flats by whose agency the *order* of tones and semitones is adjusted in the scale itself, operate equally on every individual interval which may be drawn from it.

235. *E.g.* "The 4th sound" of the scale of C "bears a pluperfect fourth—all the other sounds bear *perfect* fourths." (*Par.* 233.) So does the 4th sound of the scale of D, *viz.*, G, the 4th to which is C ♯; the C in the scale of D being essentially *sharp*. All the other sounds bear perfect fourths. (*Compare fig.* 154.)

Fig. 155.



236. Again, "the 1st, 4th, and 5th sounds of the scale of C bear *major* thirds—all the other sounds bear *minor* thirds." (*Par.* 232.) So do the 1st, 4th, and 5th sounds of the scale of E ♭, *viz.*. E ♭, A ♭, and B ♭ (all flat in the scale of E ♭), the 3rds to which are G, C, and D. All the other sounds bear minor thirds. (*Compare fig.* 154.)

Fig. 156.



Pars. 231-2 and 3 are, therefore true, not only of the scale of C, but of *every other major scale.*

237. "Melody, or tune, does not depend on the absolute, but on the *relative*, pitch of sounds—on their distances apart." (*Par.* 17.) When the notes of a musical passage are separated by the *same intervals*, the *melody* they form will be the same. Any musical *idea* may, therefore, be expressed at *any* pitch, *i.e.*, in *any* scale.

238. The expression of a musical idea in a scale other than that in which it was first conceived or expressed, is called *transposition*.

239. In transposing a passage from one scale to another, we represent each note in the one scale by the *corresponding* note (the note occupying the same *place*) in the other, and *adjust* the intervals of which it is composed, by substituting the *signature* of the new scale for that of the old one.

Thus, fig. 157 is in the scale of C, which requires neither sharp nor flat. To transpose it into D we must place *two sharps* at the head of the stave; to transpose it into E ♭, *three flats;* into E, *four sharps;* into F, *one flat;* into G, *one sharp,* and so on.

Fig. 157. HAYDN.



The student is recommended to try the effect of the above transpositions *without* sharps or flats.

CHAPTER XXIII.

Rhythmical Licences.

240. The rhythmical licences admissible in musical performance consist in the compression of more than its proper complement of notes into a single beat, and in the slackening, or accelerating, the pace of particular beats. Of the former, the most common example, the *triplet* or *triolet*, has been already noticed.

241. "A triplet is a group of *three* notes, which (by licence) is performed in the time of *two* of the same kind." (*Par.* 49.)

242. The triplet is but another mode of indicating a change of time, from simple to *compound*, in the particular passages where it is introduced.

Figs. 158 and 159 are identical.

Fig. 158.



Fig. 159.



243. With the triplet may be classed all groups whatever of irregular rhythmical formation. In modern instrumental music these are found in great numbers and variety,—*five* or more notes being sometimes compressed into the time of *four* of the same kind, *four* or more, into that of three, &c. &c.

Such groups are best studied in connexion with musical practice.

Departure from the average *pace* of a movement in the case of "particular beats," is indicated by the Italian words, *Rallentando*, *Accelerando*, &c., to be explained in Chapter XXVII.

CHAPTER XXIV.

Graces.

244. Passages not forming an integral part of a movement—which without essential loss to it might be, and often are, omitted—are called *graces*, or embellishments. The principal graces used in *melody* are the *appoggiatura*, the *beat*, the *shake*, the *turn*, the *acciaccatura*, and the *portamento*. The principal graces used in *harmony* are the *tremolando* and the *arpeggio*. Graces are, for the most part, expressed in *smaller* notes than those used for the integral parts of a movement.

245. The *appoggiatura* (from *appoggiare*, Ital., *to lean*) is a small note, which, being prefixed to another, robs it of its *accent* and a portion of its time.

246. In general, the appoggiatura is a note of *half* the length of the note which it displaces; but its full time should be given to the appoggiatura, whatever be its length—the following note being shortened accordingly.

Figs. 160 and 161 are severally identical with figs. 162 and 163.

Fig. 160. HANDEL.

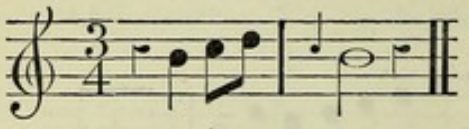


Fig. 161.

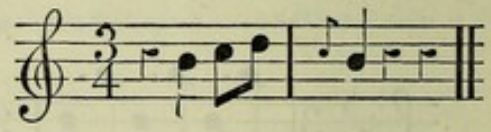
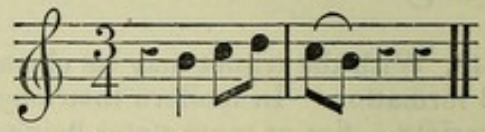


Fig. 162.



Fig. 163.



Latterly, the appoggiatura has been falling into desuetude; modern composers preferring the less equivocal forms of ordinary notation. Fig. 164 would certainly have been expressed by an earlier master as fig. 165.

Fig. 164. MOZART.

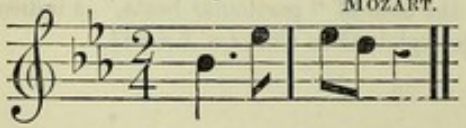
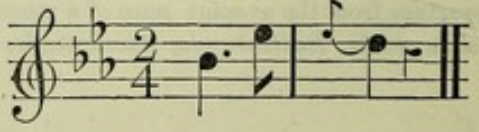


Fig. 165.



247. The *beat* is a short appoggiatura, made on the semitone below a principal note. Its effect is to give force and especial emphasis to that note.

Fig. 166.



248. The *acciaccatura* (from *acciaccare*, Ital., *to pound*) is a group of two notes, introduced with the utmost rapidity, before another note. The interval formed by the two notes should never *exceed* a *minor* third.

Fig. 167. 

249. The appoggiatura, beat, and acciaccatura should severally be uttered *on* the beat due to the note which they precede—not before it

250. The *shake* consists in a rapid alternation of two adjacent notes. It is indicated by *tr.*, a contraction of the Italian word *trillo*, placed over a note which is generally preceded by an appoggiatura.

Fig. 168 is to be performed like fig. 169.

Fig. 168. 

Fig. 169. 

251. The shake, unless it be a very short one, is always concluded by a *turn* (*See fig.* 169.)

252. The *turn* is a group composed of a principal note, and two subsidiary notes, one above and one below it. It is indicated by ∼, or ≀ placed over the principal note. ∼ is the sign of the *direct*, and ≀ of the *inverted*, turn.

Fig. 170, which contains an example of the direct, as well as of the inverted, turn, should be performed like fig. 171.

Fig. 170. 

Fig. 171. 

253. The turn, like the appoggiatura, beat, and acciaccatura, should be begun *on* the beat due to the note *over* which it is placed. When it is placed *between* two notes, it should follow the first of them.

Fig. 172 is to be performed like fig. 173.

Fig. 172. 

Fig. 173. 

254. The *portamento* (from *portare*, Ital., *to carry*) consists in the smooth utterance of two following notes, part of the time due to the first of which is given to the *anticipation* of the second. When (in vocal performance) each note has its own syllable, the anticipated portion of the second note is sung to the first syllable.

Fig. 174 is to be performed like Fig. 175.

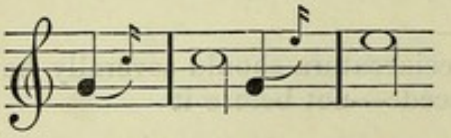
Fig. 174. 

Fig. 175. 

255. The *tremolando* (from *tremolare*, Ital., *to tremble*) is produced either by the rapid iteration of the same sound or the alternation of different sounds in the same combination.

Figs. 176 and 177 are performed like figs. 178 and 179.

Fig. 176. 

Fig. 177. 

Fig. 178. 

Fig. 179. 

256. The *arpeggio* (from *arpeggiare*, Ital., *to play upon the harp*) consists in striking the sounds of a chord in rapid succession, instead of simultaneously. It is indicated as in fig. 180.

Fig. 180. 

CHAPTER XXV.

Signs of Repetition, Contractions, &c.

257. The alphabet of music includes, besides notes, many characters, and even words, indicative of the style or manner of performance of the movements, particular passages, or individual notes, to which they refer.

258. Repetition is indicated by *dots* enclosing the passage to be repeated. These dots are generally, though not always, placed at the beginning and end of a measure.

Fig. 181.



259. Sometimes one or both of the bars enclosing a passage to be repeated are doubled; but the double bar is most often, though not always, introduced when the last measure of the passage to be repeated is incomplete.

Fig. 182.

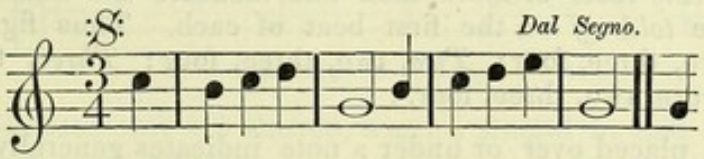


&c.

260. The beginning of the passage to be repeated is frequently indicated by a *sign* :𝄋:, referred to at the end of it by the (Italian) words *Dal Segno*, i. e., *from the sign.*

Thus, fig. 182 might be expressed like fig. 183.

Fig. 183.



&c.

261. When the repetition is to be made from the *beginning* of a movement the dots are often omitted, and the words *Da Capo* (*from the beginning*), or *Da Capo al Segno* (*from the beginning, at the sign*), if there be a sign, are used.

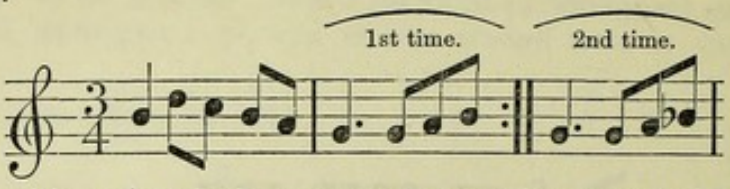
Thus, fig. 181 might be expressed like fig. 184.

Fig. 184.



262. When, on repetition, any measure or measures are to be omitted, the words "1st *Time*" are placed over *them*, and the words "2nd *Time*," over those to be substituted for them.

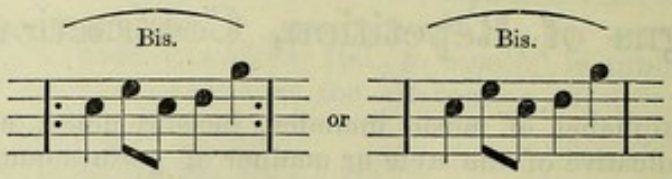
Fig. 185.



&c.

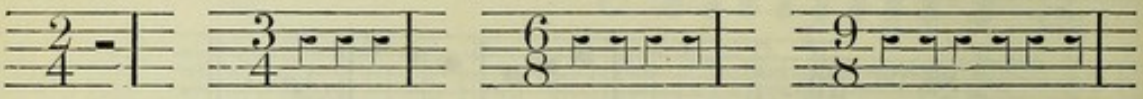
263. The repetition of a *single* measure is sometimes marked by the word *bis* (twice) placed over it in addition to, or instead of, the dots.

Fig. 186.



264. Silence lasting an entire measure (properly represented only by *rests* equal to the contents of that measure) is often expressed by a *semibreve* rest, whatever be the kind of time employed.

Fig. 187. *Fig.* 188. *Fig.* 189. *Fig.* 190.



Figs. 187, 188, 189, and 190, are all occasionally represented by fig. 191—the form properly applicable to *common* time only.

Fig. 191.

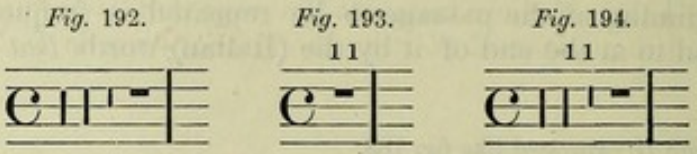


265. Silence lasting *longer* than one measure is, in single parts, generally indicated by a number, or numbers, placed over a semibreve rest, representing the number of measures of silence.

266. In ancient music the necessity for these figures was obviated by the employment of the *breve*, and the *long* (*double breve*) rest.

Fig. 192, equally with fig. 193, indicates a rest of *eleven* measures. The two forms are sometimes combined, as in fig. 194.

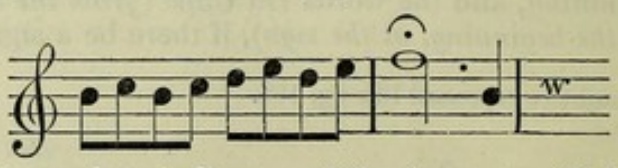
Fig. 192. *Fig.* 193. *Fig.* 194.



267. In *counting* rests of more than one measure the numbers (of the measures) should be *told off* on the first beat of each. Thus fig. 192 should be counted, *One*, two, three, four; *Two*, two, three, four; *Three*, two, three, four; and so on to *Eleven*, two, three, four.

268. A *pause* placed over or under a note indicates generally that the sound due to it may be sustained as long as the performer pleases. (*Fig.* 195.) A pause is sometimes used to mark the *end* of a movement.

Fig. 195.



269. The *direct* (W) is used to indicate a following note which it is not convenient or necessary to express. It is especially used at the end of a line or the bottom of a page, as a preparation for the next.

CHAPTER XXVI.

Marks of Expression.

270. A *dash* placed over or under a note indicates that it is not to be sustained throughout the beat, or portion of a beat, due to it, but *interrupted*, as though it were a much shorter note followed by rests. A *dot* placed over or under a note indicates a modified form of the effect due to the dash.

Fig. 196 should be performed like fig. 197, and fig. 198 like fig. 199.

Fig. 196.



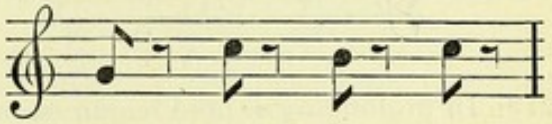
Fig. 197.



Fig. 198.



Fig. 199.



271. Dashes are sometimes placed over *minims*, where they are understood to imply the effect represented by the word *sforzato* (forced). (*See fig.* 211.)

272. Notes with dashes over them are said to be performed *staccato, i. e.*, cut off, separated; notes with *dots* over them, *mezzo-staccato, i. e., half*-staccato.

273. A *slur* placed over or under two or more notes indicates that they are to be performed *legato, i. e.*, smoothly (literally, *bound together*). In vocal music, the slur indicates that the notes under or over it are to be *vocalized, i. e.*, sung to one syllable.

HANDEL.

Fig. 200.



274. When *two* notes only are slurred, a *stress* should be laid on the first, and the second should be made staccato.

Fig. 201 should be performed like fig. 202.

Fig. 201.

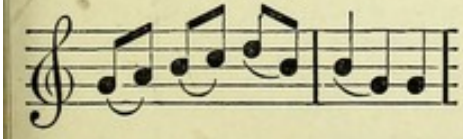
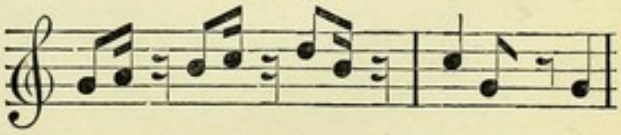


Fig. 202.

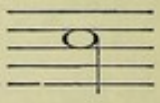


275. The *last* of a group of slurred notes is always short, by virtue of its position.

276. When the slur is placed over two or more notes of the *same* name and pitch, it is called a *tie* or *bind*, and has the effect of turning them into one note—equal in length to the two added together. (*Compare Par.* 198.)

Figs. 203 and 204 are identical.

Fig. 203. 

Fig. 204. 

277. The tie is generally used to connect *two* notes, the *first* of which is *un*-accented, and, more especially, the *last* note of one measure with the *first* of another. Sounds beginning on *accented* beats are generally expressed by entire notes, or by dotted notes.

The form in fig. 205 (*Compare par.* 180) is now obsolete, that in fig. 206 having superseded it. Fig. 207, however, is not incorrect, though more often written as fig. 208.

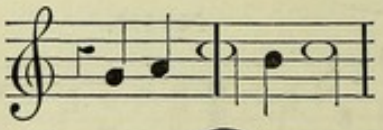
Fig. 205. 

Fig. 206. 

Fig. 207. 

Fig. 208. 

278. In prolonging a note begun on an *un*accented beat to an accented beat, "the natural and ordinary accent" of the measure in which it appears "is disturbed." (*Par.* 180.) The result of this disturbance is called *syncopation*. Syncopation is rendered more apparent by the employment of the sign >, or the letters *Sz*. (*See Fig.* 211.)

CHAPTER XXVII.

Words relating to Pace, Intensity, and Style.

279. The vocabulary of music has been enriched, or corrupted, by the contributions of every people among whom musical composers, performers, or even transcribers, have been found. *Lively*, *Doucement*, *Feierlich*, &c. &c., are used severally to indicate the pace, intensity, or style, of music printed in England, in France, or in Germany.

280. These words carry with them the disadvantage of being intelligible only to the people of those countries, or to those who have studied their language,—a disadvantage the more to be deprecated from the fact that musicians possess a sort of *common* language in Italian, the *musical terminology* of which is more or less accepted by every musical people.

A complete list of Italian words relating to pace, intensity, and style, would furnish material for a Musical Dictionary. The following lists contain some of the most important, classed under their several heads. The English words immediately following the Italian are such *literal* translations as would be found in a dictionary. They represent very imperfectly the meanings of the latter as applied to music, which indeed are only to be ascertained from a close study of Italian, or considerable experience in musical performance. Thus, *Grave*, *Lento*, and *Largo*, may be regarded as equivalents, so far as *pace* only is concerned; but each indicates a different *style* of performance,—*Grave* implying more solemnity than *Lento*, and *Largo* more dignity or *breadth* than either.

281. Words relating to pace, intensity, and style, admit in every instance of *contraction*, and generally of modification, by the *augmentation* or *diminution* for which the Italian language presents such facility. Sometimes two or more are joined together in a way that appears somewhat contradictory, until it is understood that they refer not *only* to pace, but to *style* also. Thus, *Allegro Andante* means lively in *manner*, but somewhat deliberate in *pace*.

Each of the words in fig. 209, excepting the three first, may be considered to express a quicker movement than the one before it.

Fig. 209.

Words relating to Pace.

GRAVE, *grave.*
LENTO, *slow.*
LARGO, *broad.*
LARGHETTO, *rather broad, not so slow as* LARGO.
ADAGISSIMO, *very leisurely, slower than* ADAGIO.
ADAGIO, *leisurely.*
ANDANTINO, *going gently, slower than* ANDANTE.
ANDANTE, *going at a moderate pace.*
ALLEGRETTO, *rather merry, not so fast as* ALLEGRO.
ALLEGRO, *merry, lively.*
PRESTO, *quick.*
PRESTISSIMO, very *quick.*

Connected with the above are the following:—

Fig. 210.

ACCELERANDO,* ACCEL°., *accelerating* (*the pace*).
RALLENTANDO,* RALL°., *slackening* (——).
STRINGENDO, STRIN°., *pressing onwards.*
PIÙ MOSSO, *more moved, quicker.*
RITARDANDO, RITAR°., *retarding.*
RITENUTO, RITEN°., *holding back.*
A TEMPO, *in time,* (*after an* ACCEL°. *or* RALL°.).
IN ISTESSO TEMPO, *in the same time; i. e., the times, or* beats, *the same, whatever be the* forms *of the notes.*
ALLA BREVE, *by the breve; i. e., the breve being regarded as the* whole note—*each* beat *being a* minim.
TEMPO ORDINARIO, (*in*) *ordinary time* } *neither fast nor slow.*
—— COMODO — *convenient* — }

* * These words are *correlatives.*

Modern composers frequently add to the words above, an *exact* indication of the pace of their music, by a reference to the Metronome. (*See Chap. XXIX.*)

Fig. 211.

Words relating to Intensity.

PIANO,* PIA., *p, soft.*
MEZZO PIANO, MEZ. PIA., *mp, rather soft.*
PIANISSIMO, PIAN^mo^., *pp, very soft.*
FORTE,* FOR., *f, loud.*
MEZZO FORTE, MEZ. FOR., *mf, rather loud.*
FORTISSIMO, FOR^mo^., *ff, very loud.*
CRESCENDO,† CRES., *or* <, *increasing* (*in loudness*).
DECRESCENDO,† DECRES., *or* >, *decreasing* (*in loudness*).

To the above may be added:

FORTE PIANO, *fp, loud and* (*immediately after*) *soft.*
SFORZATO, *sz, forced* (*applicable to single notes only*).
RINFORZANDO, RINFORZ., *forcing* (*applicable to passages*).
CALENDO, *descending* }
PERDENDOSI, *losing itself* } *decreasing in* speed *and*
DIMINUENDO, *diminishing* } (*generally*) *in intensity.*
SMORZANDO, *extinguishing* }
DOLCE, *soft.*

* † These and their dependent words are *correlatives.*

All these words are liable to modification by the addition of one or more others, expressive partly of pace, but more especially of style. The following are some of the most important of them:—

Fig. 212.

Words relating (chiefly) to Style.

AGITATO, agitated.	MAESTOSO, majestic.
ANIMATO, animated.	MARCATO, marked.
A POCO A POCO, by degrees.	MOLTO, much, very.
ASSAI, sufficiently.	MENO, less; *e. g.*, Meno Allegro.
BEN, well; *e. g.*, Ben Marcato.	MEZZO, half.
BRILLANTE, brilliant.	MODERATO, moderate.
CON, with.	NON, not; *e. g.*, Non troppo Lento.
(CON) BRIO, mirth.	PIÙ, more; *e. g.*, Piu Animato.
—— ESPRESSIONE, expression.	POCO, little.
—— FUOCO, fire.	QUASI, almost, as though.
—— MOTO, motion.	SEMPRE, always; *e. g.*, Sempre *pp*.
—— TENEREZZA, tenderness.	SOSTENUTO, sustained.
ESPRESSIVO, expressive.	STACCATO, cut off.
GIUSTO, exact.	TENUTO, held, sustained.
GRAZIOSO, graceful.	VIVACE, lively.
LEGATO, bound.	VOLTI, turn.
MA, but; *e. g.*, Ma non Rall°.	SEGUE, it follows.

282. The words in fig. 209 are all used occasionally as noun-substantives. We speak of *an* Adagio, *an* Andante, *an* Allegro—as of movements to be performed in the styles indicated by those words.

CHAPTER XXVIII.

The Tenor and Alto Staves.

"All the notes (twenty-three) required for *average* vocal music can be placed on a stave of *eleven* lines." (*Par.* 34.) But "no *individual* voice can utter" twenty-three sounds; consequently, in writing music for individual voices, a smaller number of lines suffices. "Practically, whether for vocal or instrumental music, a stave of *five* lines is generally adopted; the *particular sets*, or staves, most used being the five highest and the five lowest of the Great Stave" of eleven. (*Par.* 35.)

"The lower one of these sets, or staves, of five lines is used for voices and instruments of low pitch: the upper, for voices or instruments of higher pitch." (*Par.* 36.) "Music for the *lower* voices of women and the *higher* voices of men *demands other staves*, which are, equally with the treble and bass staves, extracts from, or parts of, the Great Stave of eleven lines." (*Par.* 39.)

283. The voices of *men* (beginning from the lowest) are Bass, Barytone, Tenor, and Counter-tenor; those of women are Contralto, Mezzo-soprano, Soprano, and Treble. The *highest* of the former, the Counter-tenor, is almost identical in *compass* with, though very different in *timbre* from, the *lowest* of the latter, the Contralto. The Treble may be regarded rather as a *puerile* than a *female* voice.

The relative places, in the musical system, of these voices is exhibited in fig. 213, and the relations of the *different staves* they occupy to the Great Stave is shown in fig. 214.

Fig. 213.

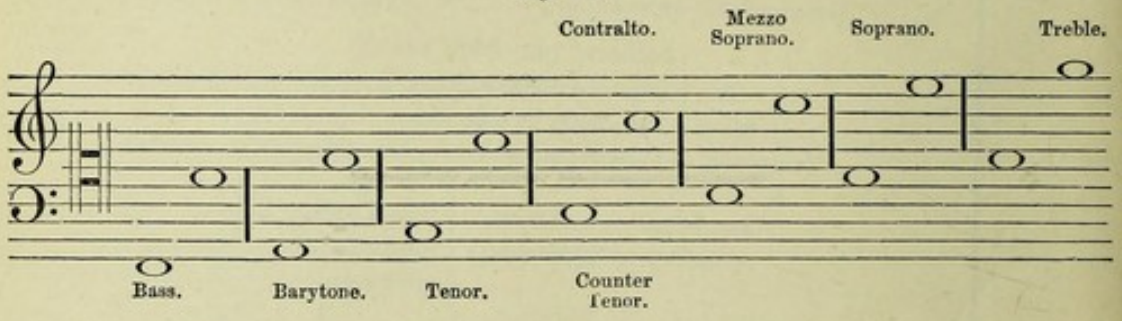
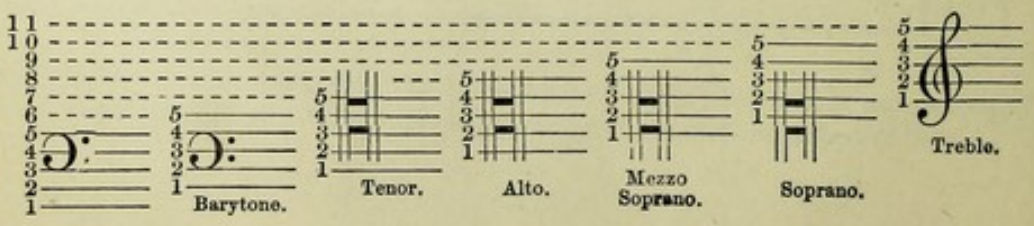


Fig. 214



284. Of the seven staves (in fig. 214) *two* are headed by the F clef, *four* by the C clef, and *one* only by the G clef.

285. The 4th line of the Great Stave (indicated by the F clef), is also the 4th line of the *bass* stave; but it is the 3rd line of the *barytone* stave, the 2nd of the *tenor*, and the 1st of the *contralto*.

286. The 6th, or middle, line of the Great Stave (indicated by the C clef), which forms no part of the *bass* or of the *treble* stave, is the 5th line of the *barytone*, the 4th of the *tenor*, the 3rd of the *contralto*, the 2nd of the *mezzo-soprano*, and the 1st of the *soprano*.

287. The 8th line of the Great Stave (indicated by the G clef), which forms no part of the *bass*, *barytone*, or *tenor* stave, is the 5th line of the *contralto* stave, the 4th of the *mezzo-soprano*, the 3rd of the *soprano*, and the 2nd of the *treble*.

288. Two of these staves, the *barytone* and the *mezzo-soprano*, have become obsolete. Music for the barytone *voice* is now commonly written on the *bass stave*; music for the mezzo-soprano voice, on the *contralto*, the *soprano*, and even the *treble* stave, which latter, in England, is generally substituted for the *soprano*.

The treble stave was once used exclusively for *instrumental* music, and has not even yet been *universally* adopted for vocal. The soprano stave is still much used on the Continent.

289. Thus the staves in actual use are but five, and, in England, only four,—the *bass* and *tenor* for the voices of men, the *contralto* (or *alto*) and *treble* for the voices of women and children.

The bass and treble staves, the lowest and the highest of the Great Stave of eleven lines (*see Chap. IV.*), can need no further explanation.

290. On the 4th line of the *tenor* stave is found the C clef. (*See fig.* 214.) The C clef, it will be remembered, is the distinguishing mark of the 6th, or *middle*, line of the Great Stave of eleven lines. Consequently, the 4th line of the *tenor* stave is identical with the 6th of the Great Stave; and, further, the 1st, 2nd, 3rd, and 5th lines of the former are identical with the 3rd, 4th, 5th, and 7th of the latter.

291. On the 3rd line of the *contralto* stave (*See fig.* 214) is found the C clef—the distinguishing mark of the 6th or middle line of the Great Stave. Consequently, the 3rd line of the *contralto* stave is identical with the 6th of the Great Stave; and further, the 1st, 2nd, 4th, and 5th lines of the former with the 4th, 5th, 7th, and 8th lines of the latter.

Familiarity with the tenor and contralto staves is only to be attained by practice; but it is certain that the difficulty sometimes attendant on this arises entirely from the fact that their *relation* to the Great Stave, and therefore to the more familiar *treble* and *bass* staves, is not at all, or but imperfectly, understood. One stave is of course, *of itself*, as easily mastered as another; and any difficulty found in reading from the tenor and alto staves must arise from a hitherto exclusive use of the treble and bass.

Let the following facts be borne in mind:—

292. The 1st, 2nd, 3rd lines of the *tenor* stave are identical with the 3rd, 4th, and 5th of the *bass;* the *top* line of the *tenor* stave is identical with the *bottom* line of the *treble;* and the 4th (or clef) line of the *tenor* stave is that *leger* line which connects the bass with the treble. (*Fig.* 215.)

293. The 1st and 2nd lines of the *contralto* stave are identical with the 4th and 5th of the bass; the 4th and 5th lines of the *contralto* stave with the 1st and 2nd of the *treble;* and the 3rd (or clef) line of the *contralto* stave is identical with the *leger* line connecting the bass with the treble. (*Fig.* 216.)

Fig. 215.

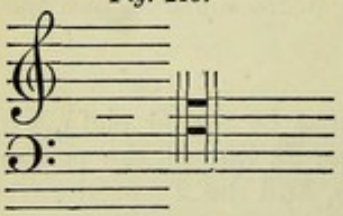
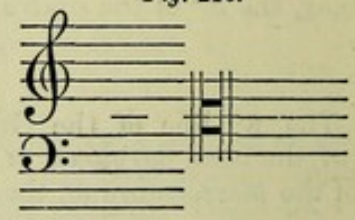


Fig. 216.



The student must be warned that, notwithstanding the recent multiplication of editions of popular musical works, in which parts for the alto and tenor voices are printed on the treble stave (the former sometimes, and the latter always, an octave higher than their proper pitch), anything like an extensive acquaintance with classical music is quite impossible without familiarity with the alto, tenor, and soprano staves.

CHAPTER XXIX.

The Syren and The Metronome.

294. "The pitch of a musical sound depends on the *number* of vibrations communicated to the air *in a given time*" (*Par.* 5),—its duration, "on the time during which the air continued to vibrate *at the same pace.*" (*Par.* 6.)

295. Although "the musical student is chiefly concerned with the pitch and duration of sounds as compared with one another," yet, "every sound is assuredly of a *definite* and *appreciable* pitch and duration." (*Par.* 9.)

296. C, the centre of the musical system (*Par.* 30), is the result of 256 vibrations *per* second; its octave above, of 512; and its octave below, of 128. The highest C on an ordinary Piano-forte is the result of 2048 vibrations *per* second; the lowest C, of 32. The octave below the latter, the result of 16 vibrations *per* second, has till lately been thought to be the lowest sound appreciable by the human ear.

297. It is difficult to believe that even the lowest of these numbers is to be *counted*; yet methods whereby their correctness could be ascertained *indirectly* have been known for a great length of time; and mechanical science has recently made even a *direct* estimation of it possible. The most perfect of these contrivances is an instrument called the *Syren*, invented by a French mathematician, Cagniard de la Tour.

298. The Syren (*see fig.* 218) consists of cylinder A, generally about 2 inches long and 3 inches in diameter, the *table*, or top, of which is pierced with 25 holes placed in a circle at equal distances apart. In immediate contact with this table is placed a *disk* B, about $1\frac{1}{2}$ inch in diameter, pierced with the same number of holes as, and exactly coinciding with, those in the table of the cylinder. By means of a short pipe C, communicating with a bellows, a blast of air, slightly compressed, is forced into the cylinder, from which its only means of escape is through the holes in the top of it, *when those of the disk are brought immediately over them.* The holes of the disk and of the cylinder being cut obliquely and in opposite directions, the air, in its effort to escape from the latter, sets the former spinning, and brings each of the holes of the one successively over each of those of the other. Every time this happens, the compressed air, in its escape from the cylinder, gives a pulsation to the external air, which pulsation, if repeated at regular intervals and with sufficient rapidity, produces necessarily a *musical sound.*

299. "As the number of vibrations (or pulsations) communicated to the air in a given time increases or diminishes, so does the sound become more acute or more grave." (*Par.* 5.) In the case of the Syren, the *number* of vibrations will depend on the *pace* at which the disk revolves,—which pace, again, depends on the force with which the air is driven into the cylinder.

300. The number of revolutions, and portions of revolutions, made by the disk, are recorded by two hands, somewhat similar to those of a watch, each being centred on a separate dial, and acted upon by a mechanical contrivance which connects them with the axis of the disk D; the *time* in which these revolutions are made being ascertained by a stop-watch, or a pendulum beating seconds.

Thus, supposing 5 revolutions of the disk to be made in a second while a note of a given pitch was maintained, it would prove that that note (*e. g.*, *fig.* 217) was the result of 125 vibrations *per* second; seeing that, the disk being pierced with 25 holes, each revolution of it was the cause of 25 vibrations.

Fig. 217.

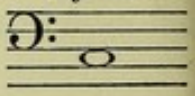
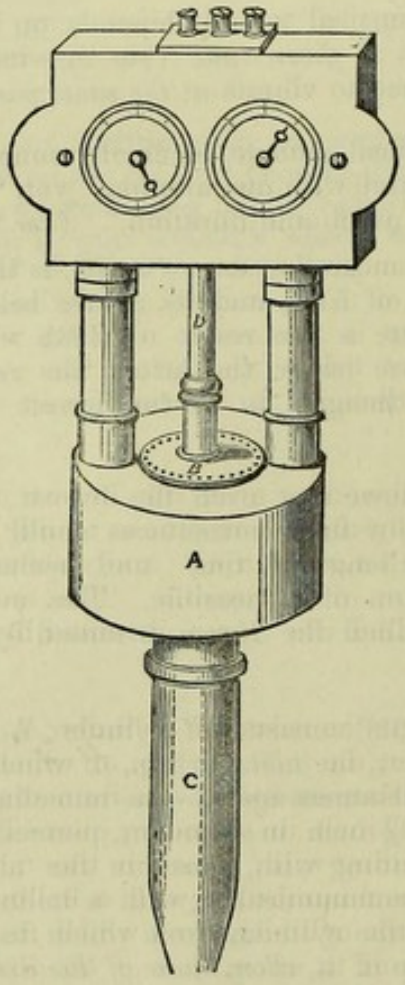


Fig. 218.

THE SYREN.



The application of the Syren to practical music is at present too remote to justify a more minute account of it here. The exact measurement of the *time* of sounds is at once more simple, and practically more important to the student, than that of their *tune*. This is effected by means of Maelzel's *Metronome*.

301. Maelzel's Metronome (*fig.* 219) consists of a pendulum A B, having an index B C, which is furnished with a weight M, easily moveable along its whole length. On the position of M depends the *pace* at which the pendulum A B will oscillate to and fro, or, more properly, the *number* of oscillations it will make *in a given time*. The figures on the index B C indicate this number *per minute*, supposing the moveable weight M to be placed immediately *under* any one of them.

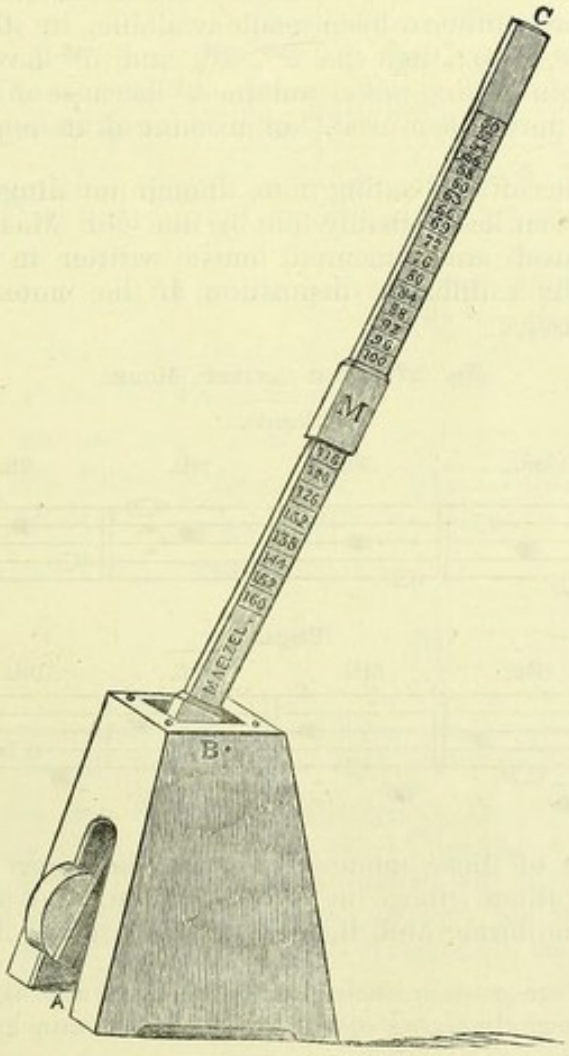
Thus, if the top of M be placed against the line marked 160, the pendulum A B, and the index B C, will make 160 vibrations *per* minute: if it be placed against the line 50, it will make 50 vibrations *per* minute; the former being the largest, the latter the smallest, number possible.

302. A composer or editor, who desires to indicate the *exact time* at which a given movement is to be performed, has only to mark against the form of note which represents each beat the figure under which the weight M is to be placed on the index B C, and the pendulum will oscillate at the pace at which each beat is to be made.

Thus ♩ = 100, means that each crotchet is to be performed, and each beat (equal to a crotchet) made, in the time of one oscillation of the pendulum, when M is placed against the line marked 100.

Fig. 219.

THE METRONOME.



Although, for the purpose of *keeping* time in musical performance, the Metronome never has been nor perhaps ever can be used, for the purpose of *indicating* it, it is most valuable. When at hand it is, of course, an indisputable evidence of the intention of the composer; and even when no at hand it is hardly less useful, since a moderate degree of practice will enable a conductor, or performer, to *remember* the pace at which the pendulum vibrates when the weight is in this or that position, and thus to carry out the design of the composer, if not perfectly, at least with far more certainty than when aided only by such words as *Andante*, *Allegro*, &c. &c.

CHAPTER XXX.

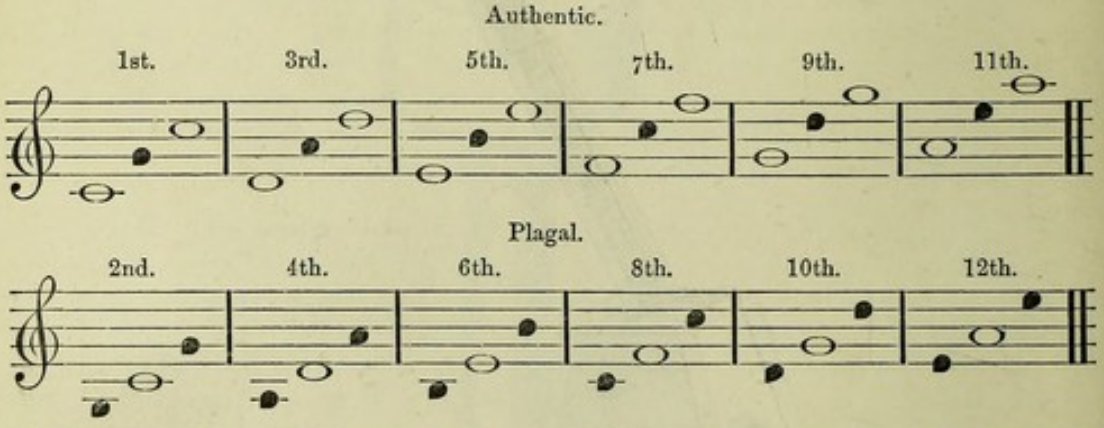
The Ancient Modes.

"The order of tones and semitones in a scale is called a *mode*. Seven modes, or forms, of scale are therefore possible; and at least that number was once *in use*." (*Par.* 76.)

303. It has been shown (*in Chap. VII.*) that of the seven modes "possible" only two are available, or have hitherto been made available, in the modern system—the 1st and the 6th (*of fig.* 40); that the 2nd, 3rd, and 5th have been rejected because they are wanting in *leading notes*, and the 4th because of its *pluperfect* fourth; and that the 7th "has never been used," on account of its *imperfect* fifth.

304. The importance of the leading note, though not altogether unappreciated, would seem to have been less sensibly felt by the Old Masters than by us; for they certainly recognised and executed music written in the 2nd, 3rd, and 5th modes (*of fig.* 40), and, by a different disposition of the notes of each, formed as many others—in all *twelve*.

Fig. 220.—The Ancient Modes.



305. The first six of these modes (those in the *upper* line of fig. 220) they called *authentic*, the others (those in the *lower* line) they called *plagal*; giving the *odd* numbers to the former and the *even* numbers to the latter.

By the "Old Masters" are generally understood the composers who flourished before the *end* of the *sixteenth* century; though the ancient *style* was maintained in many instances much later.

The large notes in fig. 220 are the tonics, or rather *finals*, of each mode.

306. The final of each authentic mode is *identical* with that of its plagal; *e.g.*, D, *not* A, is the final of the 4th mode as well as of the 3rd. A passage in an *authentic* mode, therefore, would range between the final and its octave; whereas a passage in a plagal mode would range between the 5th of the final and *its* octave; the final being, in an authentic mode, a *boundary*, and in a plagal mode, a *centre*.

307. Of these twelve "possible" modes only a certain number have been in common use at any time. Most of the old Theorists limited the number of modes to *eight*, four authentic and four plagal, counting the authentic mode whose final is D as the 1st, and the plagal mode whose final is G as the 8th, and *last*; thus rejecting *the only two* used in the modern system — those beginning on C and A.

The arrangement of fig. 220 is that given by Zarlino in his "Instituzioni Armoniche;" but the one most commonly adopted was the following. (*See fig.* 221.)

Fig. 221.—THE ANCIENT MODES.

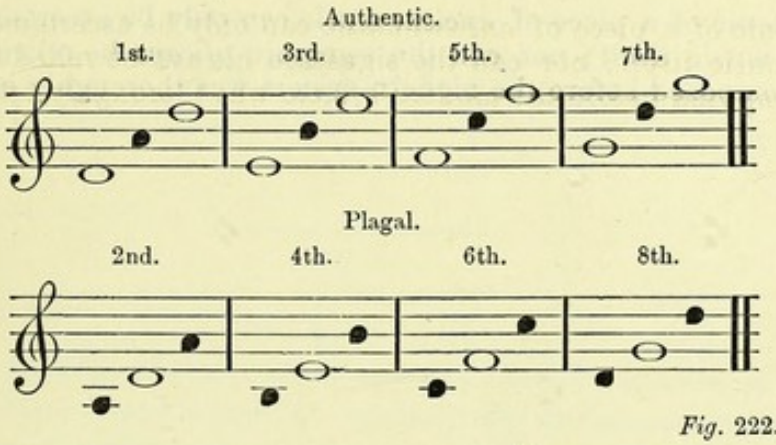


Fig. 222.

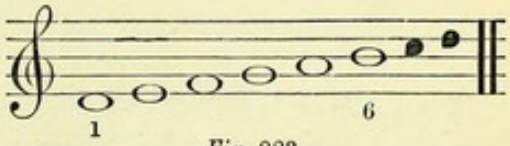


Fig. 223.

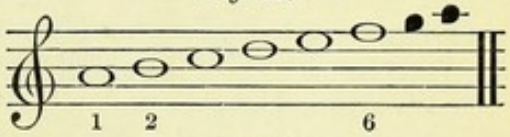
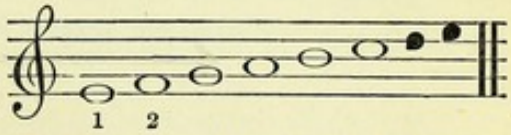


Fig. 224.



308. Of the above, the modes most commonly used were the 1st and 3rd, whose finals are D and E. (*Figs.* 222 *and* 224.) They are both *minor* modes, but differing from the modern type (*fig.* 223), the former in its *major* 6th, the latter in its *minor* 2nd. (*Compare figs.* 222 *and* 224 *with fig.* 223.)

Two of the most recent examples of the use of these modes are presented in Handel's *Israel in Egypt*,—of the 1st in the chorus, "And I will exalt Him," and of the 3rd in "Egypt was glad."

309. The old modes were liable to *modifications*, akin to those *now* made in the upper tetrachord of the minor scale. (*Par.* 146.) Thus the 4th sound (B) of the 5th mode, which is a *plu*perfect fourth from the final F, was often made *flat*,—by which means the mode became identical with the modern major scale of F. While in progressions like the last of the soprano part of fig. 225, the penultimate note was *sung*, though not written, *sharp*.

G. PORTA.

Fig. 225.



Until a comparatively recent period, such modifications as the above were left to the science or taste of the *performer*, who would, of course, often have anticipated many of the effects of modern tonality.

310. The Old Masters were acquainted with *transposition;* but they never carried it (in writing) into scales requiring more than *one* sharp, or *one* flat; and it was only recently that even these were placed *at the head* of the stave. When the growing needs of the modern system called more than one sharp or flat into requisition, *scale signatures* were introduced—though at first in an imperfect form. So lately as the beginning of the eighteenth century, the *last* sharp, or flat, was commonly marked as an *accidental.*

The signature of Handel's *trio,* "The flocks shall leave the mountains" (in *Acis and Galatea*), is *two* flats instead of three. The scale is that of C *minor.*

311. The tonic of a piece of *ancient* music can only be ascertained by examination of the music itself; nor can the signature *always* be relied on in respect to any piece composed before the modern system was thoroughly established.

APPENDIX.

The imperfections of the time-table, though eventually remediable by an act of memory, are the cause of perpetual embarrassment to beginners—especially those who bring any mathematical training to bear on the study of practical music.

Those only who have had experience of it can quite estimate the difficulty of making a mathematical student believe, or understand, that a quantity represented by $\frac{6}{8}$ has properties essentially different from a quantity represented by $\frac{3}{4}$, and that six quavers represented by the former sign are to be treated altogether differently from six quavers represented by the latter.

The following modes of designating compound times are suggested, not in the expectation of altering anything so extensively used and accepted as the existing time-table, but as a means of explaining the nature of compound time.

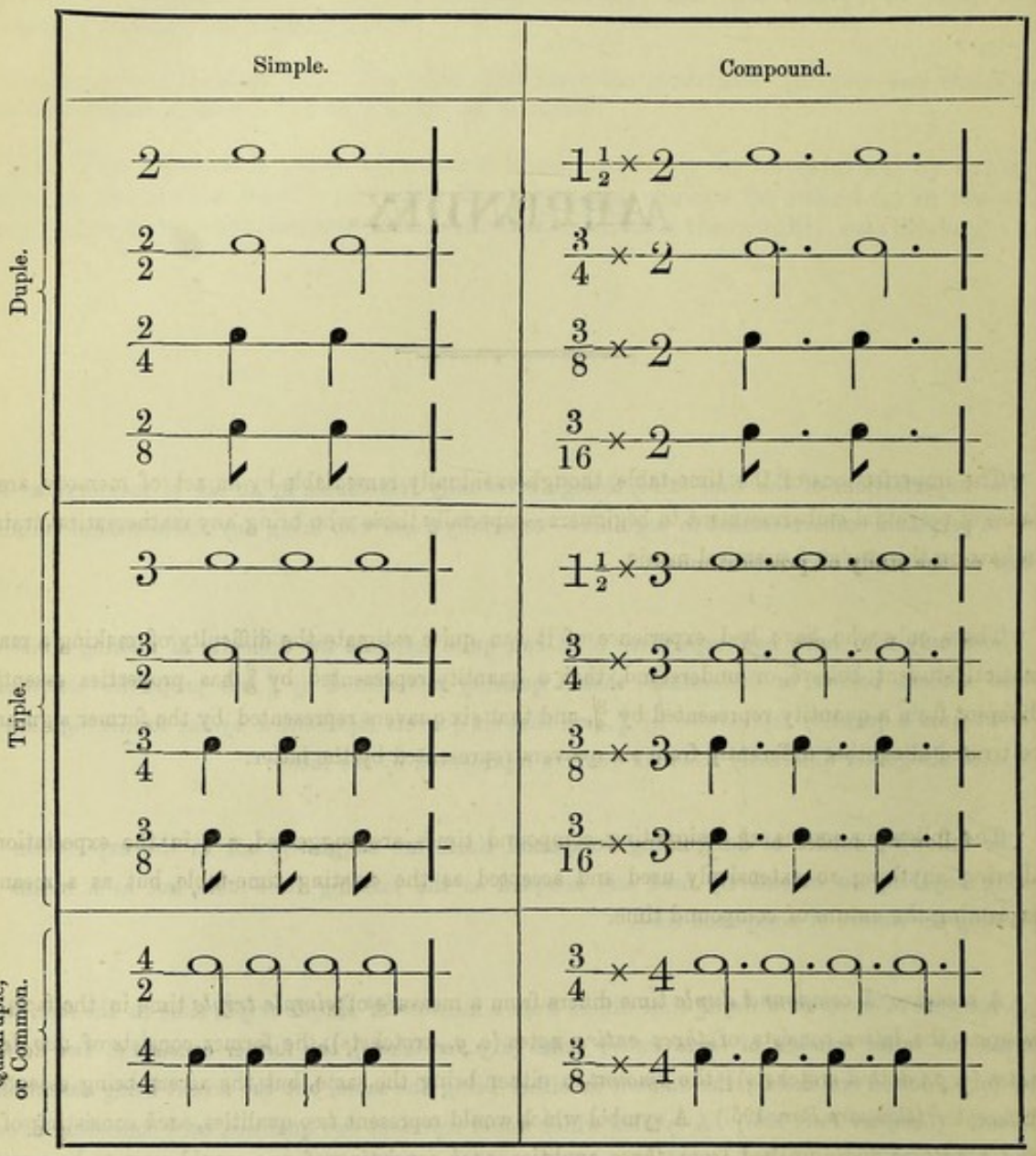
A measure of *compound duple* time differs from a measure of *simple triple* time in the fact, that whereas the latter consists of *three entire* notes (*e. g.*, crotchets), the former consists of *two dotted* notes (*e. g.*, dotted crotchets); the *amount* in either being the same, but the accent being essentially different. (*Compare Par.* 195.) A symbol which would represent *two* qualities, *each* consisting of *one and a half*, as distinguished from *three* qualities, *each* consisting of *one*, would seem to be a certain means of preventing these two kinds of time from being confounded, which, it is certain, the present signatures do not.

It is proposed, then, to mark all compound times on a uniform system, which would at once show the number of beats in a measure and the value of each beat,—the former by a fraction (of a semibreve) and the latter by a figure preceded by the common arithmetical *symbol of multiplication.*

Thus the time usually marked $\frac{6}{8}$ would be expressed by $\frac{3}{8} \times 2$; *i. e.*, three-eighths of a semibreve multiplied by two, or, in familiar language, *three quavers twice over*, in each measure.

The signatures in the left-hand column of the following table are identical with those in fig. 127; those on the right are, one and all, different. (*Compare fig.* 127.)

Proposed new Table of Time Signatures.



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THE END.

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REPORT

OF THE

STEWARTON CASE,

WILLIAM CUNINGHAME AND OTHERS,

PATRON, HERITORS, AND PARISHIONERS OF STEWARTON,

AGAINST

THE PRESBYTERY OF IRVINE.

BY

J. M. BELL, JOHN MURRAY, JAMES DONALDSON, AND GEORGE YOUNG, ESQRS., ADVOCATES.

EDINBURGH:
PRINTED FOR THOMAS CLARK, LAW BOOKSELLER;
AND
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1843.

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STEWARTON CASE.

Decided January 20, 1843.

WILLIAM CUNINGHAME and OTHERS, Suspenders.—*Dean of Faculty (Robertson)—Handyside.*
THE PRESBYTERY OF IRVINE, Respondents.—*Bell—Rutherfurd—Dunlop—Moncreiff.*

A presbytery having, in terms of the Act of Assembly 1839, anent reunion with Seceders, admitted the minister of a congregation of the Associate Synod to be a minister of the Established Church, and added his name to the roll of the Presbytery; and having thereafter taken steps for allocating a parochial district to his church, *quoad sacra*;—Interdict granted (in respect of the opinion of a majority of the whole Court) at the instance of the patron, and several heritors of the parish, out of which the parochial district was proposed to be allocated, against the minister's sitting and voting as a member of presbytery in matters connected with the parish; and further, against all proceedings for dividing the parish, and designing and erecting a new parish therein, and placing the same under the pastoral superintendence of the minister so admitted, or any other person; and against constituting a new and separate kirk-session, having jurisdiction and discipline over the proposed new parish; and generally against innovating upon the existing parochial state of the parish as regarded pastoral superintendence, its kirk-session, and jurisdiction and discipline belonging thereto.

IN May 1839, the General Assembly of the Church of Scotland passed an Act, providing that all the ministers of the Associate Synod and their congregations, in Scotland, might, if desirous, be admitted into connexion and full communion with the Church of Scotland, and enacting certain rules to be observed by the presbyteries of the Church in relation to that subject.*

In August 1839, the congregation of the Associate Synod which had their place of worship in the village or town of Stewarton, in the parish of Stewarton, Ayrshire, applied to the Presbytery of Irvine, within whose bounds Stewarton is situated, to be received into union with the Church of Scotland, in terms of the Act of Assembly. The minutes of the meeting of Presbytery, held on 6th August 1839, bear that "a memorial and petition from the Rev. James Clelland, minister of the Associate Church in Stewarton, and from the managers and members of said congregation, praying to be received into union with the Church of Scotland, were laid upon the table. The Presbytery having found the matter regularly proceeded in, did, in terms of the Act of Assembly, (Act 8, Ass. 1839,) styled an Act anent reunion with Seceders, receive and admit the memorialists to the status and privileges of a minister, elders, and members of the Church of Scotland, respectively. Mr Clelland signed the Confession of Faith, his name was added to the roll of the Presbytery, and he took his seat accordingly."

---

* This Act of Assembly, and also that of 1834, relative to chapels of ease, will be found in the Appendix to this Report.

At the meeting of presbytery on 1st October following, a draft of articles of constitution for this new church, together with a petition from the managers relative to the allocating of a parochial district thereto, was laid before the Presbytery, who appointed a committee to consider the articles of constitution, and to perambulate the bounds of a district to be annexed to the church.

The committee gave in their report at the meeting of Presbytery on 26th November following, transmitting the articles of constitution, with certain amendments, to the Presbytery, and recommending a particular part of the town of Stewarton as a suitable parochial district to the new church, in the event of no landward part of the parish being assigned in connexion with it. They referred at the same time to the determination of the Presbytery, whether, in the face of opposition which had been offered on the part of the minister of the parish, it was legal to proceed also with the allocation of a landward part. The Presbytery sanctioned the articles of constitution as amended, declaring them to be the constitution of the new church, and appointed a committee to consider the laws of the Assembly as to the allocating of a landward district, in the face of opposition from the minister of the parish.

No intimation had been made to the heritors of the parish, of those proceedings; but William Cuninghame of Lainshaw, the patron, together with other parties, parishioners and proprietors of about three-fourths of the lands in the parish, having become acquainted therewith, resolved to intimate to the Presbytery, under the form of instrument, that they opposed any division of the parish being made, and protested against the powers of the Presbytery to allocate a parochial district to Mr Clelland, and to admit him to a seat and vote in the Presbytery. The minutes of the meeting of Presbytery, on 7th January 1840, accordingly bear that "James A. Snodgrass, Esq., writer in Stewarton, appeared at the bar on behalf of William Cuninghame, Esq. of Lainshaw, and others, heritors in said parish of Stewarton, and intimated the determination of said heritors to take all legal measures to interdict the Presbytery in the dividing of said parish. Whereupon it was moved and seconded, 'That as this is a novel and difficult case, and as in certain other cases of difficulty, the Assembly has ordered presbyteries to refer them *simpliciter* to the Assembly, notwithstanding existing laws of the Church, the Presbytery do act in the spirit of said requirement, and refer the above case *simpliciter* to the Assembly for advice and direction.' It was also moved and seconded, 'That the Presbytery proceed to allocate a district to the new church at Stewarton, any opposition for the heritors notwithstanding.' It was agreed that the state of the vote should be 'refer' or 'proceed,' and the roll being called, and votes marked, it carried by a majority of nine to eight, 'refer.' Wherefore the Presbytery did, and hereby do, refer the same to the Assembly accordingly. The moderator having received permission to leave the chair, dissented from the above finding, appealed to the Synod of Glasgow and Ayr, took instruments and craved extracts."

The moderator of this meeting, who thus dissented and appealed, was Mr Clelland.

On 28th March following, Mr Cuninghame and the other heritors and parishioners who concurred with him, presented a note of suspension and interdict, praying the Court of Session to interdict Mr Clelland "from sitting, acting, and voting as a member of the Presbytery of Irvine, in all causes, matters, or proceedings, in any way originating in or connected with the parish of Stewarton, and specially in any applications, references, or appeals made by or from the minister or kirk-session of the parish of Stewarton, and in all parochial and ecclesiastical matters having reference to, or connexion with, the parish of Stewarton;" and also to interdict the Presbytery of Irvine "from proceeding in any way or manner, by perambulation of the parish of Stewarton, or otherways, in dividing the said parish, and designing and erecting a new parish therein, and placing the same under the pastoral superintendence of Mr Clelland, or of any other person, and from constituting a new and separate

kirk-session, having jurisdiction and discipline over the proposed new parish, and from connecting the said new parish with the church and congregation of Mr Clelland, and generally from innovating upon the present parochial state of the parish of Stewarton as regards pastoral superintendence, its kirk-session, and jurisdiction and discipline belonging thereto; and further, to interdict, prohibit, and discharge all members, or pretended members, whether ministers or elders, or corresponding ministers or elders of the Reverend the Synod of Glasgow and Ayr assembled at the meeting proposed to be held of the said Synod, at Glasgow, on the 14th day of April next, or at any subsequent meeting, from proceeding to divide the said parish of Stewarton, and to design and erect a new parish within it, under the pastoral superintendence of Mr James Clelland, or of any other person, and from appointing a new and separate kirk-session within the said proposed new parish, and to connect the said new parish with the church of Mr Clelland, and generally from innovating upon the present parochial state of the parish of Stewarton, as regards pastoral superintendence, kirk-session, and jurisdiction and discipline belonging thereto."

Interim interdict was granted by Lord Gillies: and, on 15th June following, Lord Ivory, "in respect that the note had been duly intimated, and no answers lodged, passed the note, and granted the interdict as craved."

The minutes of the meeting of Presbytery, on 5th May 1840, bear "that there was produced an extract from the minutes of the Synod of Glasgow and Ayr, in the dissent and complaint of Mr Clelland, (7th January last,) sustaining said dissent, and remitting to the Presbytery to proceed to allocate a territorial district to the new church at Stewarton, according to the Acts of Assembly 1798 and 1839. Upon said extract being read, it was moved and seconded, that the heritors of Stewarton, and all having interest therein, be summoned in terms of the Act 1798, to appear at next ordinary meeting. It was also moved and seconded, that the Presbytery do not proceed in this matter; and the roll being called and the votes marked, it carried first motion. Whereupon the Presbytery did, and hereby do, resolve in terms thereof, and agree to proceed accordingly." From this resolution, a complaint was taken to the Assembly by one of the members; and it having been remitted to the Commission, that body, on 14th August 1840, pronounced the following deliverance;—"The Commission dismiss the complaint, and approve of the conduct of the Presbytery, and remit to them to proceed according to the laws of the Church, instructing them at the same time to insert express words in the deliverance, by which they allocate a territorial district to the Church in question, limiting the effect of the same to matters of spiritual jurisdiction and discipline, which alone are implied in, or would be affected by such allocation under the existing laws of the Church; and also to insert the reservation, likewise implied, to heritors and their tenants in the part of the parish which may be set apart for the new church, having legal right to the sittings in the original church, to continue, in their option, members of the congregation thereof."

The minutes of the meeting on 1st September following, bear, "that Mr James Browning, messenger-at-arms, compeared, and served upon the Presbytery copy-note of suspension and interdict, and interlocutors of interdict at the instance of William Cuninghame, Esq., of Lainshaw, and others, heritors of Stewarton; which papers being read, the Presbytery agreed to defer the consideration of the same till their meeting in November; and, in the mean time, appoint the following committee to confer with the heritors of Stewarton, in order to bring about an amicable adjustment of this matter," &c.

The committee reported to the meeting of 24th November following, that the heritors refused to hold any conference. The minutes of this meeting bear that, "after some discussion, it was moved and seconded, 'That the Presbytery meet at Stewarton on the 10th day of December next, to proceed to the allocation of a parochial district *quoad spiritualia* to the new church

there, agreeably to the remit of the Commission of the Assembly, the heritors, together with the minister and kirk-session, to be summoned in terms of the Act of Assembly.' It was also moved and seconded, 'That whereas the interdict anent the division of the parish of Stewarton has again been served on the presbytery, and whereas the deliverance of the Commission is far from being definite, and in one of its bearings is such as to leave the Presbytery in doubt as to the import of the finding, the Presbytery decline to proceed with the division of the parish of Stewarton, and refer the matter *hoc statu* to the General Assembly, for explanation and advice.' It was agreed that the state of the vote should be first or second motion, and the roll being called and votes marked, it carried first motion. Wherefore the Presbytery did, and hereby do resolve, in terms of the first motion accordingly." Certain members dissented from this resolution, and lodged reasons of dissent.

The Presbytery met accordingly at Stewarton on 10th December. The minutes of the meeting bear:—" The minute appointing this meeting was read. Citation to the kirk-session and heritors of Stewarton was returned duly served. Parties were called: Mr Steven compeared for the kirk-session, and James Anderson Snodgrass, Esq., writer, as agent for the heritors; Mr James Browning, messenger-at-arms, also appeared, and served of new the note of suspension and interdict. There was also served on the Presbytery a notarial protest by Mr Snodgrass, on part of said heritors. Mr Steven was heard. Parties were removed. It was then moved, 'That in obedience to the superior judicatories of the Church, to whom the Presbytery consider themselves bound to yield obedience in all spiritual matters, and also with the view of promoting, by increasing the amount of pastoral superintendence, the spiritual interests and eternal welfare of the large population of Stewarton, the Presbytery appoint the minister and kirk-session of the new church, Stewarton, to take care of the souls, and to exercise spiritual jurisdiction and discipline over the persons inhabiting the district comprehended within the following boundaries—namely, Stewarton water, from Kirkford bridge to the foot of Clarkland burn, thence up the Clarkland burn to the point where it is crossed by Crosshill road, thence along the road leading into the Dunlop and Stewarton road near Cockletie, thence along the Dunlop and Stewarton road, to the cross of Stewarton, and thence to the Kirkford bridge. That as the Presbytery cannot understand the interdict now served upon them to be intended to prevent them from doing any purely spiritual act, or to encroach at all on the spiritual discipline and government of the Church of Scotland, as by law established, and secured by the Treaty of Union, but to refer entirely to the civil rights of the parties applying for the same; they declare and provide, as it is hereby expressly declared and provided, that no civil right of these parties, or of any others whatever, shall be in any degree affected by the foresaid allocation; and they further declare, that the effect of this allocation is limited exclusively to matters of spiritual discipline and government; as also, that heritors and their tenants in that part of the parish of Stewarton, thus set apart as a territorial district to the new church, having legal rights to sittings in the original church, may, in their option, continue members of the congregation thereof." This motion was seconded and agreed to, one of the members dissenting from the whole proceedings.

These proceedings of the Presbytery became the subject of a petition and complaint against the majority which concurred in them, for breach of interdict, at the instance of the suspenders. Judgment therein was sisted, till the issue of the process of suspension.

On 12th December 1840, appearance was made in the suspension for the Presbytery by the procurator for the Church, and answers were thereafter given in. In March following, counsel appeared at the bar in name of the Presbytery, and produced an extract of the minute of their last meeting, (on 24th February 1841,) which bore that it was "moved and carried by a majority—'That the procurator and agent of the Church be authorized by the

Presbytery to act for them, in the action now pending between them and the heritors of Stewarton, anent the division of said parish;" and craved leave to sist the Presbytery and the whole clerical members thereof by name, as also certain individuals, elders of the Presbytery. The Lord Ordinary allowed the minute to be received as a minute on behalf of the Presbytery, and of the alleged majority of that body. But in so far as the names of the minority were used, appointed intimation to be made to them. The result was, that the minority appeared by other counsel, and, by minute, disclaimed the appearance which had been made for them, recorded their disapproval of the conduct of the majority of the Presbytery, declined to resist the process of suspension and interdict, at the instance of the heritors of Stewarton, and begged to withdraw their names as respondents accordingly. The minute of disclamation bore, "That the minuters, being eleven in number, are a majority of the clerical members of the said Presbytery, and the resolution of 24th February was carried only by means of the votes of five persons, who are not legally members of Presbytery; that of these five, two are ministers of what are called parishes *quoad sacra*, within the bounds of Presbytery, and three of them are elders of such parishes."

Mr Clelland having demitted his charge and gone to England, a meeting of the Presbytery was held, when a call was moderated in, in favour of the Rev. James Latta, preacher of the gospel, as his successor.

In consequence of the proposed induction of another minister into the new church, and to the pastoral superintendence of the annexed territorial district, the suspenders applied for a special interdict against this proceeding, pending the discussion between the respondents and them.

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

A portion of Mr Clelland's original congregation, who opposed the resolution of the majority to connect themselves with the Establishment, some time afterwards raised an action of declarator, to vindicate their right of property in the church or meeting-house, and preserve it for the use of those of the congregation continuing to adhere to the Associate Synod, in which action they were successful, the majority having made no appearance. The consequence was, that the meeting-house was found to belong to them, and to be under their exclusive control.

The General Assembly of 1841 appointed a Special Commission, with particular reference to this case of Stewarton, to whom the Presbytery was instructed to apply for direction and advice.

Mr Latta, in whose favour a call was moderated in, having died before induction, it was moved and agreed to at the meeting of Presbytery on 29th June 1841, "That the Presbytery meet at Stewarton on the first Wednesday of August next, for the purpose of moderating in a call to a minister to the

new church, provided that their taking such a step be sanctioned by the Special Commission, to whom the Presbytery are instructed to apply for direction and advice."

The matter was accordingly referred to the Special Commission, and no further proceedings appeared to have taken place.

A record was made up in the process of suspension and interdict, and the Lord Ordinary ordered Cases.

The suspenders pleaded ;—

1. The Act of the General Assembly 1839, under the pretended authority of which and of the previous Acts 1833, and 1834, and 1837, the respondent, Mr Clelland, had been admitted a member of the Presbytery of Irvine, and proceedings taken to divide the parish of Stewarton *quoad sacra*, and annex a parochial district to Mr Clelland's church, with a separate kirk-session, was *ultra vires* of the General Assembly, illegal and inept. It was unconstitutional and illegal in the General Assembly, or in any of the presbyteries of the Church, on the pretext of erecting new parishes *quoad sacra*, to alter the constitution and increase the number of members of a presbytery, which was a recognized court, possessed of certain jurisdictions, both civil and ecclesiastical, affecting the civil rights of heritors and parishioners within the bounds of the Presbytery, and their status and rights as members of the Established Church. Even supposing the Church courts to possess power to form a district ecclesiastical, in connexion with a place of worship, they were not entitled to do it without the consent of the heritors within the same.

Mr Clelland had never taken the oaths to Government, and, by express statute, no person could be admitted or continued a minister within the Church, unless he first took the oath of allegiance and subscribed the assurance.[1] Further, Mr Clelland had been added to the roll of the Presbytery without presentation, without trial, without a parish, and without a permanent endowment, while, from its commencement, the Established Church of Scotland had been an endowed, territorial, parochial establishment, and patronage was the existing law of the Church.[2]

The division of a parish, and the establishment and erection of a new parish, to the effect of constituting the minister and an elder thereof, members of Presbytery, and instituting a separate kirk-session exercising parochial jurisdiction, was competent only by Act of Parliament, or by decree of the Commissioners of Teinds, under the provisions of the Act 1706, cap. 9.[3] The power of making new parishes was not given to the Church by any act of the legislature ; on the contrary, the want of such power was completely established by the fact, that it was given to the Commissioners of Teinds only.

In the various statutes down to 1592, the definition of the Kirk as consisting of the ministers of the blessed Evangel, could only be read as including parish ministers, because the Church contained no extra-parochial ministers.[4] The whole phraseology of the Act 1592, c. 117, connected ecclesiastical functions within the Church, with the possession of a benefice following on the presentation of a patron. The language of the Acts 1581, c. 99—1581, c. 100—and 1584, c. 132, demonstrated the identity of the use of the word Kirk with parish ; and that, by the word Ministers, was meant those possessing benefices, and officiating in parish kirks.[5] In the ratification by the Act 1592 of the

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[1] 1693, c. 23. [2] Cullen, Nov. 1840, (ante, vol. III., p. 70.)

[3] Calderwood's History, p. 837 ; Connell, p. 11, and App. 6, 7, and 8 ; 1609, c. 25 and 26 ; 1617, c. 3 ; 1641, c. 56 ; 1690, c. 23 and 30 ; 1693, c. 23. The case of Garrill, mentioned in Connell on Tithes, App. No. 61.

[4] 1567, c. 6 ; 1579, c. 69 ; 1592, c. 116 ; Knox's History, ed. 1790, p. 229 ; Buik of Universal Kirk.

[5] Calderwood, p. 320, as quoted by Connell ; Second Book of Discipline, c. 7, § 10.

assemblies, synods, and presbyteries of the Kirk, the qualification of membership in the ministers was directly founded on their connexion with some particular kirk. The Church might have the power to transfer parishes from one presbytery to another, but it could not increase the number of parishes; and none but parish ministers could form part of the constituent body of the presbytery.[1]

The first attempt to introduce ministers not properly parochial into the Church, was the Act of Assembly in 1833, erecting into separate parishes, *quoad sacra*, the districts provided with places of worship and ministers, in terms of the Acts 4 Geo. IV. c. 79, and 5 Geo. IV. c. 90, and authorizing the ministers thereof to enjoy the whole powers and privileges competent to parish ministers. This Act of Assembly was illegal, and contrary to the provisions of the Acts of Parliament it pretended to carry into effect.[2]

The Assembly's Act of 1834, admitting ministers of chapels of ease to be constituent members of the Church courts, was also beyond the power of the Church. The overture of 1837, (for it never passed into an Act,) anent the admission of the ministers of new or extension-churches to the privileges of parish ministers, was likewise *ultra vires* of the Church.

If the respondents founded on the practice of the Church, it was incumbent on them to prove a distinct universal practice. The cases they had referred to did not do so. The cases of collegiate ministers in royal burghs referred to were not in point. There was no opposition in any of them, and their endowments were permanently secured.

In so far as the Act 4th and 5th Will. IV. was assumed, (but not admitted) to imply or recognize an authority in the Church courts to erect parishes *quoad spiritualia*, it did not authorize and validate the proceedings complained of, in respect that it had reference only to churches, chapels, or places of worship which were endowed; and, moreover, it contained an express reservation in favour of the provisions of the existing law, and the powers of the Teind Court.

On the question of *jurisdiction* the suspenders pleaded, that, assuming the proceedings complained of to be beyond the powers of the Church, and contrary to the law of the land, it necessarily followed that a civil wrong had been committed, for which redress might be sought in the supreme civil Court. A presbytery being an established court, and especially a court with civil as well as ecclesiastical jurisdiction, an objection to its constitution was competent in the Court of Session.[3] The respondents had an interest to prevent any illegal alteration in the constitution of the Church courts, to whose jurisdiction they were subject in many important civil matters, or any unauthorized division of the parish with which they were connected; and their right to prevent that illegality, by interdict, was not an ecclesiastical but a civil right. Any illegal alteration of the statutory constitution of the courts of the Established Church, and any new ecclesiastical arrangement of the parishes in the Church, if illegal and inconsistent with the statutes, might be prevented by the Supreme Civil Court. The Court of Session was the only Court which could afford the remedy sought. The form of suspension and interdict was not known in the Court of Commission of Teinds. That was a statutory court, with limited functions, and could not meet the evil complained of. And the Court of Session had power to redress civil injuries of every description which had not been taken from it by express statute.[4]

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[1] 1693, c. 22; Act of Assembly, 1694; do. 1753, c. 4; Morrins' Annals of the Assembly, vol. ii. p. 311; Records of Presbytery of Edinburgh, 21st and 28th Nov. 1821; Connell, p. 220.

[2] Gordon, 18th Feb. 1836, (14 S. 598;) Irvine, 24th May, 1838, (16 S. 1024;) Panmure, 30th May 1839.

[3] 1 Ersk. 5, § 24; 1 Ersk. 2, § 2; 2 Ersk. 10, § 56, 7, 8; Sir H. Moncreiff's work, p. 2.

[4] 1 Ersk. 3, § 23; Kames' Law Tracts, p. 231; 4 Bank. 22, § 24; Heritors of Corstorphine, March 10, 1812, (F. C.;) Lord Pitmilly's Opinion in the case of Findla-

The respondents pleaded :—

The Church of Scotland had, at all times, been in use to establish new charges and admit additional ministers to seats in her judicatories, without any sanction from the Court of Teinds, when no patrimonial burdens were to be created; and, in 1833, the General Assembly had, on the report of a committee, consisting of the leading clergymen on both sides of the Church, and several eminent Judges and lawyers, admitted the ministers of the parliamentary churches as members of Church courts, and assigned to them their several districts, as parishes *quoad spiritualia*. Following the same course, the General Assembly of 1834 declared the ministers of the existing chapels of ease, entitled to take their seats in the respective presbyteries within whose bounds they were settled, and made provision for obtaining constitutions from the General Assembly, allocating parochial districts *quoad spiritualia*, and providing them with kirk-sessions. This was directed to be done in each case, as it arose, by the presbytery of the bounds. The Act anent union with Seceders was sent through the presbyteries in terms of the Barrier Act of Assembly, and agreed to by them almost unanimously, and was finally passed by the Assembly 1839, there never having been a division in the Assembly upon the measure, in any of its stages. The proceedings complained of, would not in the slightest degree affect the patrimonial burdens or civil interests of the suspenders as heritors or parishioners;[1] while, on the other hand, the spiritual privileges claimable by them and their households and tenants, so far from being impaired, would be thereby increased in efficiency and extent.

The privilege of a seat and vote in the Church courts, was incident to the recognition of a congregation as a constituted congregation of the Established Church, and was not affected one way or other by the allocation or non-allocation of a special district to the minister and session. Not only at the date of the Act 1592, but for many years afterwards, a large proportion of the ministers of the Church had no civil connexion with a parish or benefice, and no legal provision whatever.[2] In 1617, for the first time, local stipends were authorized to be assigned to ministers; but till the establishment of the present system in 1633, the ministers generally continued without any provision secured by law.

The Church was vested by statute, with absolute and exclusive ecclesiastical jurisdiction.[3] The Act 1592, c. 116, was to be read as authorizing not only the General Assemblies, Presbyteries, and Kirk-Sessions, "appointed by the kirk," then in existence, but also those, at any future time existing, which should have the character of being "appointed by the said kirk." Such had been the construction invariably put on this part of the statute, the number of presbyteries at the present day being twenty-nine more than existed at the date of the Act 1592, all erected by the authority of the Church alone; and always dealt with by the civil Courts exactly as those which previously existed.

Synods, in the same way, had been at different times erected, suppressed, or modified, by the exclusive authority of the Church.

By the Revolution settlement the Act 1592 was revived, and the Presbyterian Church was restored to the foundation it then occupied, without change.[4] The power of admitting to a share in Church government (independent of a right to stipend, or a civil connexion with a parish recognized by the municipal law[5]) was in the Church alone.

The two matters—on the one hand, the conferring spiritual authority and

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ter, (4 S. 514;) Robertson's Report of Auchterarder case, Vol. ii. pp. 4 and 232; Opinion of Lord Gillies in Strathbogie case, (2 D. B. M. pp. 591 and 592, and D. B. M. 292.)

[1] 1 Ersk. 5, § 23; Deliverance of Presbytery of Irvine, Dec. 10, 1840, (*supra*, p. 4)

[2] 2 Ersk. 10, § 17, 18; 1592, c. 123; Calderwood, p. 326; Booke of the Univer. Kirke, Ban. Ed. p. 74; ib. 82, 83; ib. 113; ib. 224, 225.

[3] 1567, Thomson's Acts, vol. iii. p. 27; 1579, c. 69; 1581, c. 99; 1592, c. 116; 1662, c. 1; 1690, c. 1.

[4] 1690, c. 5.

[5] 1690, c. 5; 1693, c. 22; 1695, c. 27.

regulating pastoral superintendence, and on the other hand, the making provision for the support of a minister and upholding a place of worship—were totally distinct in their natures. The one was a matter of purely spiritual, and the other of purely secular concern and jurisdiction. No mere Church courts, as such, could ever impose any burden for the latter purpose, nor did the Church of Scotland at any time pretend to such power; and no secular court could create, or transfer, the power of discipline and pastoral superintendence. The statutes regarding the erection of parishes by the Teind Court, were limited to the properly secular and civil matter of making provision for the personal sustenance of ministers, and upholding places of worship; and, with that view, uniting or disjoining certain territorial limits into districts, which were subjected to certain burdens in regard to stipends, the erection and repair of churches, manses, &c. These districts, the erection of which was attended with such civil consequences, were alone properly and technically denominated "parishes;" and although the divisions for purely spiritual purposes, did, in common parlance, and for the sake of convenience, receive the same name, they were not parishes in strict legal and technical language.[1] Equally after, as before, the issuing of the teind Commissions, the Church was in use to establish additional ministers, with sessions, and seats in Church courts, and to assign limits for their ministrations; and their proceedings in this respect had been recognized and sanctioned by the civil Courts, and the enactments of the legislature.[2]

The legal efficacy of the Act of Assembly in 1833, admitting parliamentary ministers to Church courts, was recognized by the statute 1 & 2 Vict., c. 87. This necessarily involved the recognition of the General Assembly as the competent judicatory to do the same thing in regard to the ministers of chapels of ease. The Act of Assembly in 1834, anent chapels of ease, was recognized, and *verbatim* recited in the statute 1 & 2 Vict. c. 22.

The respondents also contended that the special interdict, granted by the Lord Ordinary, went beyond the prayer of the note of suspension.

On the question of *jurisdiction*, they pleaded, that the matters in regard to which the interdict was sought, were of proper ecclesiastical cognizance, within that province, which, by statute, had been conferred exclusively on the Church, or recognized as inherent in it alone.[3] The Court of Session, though equally supreme in its own province, was equally limited thereto; and its province was certainly limited to matters *civil*, though it did not extend universally even to them, and was excluded, for instance, from the cognizance of fiscal questions. It was *ultra vires* of the civil court to pronounce any order, ordaining an ecclesiastical judicatory, such as the presbytery of Irvine, to disobey the superior Church judicatories to which alone, by the law and constitution of the country, the Presbytery was subordinate. And even on the assumption of an excess of power, on the part of the presbytery and its superior church judicatories, in the matter in question, the Court of Session had no right to interfere, because it was radically devoid of jurisdiction in the matter, unless in so far as any encroachment had been made on its own province.[4] But any allegation

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[1] 1, Ersk. 5, § 21.

[2] 1592, c. 21; Thomson's Ed.; Connell's Appendix, No. 1.; 1594, c. 43: 1592, c. 20; Thomson's Ed.; Book of the Kirk, p. 383; Pet. Ed., do., p. 478; 1606, c. 27; Book of the Kirk, p. 528; Pet. Ed.; 1606, c. 30; Thomson's Ed.; 1606, c. 29, do.; Calderwood, p. 312; Dundee v. Lauderdale, M. 9904; Town of Haddington, M. 9901; 2, Stair 8, § 27; Adamson, Feb. 14, 1826; F. C., Magistrates of Stirling, v. Gordon, 24th Feb. 1837, (15 S., 657); Connell, p. 121; Opinion of Lord President in case of Gordon, Feb. 18, 1836, (14, S. 509); Opinions of Lords Moncreiff and Jeffrey in case of Irvine, May 24, 1838, (16 S. 1024, &c.); Opinion of Lord Justice-Clerk in case of Gardner, 5th Dec. 1838, (1 D. B. M. 158.)

[3] 1592, c. 116; 1690, c. 1; 1690, c. 5.

[4] 1537, c. 36; 1 Ersk. 2, § 7–8.

of encroachment which could be made, referred, not to the province of the Court of Session, but that of the Commission of Teinds. That Court, however, (subject to appeal to the House of Lords) was supreme in its own province, and to it exclusively belonged the vindication of its own authority.[1]

The great judicial and legislative institutions of the country were certainly protected and regulated by law, and every subject had a right in the maintenance of these. This right, however, was not a civil right in the sense which would make it the subject of adjudication in the Court of Session. It was a constitutional right, to be vindicated by the means provided by the constitution, and not by a suit in the Court of Session, unless that tribunal should have been specially empowered to act in the matter. But assuming it were otherwise, the existence of a civil right to have certain spiritual privileges protected, would not render civil those privileges which were, in their own nature, spiritual. These would remain spiritual as before. The proceedings sought here to be interfered with, related entirely to pastoral superintendence and discipline; and these could never be other than spiritual. Nor could any civil consequences ever follow from the spiritual acts of a Church court, but by allowance of the municipal law, as administered by the civil courts.

Even if civil consequences were, by the municipal law, adjected to the acts sought here to be interdicted, (which, however, was not the case, and had been specially guarded against in the deliverances of the Presbytery,) this could not convert a matter, in its own nature ecclesiastical and spiritual, into a matter civil. The matter must ever retain its own real character, whatever consequences the state might attach to the Church's acts regarding it.

The civil Courts had always the determination of the question, whether the act of the Church, in the matter spiritual, was that act to which a civil consequence was intended by the state to be attached; and they could give or withhold the civil consequence accordingly. They could never, however, interfere with the spiritual matters themselves, because that would be exercising a jurisdiction which the constitution of Scotland altogether disclaims, as not being vested even in the Sovereign, the only source of judicial power.[2]

The Lord Ordinary (Cuninghame) pronounced the following interlocutor:—"Having considered the revised cases and whole process, in respect that the parties have presented a joint note to the Lord Ordinary, requesting that the case, from its great public importance, may be immediately reported to the Court—so as to enable their Lordships to advise the cause, if consistent with the other business of the Court, during the present Session—makes great avizandum with the process, and appoints printed copies of the revised cases and record to be boxed *quamprimum*, that they may be reported to the first division of the Court."*

The Court directed the opinions of the other Judges to be taken; and one counsel on each side was heard in presence of the whole Court.

Thereafter, the following Opinions were returned:—

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[1] Gavrill, Jan. 22, 1662, Reported by Connell; M'Caul, 17th Feb. 1838; 16, S. 607.

[2] For an incidental proceeding, relative to the terms in which the respondents had objected to the jurisdiction of the Court of Session, see Appendix.

* "NOTE.—The Lord Ordinary has perused the revised cases, and considered the authorities referred to, and has come to the conclusion that the plea of the suspenders is well founded on the merits; and that this Court has jurisdiction to afford them redress in the form which they now ask. It was the Lord Ordinary's intention to have explained fully the grounds of his opinion in a note, which he had made some progress in preparing; but as he cannot fix a precise day for its completion, from a temporary indisposition under which he labours from an accident, and as the parties have united in a request that he should immediately report the case, he does not consider himself at liberty to delay the case one day in its progress to the Court."

Lord Medwyn—The question involved in the present case is this,—Whether the Established Church of Scotland has power, of its own authority alone, to erect parishes *quoad sacra*, to plant ministers in the churches belonging to these, with elders, forming a kirk-session having the power of discipline over the parish, and to admit them as members of the Inferior Church courts; and finally, with the right of being nominated to the General Assembly, increasing also the numbers to be sent from each Presbytery to that Court, in respect of this addition to the ordinary parochial clergy. This is a great constitutional question, and no one feels more deeply than I do the great importance of the discussion, and the powerful interests involved in it. I have bestowed much study, and most anxious thought on the consideration of this question, and I have earnestly sought for light from every source, that I may be directed in this important controversy "to judge righteous judgment."

Two questions arise:—1. Have the Church courts power to erect these parishes, and plant ministers, with privileges in all respects equal to those of the parochial clergy, except that they have no right *ex lege* to stipends, manses, and glebes? 2. Has this Court jurisdiction in this matter, so as to entitle us to entertain the suspension and interdict which is now before us?

Although a question of jurisdiction should generally be disposed of in the first place, yet here it is so obviously involved in the merits of the question, that I shall proceed to consider the right or power of the Church, in its legislative capacity, to have passed the two acts of Assembly in 1834 and 1839, under which the respondents assert that they were entitled to erect a new parish, and plant another minister, with a kirk-session, in the parish of Stewarton, and make him a constituent member of the Church Courts.

In support of my opinion in this case, I propose to show:—

1. That when the Reformed Church was adopted by the State, and established as the only form of religion in Scotland, its constitution and polity were not then fixed, but these were afterwards given to it jointly and in concurrence with the governors of the State, and as specially agreed to and sanctioned by them.

2. That when the Presbyterian form of Church Government was sanctioned and agreed to by the State, the only clerical members of its Courts, so recognized, were parochial ministers, with the addition of the Professors of Divinity in our Universities.

3. That at no period in the history of the Reformed Church in this country, did parishes *quoad sacra* exist, prior to the recent Act of the General Assembly; and of course no ministers of such churches were members of the Church courts recognized by the State.

4. That the Church did not claim the right of erecting new parishes, but, on the contrary, disclaimed it, declaring that it was the privilege of Parliament alone to do so; by whom accordingly, or by Commissions appointed by Parliament, new parishes have been erected, and the Ministers of such, added as members of the Church courts.

5. That the erection of a new parish *quoad sacra*, being an innovation unauthorized by any precedent, is a mere evasion of the law, which, with the full sanction of the Church, secured to Parliament the power of erecting new parishes; so that the ministers of such parishes cannot be admitted as members of the Church courts, without the consent and sanction of the State, concurring in this alteration of the constitution of the Church Courts as arranged in 1592.

6. That the erection of these new parishes, being an encroachment on the prerogative of the State, the act is in itself unconstitutional and illegal; and the Supreme Court of the State must have jurisdiction to declare it to be so, as the judicatory whose province it is to prevent any encroachment, by one body of men in the community, on the rights and privileges of another.

I admit as fully as any person can do, the independence of the Church in the exercise of its spiritual functions, when rightly and duly administered. It is not on that ground that I shall differ with the most zealous advocate of the powers of the Church. It is only as to the extent to which this independence is claimed, and the acts supposed to be the due exercise of these functions, as well as the exclusive right of the Church courts to declare what is within their jurisdiction, that there can be any difference between us. By an authority, which all are bound to recognize, the authority of the State speaking through its Parliament, the Reformed Church in this country, before it adopted its Presbyterian form, and now, since it has done so, has repeatedly been declared to be "the true and halie kirk." As such it must be recognized, by every one administrating the law of Scotland, as possessing all the privileges conferred upon it by its divine Founder and Head, as a branch of the Holy Church Universal; i tmust

also be allowed all those branches or matters of jurisdiction conferred upon it by the State, which are ecclesiastical merely, but not properly spiritual. Spiritual functions, an act of the State may recognize, ratify, and enforce, but does not confer; the others may be given or withheld, according as the Church and the State may agree together; and certainly with regard to some of these latter, it will not be questioned by any one, that in exercising the jurisdiction thus conferred upon the Church, her Courts are subject to the review and control of the Courts of the State. It can be only as to those approaching nearest to the spiritual functions, and in which there is involved an exercise of these functions, that there ever has been any conflict of jurisdictions. Properly speaking there is no conflict, but there may be interference, if either passes the limits of its own province: and the experience of history shows that this has most generally been the effect of ecclesiastical domination, founded, as alleged, on the spiritual power of the Church, and the effect of its establishment by the State, which gives the Church support and endowment, and its ministers power and privileges and *status* in the community. With the due and rightful exercise of the spiritual functions of the Church, I hold that no Civil court can interfere: to this extent the Church is independent. I will explain, though briefly, the grounds on which I think this rests, in the case of the Established Church of Scotland.

In August 1560, the Convention of Estates ratified the Confession of Faith drawn up by the Reformed preachers, agreed to adopt them as the only preachers of the Gospel, abolished the jurisdiction and authority of the Bishop of Rome, annulled all acts of Parliament not agreeing with God's Word, and contrary to the Confession of Faith, and prohibited hearing mass or administration of the sacraments "by any of the usurpit ministerie of the papistical kirk." Thus sanctioned, what has been called the first meeting of General Assembly of the Church, took place in December 1560, consisting of 42 members, six of these being ministers. Eight ministers were appointed to particular towns, and five superintendents were selected. Queen Mary returned to Scotland in August 1561; but no Parliament was held till 1563; and although no ratification of the change of religion was then obtained, yet while the Popish Church was everywhere suppressed, the Reformed Church openly exercised its functions, and proceeded on its full recognition by the State. Commissions were granted by the Secret Council for the election and admission of superintendents; an arrangement was made with the possessors of the ecclesiastical benefices,[1] by which they were to give up one third, out of which the Reformed ministers might be supported; a proclamation was issued by the Queen, 31st May 1562, against "any alteration or innovation of the stait of religioun, or to attempt ony thing against the forme quhilk her Majestie fand publiclie and universallie standing at hir arryvall in this realme, under the pane of deid." In the Parliament 1563,[2] an act was passed as to manses and glebes in favour of the reformed clergy;[3] and in the next Parliament, April 1567, an act in favour of the true religion is passed.[4] Under the new reign, and upon the appointment of Murray to the regency in 1567, these acts in favour of the Church are ratified and renewed by Parliament, and the Reformed Church is fully recognized as the Established Church of Scotland,[5] declaring "the ministers of the blessed Evangel of Jesus Christ * * * now * * * amangst us, * * *, and the people of this realme that professes Christ, as he is now offered in his Evangel, and do communicate with the haly sacraments according to the Confession of Faith, to be the onlie true and halie kirk of Jesus Christ within this realm."

In order to prepare for this recognition, and the other important matters that were to come before this Parliament, it appears that an act of the Secret Council, 2d December 1567, was passed, enabling certain barons and commissioners of burghs to meet with Spottiswood, Knox, Craig, Row, and Lindsay, to concert the matters to be proposed concerning the estate of the Kirk.[6] The fruits of their conference are presented to the Council, (see Acts v. iii. p. 36,) and are the groundwork of the above act, and of other acts of that Parliament. One of these is entitled, "Anent the jurisdiction of the Kirk;" and it bears "Anent the article proponit and given in by the Kirk to my Lord Regent and the thre estatis of the present Parliament, anent the jurisdictioun justlie appertaining to the trew kirk and immaculate spous of Jesus Christ. . . . The King's grace, with avise of my Lord Regent and the thre estatis of this present Parliement, hes declarit and granted jurisdictioun to the said kirk; quhilk consists and stands in preacheing of the trew word of Jesus Christ, correctioun of maneris, and administratioun of

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[1] Acts of Parliament, 22d December 1561, v. ii. p. 606. [2] Keith, p. 510. [3] Acts of Parliament, v. ii. p. 539. [4] Ibid. p. 548. [5] Ibid. 1567. c. 6. [6] Acts, v. iii. p. 33.

haly sacramentis. And declaris that thair is na uther face of religioun than is presently be the favour of God establisheit within this realme. And that thair be na uther jurisdictioun ecclesiasticall acknowledgeit within this realme, uther than that quhilk is or sal be within the same Kirk, or that quhilk flows thairfra *concerning the premissis.*" And it concludes with a commission to certain lords and ministers "to seirche furth mair specialle, and to consider *quhat uther special points or clauses* sould appertaine to the jurisdictioun, privilege, and authoritie of the said Kirk, And to declair thair myndis thairanentis to my Lord Regent and thre estatis of this realme at the next Parliament, sua that they may tak order thairintill, and authoreis the samen be act of Parliament, as sal be fund aggreabill to the word of God."[1]

This important enactment, however, gives no countenance to the notion that it recognises a general ecclesiastical jurisdiction in the Church; on the contrary, the jurisdiction it alludes to is special; it only acknowledges the jurisdiction of the Reformed Church in preaching of the word, correction of manners, and administration of the sacraments, and declares that no other face (form) of religion is to be tolerated in this country; and the object of the commission is to inquire what other points should appertain to the jurisdiction of the Church, that they may be granted and authorized by act of Parliament. The ministers of the Reformed Church, then, alone are to preach the word, administer the sacraments, and to exercise church discipline.

The best interpreter of an ancient statute is the knowledge of the reasons which called for its enactment, the evil to be remedied by it, or the privilege to be conferred. The Reformed Church had a severe contest with the ancient church; it was not easy to root out all regard and attachment to it; and fears were long entertained by the Reformers that it might revive through favour of the Queen. The countenance which it was suspected the Queen was inclined to give it, naturally awakened the jealousy of the Church.[2] Hence petitions were often preferred, even to a much later period, to have Popery utterly put down. Very recently an ill-advised step had been taken to revive the Archbishop of St Andrews' consistorial jurisdiction, which called forth a remonstrance in very anxious terms from the General Assembly to the Lords of the Secret Council (25th December 1566.) They say the Queen is not well informed, and that she ought not to set up that Roman Antichryst again; 'scho may not bring us, the greatest part of the subjects of this realme, back again to bondage, till als lawfull and als frie ane Parliament as justly damned that Antichryst and his usurpit tyrannie, have given decisioun betwixt us and him." It was this which induced the Church to claim, and the State, in the following year, to enact, that no other jurisdiction ecclesiastical should be allowed, except that which was to be in the Reformed Church.[3] And it is quite a mistake to hold that it had any reference to the power of the civil magistrate *circa sacra*, which, whatever it may be, cannot be affected by this statute. It was simply to exclude any interference of the former church, whose ministers still retained their benefices, and, in many places, a hold over the affections of the people.

An act, in the same terms as above, is passed in 1579,[4] and a similar commission granted by it; and at the same time the act 1567, c. 6, is re-enacted. It was still a limited granted grant of jurisdiction, not universal in all matters ecclesiastical, and Calderwood[5] rightly describes this as ordaining "that there shall be no other jurisdiction ecclesiastical but that which is and shall be within the same Kirk, concerning preaching of the word, correction of manners, and administration of the sacraments;" and concludes, "so ye see what points they acknowledged clearly to appertain to the jurisdiction of the Kirk." And Sir George M'Kenzie,[6] having a view to the Episcopal Church which was then established, and attending only to the term *declared* in the statute, observes of this act—"which infers that ecclesiastics have no temporal jurisdiction save from the king; * * * but they are acknowledged to have had an ecclesiastic jurisdiction: for the act bears, *has declared*, and this ecclesiastic jurisdiction is declared to consist in preaching, correction of manners, and administration of the sacraments." M'Kenzie would, no doubt, have been much surprised if, under this act, the Church had claimed jurisdiction in the plantation of Kirks, and friend though he was to the then Established Church, would, as Lord Advocate, have taken abundant care to prevent any such interference with the prerogatives of Parliament. That in 1579 the same act is re-enacted as had passed in 1567, and with a commission to the same purpose, to ascertain what other points should appertain to the jurisdiction of the Church,

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[1] 1567, c. 12. [2] Acts, v. iii. p. 24. [3] Book of the Kirk, p. 88. [4] 1579, c. 6 and 7, vol. iii. p. 137. [5] History, p. 43. [6] Observ. p. 189; licenced in 1686, published in 1687.

shows that no further progress had been made in this matter, and no further jurisdiction given; and yet many statutes had, in the interim, been passed in regard to the Church.

Some jealousy having arisen among the leaders of the Church against the King, who was desirous to moderate the violent proceedings which they were pursuing against certain Popish Lords, the act 1581, c. 1,[1] was passed, which ratifies and approves "all acts of Parliament, statutes, and constitutions for maintenance of the libertie of the trew Kirk of God, and religioun now presently professed within this realm and puritie thereof;" and then it enumerates no less than 34 acts, "and declaris the saidis actis and every ane of them, and all utheris actis of Parliament, maid in favour of the trew religioun, sin the said reformation, to have effect in all poyntis after the forme and tenoure thairof." These, then, I hold to have recognized the proper spiritual functions of the Reformed Church.

One point of jurisdiction had been secured to the Church by one of these acts, (1567, c. 7,) that the examination and admission of ministers, be only in the power of the Kirk, now openlie and publiclie professed within this realm. Their Synodal and General Assemblies had been expressly sanctioned by the countenance of the civil magistrate, and it is well known that, in the then undefined state of their jurisdiction, they proceeded in their Church courts to dispose of many matters which could not warrantably fall under the cognizance of the Church. Many curious particulars of this might easily be adduced from the Book of the Universal Kirk. But although they thus acted, it is well known that the polity of the Church had not yet been settled, notwithstanding the numerous requests by the Church to the State that this should be done, and the numerous commissions for that purpose from each body, the State and the Church, appointed by act of Parliament on the one hand, and act of the General Assembly on the other. Their spiritual powers were secured to them by Parliament and exercised; stipends, scanty no doubt and ill paid, were provided; manses and glebes decerned for; and ministers, as far as qualified men could be found, were placed in the parish churches; but the policy and other points of jurisdiction were not yet agreed on. It was the opinion of our Reformers,[2] "that one policy and one order in ceremonies was not appointed for all ages, times, and places." In this they followed the teaching of Calvin, who says:—"Forasmuch as Christ hath fully comprised in his holy oracles the whole sum of true religion, and all the parts of divine worship, and whatever is necessary to salvation, in these things we are only to have one master. But in outward discipline and ceremonies, he would not so particularly prescribe what we should do, because he foresaw that would depend on the different condition of times; and he did not judge one form agreeable to all ages. Therefore, in this case, we must have recourse to the general rules he has left us, and thereby square those laws which are proper to be made for the preservation of order and decency in the Church,"—Calvin, as quoted in Plea for Presbytery by Ministers of the Synod of Ulster, p. 200.

According to these views, the external forms of Church Government, the internal policy of the Church, and the jurisdiction which its Courts are to have, in order to give visibility and efficiency to those spiritual functions, which have a divine origin, may be matter of arrangement with the State, which is to protect and endow it. The object of the Church, in such circumstances, must be to assume such a form, adopt such measures, and obtain such powers as may enable it best to discharge its great duty of instructing the ignorant, of repressing vice, promoting virtue, and directing the devotional exercises of the people, while it is the interest of the State to recognize, and sanction, and bestow whatever may best promote the alliance with the Church—that the people may be made useful citizens, obedient subjects, peaceful members of society, and above all, that to the poor, without money and without price, the Gospel may be preached. Hence it is the duty of the State to provide, as much as may be consistent with the divine origin of some of the functions of the Church, a control over it, to see that it fulfils the purposes for which it was established and endowed, and that, in the exercise of its powers, whether original or derived, it keeps within its own province and does not interfere or encroach on the province of the State, or the rights of the subjects of the State.

Our Reformers acted on this principle in the erection of their Church. Hence we find such notices as these in the Records of the Church;—"Commission given to travell with the Lords of the Secreit Counsel to know what causes come in judgment of the Kirk, and the order of execution."[3] "Articles pertaining to the jurisdiction of the Kirk, to be proponit to the Regent's Grace and Secreit Counsell,[4] and socht to be

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[1] Vol. iii. p 210. [2] Confession of Faith, Art. 21. [3] Book of the Kirk, p. 29. [4] Ibid. p. 187.

appointit be them" in 1570; and innumerable notices of commissions to meet with Commissioners appointed by Parliament or the Privy Council, to reason on the policy of the Church. I may refer, as an instance, to that in 1574, when the General Assembly presented certain articles, declared to "be very necessar and profitable for the advancement of the Kirk of God within this realme," with a supplication to the Regent, setting forth—"Most necessar it was thought of all, that your Grace's help and assistance should be sought and implored thereunto;" and in the very next year the Assembly 'nominateth any two of their brethren after-specified, whom it shall please my Lord Regent's Grace to accept, to concur and reason with my Lord Regent's Grace, his Commissioners, upon the jurisdiction and policy of the Kirk."[1] In like manner, in 1579, "the Kirk craves at his Majestie, That persons unspotted with such corruptions as are desyrit to be reformet, may be nominat be his Majestie to proceed in the farther conference of the said policie, and tyme and place to be appointit to that effect;"[2] and the Synodal Assembly of Lothian propose to the General Assembly in the same year, that "a general order be taken for erecting of Presbyteries in places quher publick exercise is used, unto the tyme *the policie of the Kirk be established be law.*" The answer is—"The exercise may be judgit a Presbyterie." We find also, in the proceedings of Parliament, the duty equally recognized of the State approving and sanctioning a proper constitution and policy for that Church which it had agreed to establish and endow. Accordingly, immediately upon asenting to the Confession of Faith, an appointment is made to draw up a form of government and policy for the new Church. The first Book of Discipline is then drawn up, but is not approved of by the Council then exercising the powers of government; and in 1563 a further revision of it was ordered by the Assembly by certain Commissioners, who were "to report the same to the nixt Assemblie General of the Kirk; or if ane Parliament happin to be in the meantyme, that they report the saids judgments to the Lords of the Articles that sall chance to be chosen before the said Parliament."[3] So clearly was the concurrence of the State required to sanction the wishes of the Church as to their policy. Hence we find Commissioners, both lay and clerical, appointed by Parliament 1574,[4] "to convene, confer, ressoun, and put in forme the ecclesiasticall policie and ordour of the governing of the Kirk," on this narrative—"How sen the alteratioun of religioun, albeit the libertie of the evangell has been enjoyit in unitie of doctrine, yet is thair not to this day ony perfyte policie *be lawes and constitutiones* set out how the Kirk in all degrees sall be governit in decent and cumly ordour." And by another act of the same Parliament it is declared that the thirds of benefices shall remain "in maner as they ar presentlie, quhill further ordour and resolutioun be taken thereanent, in the constitutioun and establissing of the ecclesiasticall policie *be the haill estatis in Parliament.*"[5]

Accordingly, when the Second Book of Discipline was drawn up, it was presented in 1578 for the approbation of the State; and the Parliament appointit a commission for examining it, by an act which states, "Forsamekill as ane buik of the policie of the Kirk being presentit be the ministers thairof to our soverane Lord and three estatis in Parliament, they most earnestlie desirit the samen, and haill constitutiounes and ordinances thairin containit, to be confirmit be act of Parliament, and have the strenth of ane law perpetuallie in tyme cumying."[6]

Among the articles proponed by the Kirk to the King and Council in 1580, is this one—"That the Booke of Policie may be establischit be ane act of Privie Counsell quhill ane Parliament be had, at quhilk it may be confirmed."[7]

Thus fully was it recognized at the first establishment of the Reformed Church in this country, that they could not stir a step in the establishment of its policy without the concurrence of the State.

Spottiswood[8] tells us, that, some delay occurring as to the ratification of their scheme of policy, "the ministers perceiving they would not speed this way, did in their next Assembly, resolve to put their conclusions in practice, without insisting any more for ratification thereof." But if they did so, and supposing this to be within their power, they did not venture to embody this resolution in words, nor make it an act of Assembly. For all that I find in the Records of the Church is this, while they are all the time earnestly seeking the approval of the State as essential to it:—

"28th April 1581, For sa mickle as travells hes ben taken in the forming of the policie of the Kirk, and diverse sutes made to the magistrat for approbation therof;

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[1] Book of the Kirk, p. 325. [2] Ibid. p. 438. [3] Ibid. p. 41. [4] Acts of Parl. vol. iii. p. 89. [5] Ibid. p. 90. [6] Ibid. p. 105. [7] Book of the Kirk, p. 462. [8] History, p. 302.

quhilk albeit as yet hes not taken the happie effect that good men wald crave; yet that the posteritie sould judge weill of the present age and of the Assemblie of the Kirk, the Assemblie has concludit that the Books of Policie agreeit to befor in diverse Assemblies, suld be registrat in the Acts of the Kirk, and to remain therin, *ad perpetuam rei memoriam*, and the copies thereof to be taken be every Presbytery."[1]

It was not for some years after this—not till 1590, and when most of the articles in it had been discussed with the Committees of Parliament, and latterly with the King himself, and when it was known what would probably come to be approved of, that the Church ventured to go further, and to require the Presbyteries to cause every person bearing the ministrie of office in the Kirk 'to subscrive the heids of Discipline of the Kirk of this realme, at lenth set down and allowit be the act of the haill Assemblie in the Book of Policie, quhilk is registrat in the Registrar of the Kirk, and namelie the contraverted heids be the enemies of the Discipline of the Reformed Kirk of this realme, betwixt and the next Synodall Assembly of the Provinces, under the paine of excommunicatioun to be execute agains the non subscryvours;" and the Moderator of each Presbytery is to receive a copy of the book subscribed by the Clerk of Assembly.[2]

It is a complaint in the next Assembly, that the greatest part of the Presbyteries had not attended to the execution of this act. It is accordingly renewed, and the Moderator of each Presbytery is to see to the execution of it, under a penalty for the use of the poor, "besyde the publick rebuik in the oppin Assemblie."[3]

After all, this had not been very strictly obeyed, nor the copies carefully preserved, for it was with much difficulty that the Assembly 1638 could find a subscribed copy. At last one was produced by the minister of Carnock, the son of the Reformer Row.[4]

The Book of the Universal Kirk, and the historians who write the history of these proceedings, Spottiswood and Calderwood, show how long and earnestly the discussions went on between the Commissioners of the Church and those of the State, before any settlement of the policy of the Church was come to. It would be curious and not unprofitable to trace the progress of the examination and correction of the Book of Policy; but this would detain us too long. Every article in it was separately considered, and the time and pains bestowed upon this important object, can only be duly appreciated by those who read the numerous entries in the Book of the Kirk about it, from 1578 to 1592. This Book of Discipline, then, was examined and discussed for years by Commissioners on both sides.

I hold it to be quite irrelevant in any discussion as to the powers which were conceded to the Church in matters of jurisdiction, to refer to the account given by Spottiswood of the private conferences as to approving or disapproving of the Second Book of Discipline, just as little as I do to the discussions in the Book of the Kirk. I refer to both of them to show the care with which the subject was considered, and the project of the Church reviewed; and whatever may have been the opinion expressed by the Commission of Parliament during the course of the discussion, I look to the act of Parliament alone which sanctioned the Presbyterian Church with its Courts, and their jurisdiction, for the powers which were granted or confirmed to these Courts. If I were to examine it with a view to ascertain what were the pretensions and claims of the Church, and comparing those with the Parliamentary sanction, or even with the unconfirmed and rejected views of one of the Commissions by the State for reviewing it, I could easily show how much was claimed which was not sanctioned; and then, probably, the notion which of late has been put forth with so much confidence of large inherent legislative powers in the Church would be somewhat moderated. But such a comparison would be out of place in the present question, for it is a remarkable fact, as I shall notice afterwards, that in neither of the Books of Discipline does the Church claim the right of erecting new parishes, not even of uniting small parishes.

Let us attend, then, to the result of all these claims and conferences regarding them, in the final agreement as arranged by the King himself in the well-known act 1592, c. 116, which ratifies all liberties, privileges, immunities, and freedoms already given to the Kirk, and all acts confirming the same, especially the act 1581. It also ratifies the General Assemblies of the said Kirk, "the Synodal and Provincial Assemblies, the Presbyteries and General Sessions appointed by the said Kirk, with the haill jurisdiction and discipline of the same Kirk *agreed upon be his Majesty in conference had be his Hieness with certaine of the ministers convened to that effect.*" The act thus men-

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[1] Book of the Kirk, p. 487. [2] Ibid. p. 773. [3] Ibid. p. 780. [4] Scott's Lives, p. 177.

tions the kirk-sessions as appointed by the Kirk, which they are: but their jurisdiction, as well as that of the Assemblies, and their discipline, are expressly declared to have been, not the act of the Church in virtue of any inherent power in it, but agreed upon, that is conceded, by the King on behalf of the State, admitting the jurisdiction and discipline as are then particularly set down by specifying the matters to be entreated of by each; not, it will be observed, giving jurisdiction *in every point set forth in their claim in the Book of Discipline, but only to a certain limited extent.* The act further repeals all acts against the liberty, jurisdiction, and discipline of the true Church, and further declares, that the act of 1584, c. 129, "sall na wayes be prejudiciall nor derogate ony thing to the privilege that God hes given to the spiritual office-bearers in the Kirk, concerning heads of religion, matters of heresie, excommunication, collation or deprivation of ministers, or ony sicklike essential censures speciallie grounded, and having warrand in the word of God." This is the great charter of the Presbyterian Church of Scotland, sanctioning its form of government, and the members of which its Courts are composed, securing to it its jurisdiction as agreed upon, pointing out at the same time the privilege which its office-bearers derived from a higher source than the State. This act is revived, renewed, and re-enacted in the whole heads thereof, except that part of it relating to patronages, by the act 1690, c. 5, which also ratifies the Westminster Confession of Faith as the confession of the Presbyterian Church again established, and is now the sanctioning statute of the established Church.

This settlement had occupied so long a time, and so many delays and difficulties occurred, that it seemed doubtful if the policy would ever be established; insomuch that Calderwood tells us they could scarcely believe their ears when they heard this act proclaimed, along with the other acts of that Parliament, at the cross of Edinburgh, at the breaking up of the Parliament, which was then the mode of intimating the passing of an act of Parliament. It is recorded in the Book of the Kirk as the great Charter of the Presbyterian Church.[1]

I have referred, perhaps, at more length than I should have done, to these early proceedings, which seem to be either unknown or overlooked now, in order to show why I think the Church, of its own authority, and without the concurrence of the other contracting party, can make no change upon the constituent members of its Courts, or their jurisdiction, as originally approved of and sanctioned at their own request. In short, it never entered into the imagination of our Reformers, that it was the province or within the power of the Church, to arrange the policy or jurisdiction of the Church without the concurrence and approbation of the State. And it was upon principle they so acted. They did not attempt to reform the existing church: they held it to be utterly corrupt, to have departed entirely from the faith, to be no longer the Church of Christ, nor its ministers true ministers: in the rude language of the day, the Popish Church was "the congregation of Satan, the antichrist of our time," in contradistinction to the Reformers, or "the congregation of Christ"—(Bond 1557 in Knox, v. i. p. 158;) and the Confession of Faith, in describing the notes of the true Kirk, after disclaiming either antiquity or lineal descent, speaks of "the true Kirk, the immaculate spouse of Christ," as distinguished "fra the horrible harlot, the Kirk malignant," (art. 19.) The General Assembly speak of the Romish Clergy as "the pestilent generation of the Roman antichrist"—(Book of Univ. Kirk, p. 9;) and Knox undertook to show that "in all the rabble of clergy, there is not one lawful minister"—(vol. i. p. 364;) and even our statute law speaks of "the Papisticall Kirk and their usurpit ministers"—(1567, c. 5.) From such a corrupted church and such ministers our Reformers withdrew themselves, and "erected this our Kirk within Scotland," as it has been well expressed, "not on the ruins but on the nullity of the former Church." They taught, that, besides the visible Church, there is a Kirk invisible—(Confession of Faith, 1560, art. 17;) that when the visible Church becomes utterly corrupt, it loses the character of the true Church, and the invisible Church may then be constituted the visible Church in the place of the other, the most zealous and gifted of its members being set apart as office-bearers in the visible society. Accordingly, Knox himself, who had received Priest's orders in the Popish Church, never rested his title as a minister of the Reformed Church on them; indeed he had been declared a heretic and degraded from the priesthood; and in the History written by himself, he gives a distinct account of his call to and acceptance of the ministry in the New Church.—(See also M'Crie's Life of Knox, pp. 8, 24, and 32, Ed. 1839.) That this Church sought to derive no power or pri-

[1] Book of the Kirk, p. 807.

vilege through its predecessor, and had a different origin altogether, the proceedings of our Reformers in its formation uniformly show. Bearing in mind the opinions entertained of the Papal Church by the Reformers, look at the account which Knox gives in what is titled "The order of the election of Elders and Deacons in the privy Kirk of Edinburgh in the beginning, when as yet there was no public face of a church, nor open assemblies, but secret and private conventions in houses or in the field."

"Before that there was any public face of a true religion within this realm, it pleased God of his great mercy to illuminate the hearts of many private persons, so that they did perceive and understand the abuses that were in the papistical church, and thereupon withdrew themselves from participation of their idolatry. And because the Spirit of God will never suffer his own to lie idle and void of all religion, they now began to exercise themselves in reading the Scriptures secretly within their own houses, and variety of persons could not be kept in good obedience and honest fame without overseers, elders, and deacons; and so began that small flock to put themselves in such order, as if Jesus Christ had plainly triumphed in the midst of them by the power of his gospel. And they did elect some to be elders and helpers unto them, for the overseeing of the flock, and some deacons for the collection of alms to be distributed to the poor of their own body. Of this small beginning is that order, which God of his great mercy has given unto us publicly within this realm."[1]

In this respect our Reformers adopted the views and acted on the same principles as the Reformed Churches in Switzerland and France.[2] They held, as their Confession of Faith bears, that the notes of the True Kirk 'ar nouthir antiquetie, tytle usurpit, lineall descente, place appointit, nor multitude of men approving an error;" they are, first, the trew preaching of the word of God; secondly, the rycht administration of the sacraments of Christ Jesus; last, ecclesiasticall discipline upreichtlie ministered as God's word prescribes. "Quhairsaever than thir former notes ar sene, and of ony time continue (be the number never sa few above twa or thre,) thair, without all dout, is the trew Kirk of Christ, wha, according to his promeiss, is in the middss of thaim." On this ground, they held that the churches they had in cities, towns, and places reformed, at the date of the Confession, "are true kirks;" and as to the external form which was to be given to the members of the invisible Kirk, we are correctly told "they held that no particular form of Church government had been exclusively prescribed in Scripture, and that this was a question of expediency."[3] This is the statement of the able and impartial historian of the Church of Scotland, who commends 'this doctrine as most salutary."

"Thus, then, when the irregular meetings of the Reformers were to obtain the face of a Church, which was to become the national and established Church, the policy of that Church, and its powers and jurisdiction as a visible society, were fixed in conjunction with the State.

Among the claims made by the General Assembly of late, in support of their recent measures, it has been asserted, that when the act 1567, c. 6, and subsequent statutes, secured to the Reformed Church the exclusive power of preaching the word, administering the sacraments, and correction of manners, it bestowed a universal ecclesiastical jurisdiction in those matters, with the most extensive and uncontrolled legislative powers regarding them. No such opinion will be maintained by any one in the slightest degree acquainted with the early history of the Established Church, and the steps taken in its formation; for their proceedings, and the powers assumed and exercised by the Church, abundantly show that the jurisdiction was not held, as would now be thought, to embrace every arrangement which can be supposed necessary or useful for the due efficiency of the exclusive privilege conferred. I do not say that the jurisdiction secured to the Church implies nothing but the power of preaching: I do not confine the right to do so within such narrow bounds. It implies, and so was understood and acted on at the time, whatever obviously and immediately falls under a power of regulation for the due exercise of preaching. Thus, the hours and days of prayer and sermon, the times of visitation and catechising, the times of celebrating the holy communion, were regulated by the kirk-session or higher Church Courts: but this is very different from holding that the Church acquired a universal ecclesiastical jurisdiction in the matter, so as to give their Courts the power of enacting any measure whatever that they conceived would give greater efficiency to the preaching of the word throughout the land. Look at "the articles pertaining to the jurisdiction of the Kirk, to be proponit to the Regent's

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[1] Knox, v. ii. p. 408. [2] Art. 16. [3] Cook's History, vol. i. p. 249.

Grace and Secreit Counsell, and socht to be appointit be them" in 1570, just three years after the act 1567 was passed. The first is—"That the Kirk have the judgment of true and false religioun, or doctrine, heresies, and sicklyk, annexit to the preaching of the word and ministration of the sacraments.

"2. Election, examination, and admission of them that are admitted to the ministrie or other functions of the Kirk, charge of souls, and ecclesiasticall benefices, the suspension and deprivation of them therefra for lawfull causes.

"All things concerning the discipline of the Kirk quhilk stands in correction of manners, admonitions, excommunications, and receiving to repentance."[1]

Nothing can be so unlike the possession of a universal ecclesiastical jurisdiction, with legislative powers, relative to preaching the word, correction of manners, and administration of the sacraments, than this application to the State to have the above powers conferred upon them.

In like manner, look at the articles proposed for enactment by the State in 1582, just three years after the act 1579, which renewed the act 1567, and other articles a few years later in 1586. The first require, that Presbyteries and their discipline be approved and established by authority: that presentations of benefices be directed to Presbyteries of the bounds where the benefice lyis, that be them after due tryall the qualified person be admitted: that no presentation be given to any man with a blank: that ministers who, through age, or sickness, or other accidents, are unable to execute their office, may bruik their living during their life: and that when ministers are deposed or excommunicated, their benefices are to vaik, and other qualified men to be provided thereto.[2]

Again, "The humble petitions of the ministry to the King's Majestie, for some matters tending to the establishing of the policy of the Kirk," presented in 1586, contain these among other points:—That in the chief burghs there be teaching four times in the week, besides the discipline, visitation of the sick, and other charges, and that two ministers therfor be appointed to such towns: that collation granted by men that had no commission nor ecclesiastical function in the Church, be declared null: That the judgment of causes concerning deprivation of ministers in the second instance, shall come by appeal to the General Assembly, and take final end, and not before the Lords of Session by way of reduction.

I have omitted to allude to the following request to the King and Council in 1581.[3]—"That ane act of Parliament may be made concerning the deposition of ministers, and the causes at lenth to be exprest in this article." Now it really seems abundantly clear that if the interpretation which has been recently put upon the acts 1567 and 1579, as to the jurisdiction of the Kirk, were sound, it would have been unnecessary to apply to the State in such matters, as we have seen, since their own legitimate powers should have been quite sufficient. But at the time the jurisdiction as to preaching, correction of manners, and administration of the sacraments was secured to the Church, it was well known that it gave no such universal ecclesiastical jurisdiction in these matters as to include whatever might by any process of reasoning be supposed to increase the efficiency of those acts; and so prevent the necessity of application to the State in many points which would have fallen under a universal ecclesiastical jurisdiction, if that had been conferred on the Church, or declared to belong to it, as to preaching and the other acts of jurisdiction specified. To plant churches in portions of parishes remote from the parish church, or in densely peopled districts, and to provide ample stipends for them, as well as a manse and glebe, or in large burghs to increase the number of the clergy and churches, at once occurs to the mind as a beneficial object, and as to which the Church might hold that it leads to due and efficient preaching of the word and administration of the sacraments; and they might also hold that the admission of these additional ministers as members of the Church Courts was within their competency, because it would add greatly to the efficient exercise of their jurisdiction in the correction of manners. But I think I shall be able to show that the Church did not claim any such power as belonging to them in virtue of the jurisdiction ecclesiastical they possessed, but, on the contrary, most expressly disclaimed it, and have uniformly acted on this disclamation till the recent days of assumption of power by the Church, although there was a demand for additional churches. And these were provided, and the difficulty from the Assembly not being empowered to erect them into parochial churches was got over, by establishing them as chapels of ease.

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[1] Book of the Kirk, p. 187. [2] Ibid. p. 658. [3] Ibid. p. 476.

It surely will never be argued that the jurisdiction, given to the Church in preaching, must have been a universal ecclesiastical jurisdiction, to the effect of authorizing them to erect new parochial charges, and plant ministers therein, from the circumstance that in the early days of the Church, and before the present constitution of the Church government was formed, the superintendents and commissioners for planting churches performed their annual visitation and preached throughout the country, admitting ministers into churches where qualified men could be found. It is well known that this duty, so necessary in the infancy of the Establishment, was expressly recommended and sanctioned by the State. It was not the act of the Church alone, under a notion of its falling within the jurisdiction secured to them, that such "high ministers" should be appointed with such powers and duties. The State, as has already been noticed, actually issued their *congé d'elire* for their election and inauguration. We find, however, that the duty of visitation was very imperfeetly performed: there are constant complaints to the Assembly on this subject, and the excuse generally is on account of the non-payment of their salaries, and the difficulty of getting the members of the ancient Church to obey these substitutes for their bishops. And in passing, I may observe, that the Church, which is said to have existed unacknowledged by the State, and of its own independent authority, for seven years prior to its second recognition in 1567, presented in 1562 a petition to the Queen and Privy Council as to things they wish reformed; and one of these is concerning "the inobedience of certain wicked persons, who not only truble and have trubled ministers within their functiouns, but also disobey the superintendents in thair visitation."[1]

We have seen that jurisdiction is granted to the Church, as to correction of manners by ecclesiastical discipline. This was contrary to the views of that portion of the Swiss reformers who followed Zuinglius, who held that this was the province of the civil magistrate alone. But it was claimed by our Reformers, and conceded to them. This jurisdiction might be supposed to give to the Church the power of fixing the terms and modes of procedure in excommunications by admonitions public or private, but it did not prevent a most salutary interference on the part of the State for the protection of the subjects from an oppressive exercise of this power. Certain articles having been sent by the Assembly in 1586 to the king, "craving present resolution," the brethren reported that in the haill heids they fand little difficultie, except quhilk is noted "with his Majestie's hand." Now one of these was, where the Book of Discipline proposed it should be enacted by Parliament as to Presbyteries—5. "It hes power to excommunicat the obstinat." Observe, the Kirk felt that this required further sanction from Parliament than it had already got by having the above jurisdiction conferred upon it. The entry then proceeds thus: "His Majesty agreed unto the fyfft article in this manner: It hes power to excommunicat the obstinat, formall process being led, and deu intervels of tymes being observed."[2] It seems impossible, after this, to say that universal ecclesiastical jurisdiction was bestowed on the Kirk in the correction of manners, as is now contended for. In granting the power of excommunication, which was craved in the articles 1570, the qualification which was added by the King's own hand was adopted. It is accordingly to be found in the act 1592, and is now the statute law of the Church. The King had always objected to the summary excommunication which was originally the practice of the Church, and considering the very "fearful sentence," and the serious consequences which then attended it, his sense of justice led him to desire that some time and a little deliberation should be secured in favour of the offender before it was pronounced. All acts enjoining civil pains upon sentences of excommunication were happily rescinded at the Revolution.

Instead, then, of any assertion of a universal ecclesiastical jurisdiction in the matters specially noticed in the acts 1567 and 1592 as the exclusive jurisdiction of the Church, which, it is said, warrants the Church in erecting new parishes *quoad sacra*, we shall find that at no period is any claim made by the Church, nor any admission by the State, of jurisdiction in the Church as to the erection of new parishes.

I do not recollect, in the First Book of Discipline, any claim made by the Church to any jurisdiction in this matter. The small number of reformed clergy, compared to the number of churches, was such at that period, that it is not wonderful if the idea of erecting new churches and parishes did not attract the attention of the Assembly; but it will appear that the analogous case of a union of churches did, and the Church did

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[1] Book of the Kirk, p. 21.

[2] Ibid, p. 664.

not think they had power to do so under the notion that they were entitled to regulate every matter which concerned the spiritual edification of the people. For we find in June 1563, that the General Assembly "ordainet that supplicatione be made to the Queen's Majestie and Secret Counsel for unioun of kirks, that where two or thrie are within two or thrie miles distant, the same to unite, and cause the inhabitants to resort to ane of the saids kirks, to heir the word and receive the sacraments, because the scarceness of ministers permitts not every kirk to have a several minister, and also the small number of sick parochines (parochiners?) requyres not the samein."[1]

Even in the Second Book of Discipline, the authors of which had much higher notions of the powers of the Church than the original Reformers, no claim is made that the Church of its own authority should either unite or divide parishes. They go no further than to say, that, by the advice of commissioners appointed "*be the Kirk and the Prince,** parroches in landward or smal villages may be jonit tua three or ma in sum places togedder * * * and in sum places, quhair neid requiris, ane parrochin, quher the congregatioun is our gret for ane kirk, may be devydit in tua or ma."[2] This is important as to the original claim made by the Church regarding this matter. For it must not be supposed, that where it is said of the Assembly, "It sould tak cair, that kirkes be planted in places quhar they are nocht planted," this applies to the forming of new parishes by the power of the Assembly. It may be that this was to urge the State to erect new parishes. But the truth is, it simply means this, that the Assembly should take care to have the churches planted with ministers, as soon as qualified men could be found, for the many vacant parish churches throughout the country. This is the meaning of the term planting a kirk, including the securing a stipend for the minister, in all contemporary records. It confers no power upon the Assembly further than to urge the filling up of the parochial churches with ministers by those entitled to present to them.

I do not know that the erection of a new church came under discussion of the General Assembly till the year 1600, when, at the Assembly held at Montrose in March, after assenting to the proposal of building a church, and annexing a parish to it at Stranraer, "The question was proponit to the haill Assemblie, where congregations are so spacious, that a great part therof may not commodiously resort to their awn paroch kirk, be reason of the great distance of their habitation therfra, If it be lawfull to ane number of the said congregation, big ane new kirk, and entertain a pastor at the same upon their awn expenses?[3] The Assembly, after long reasoning, thought it lawful and expedient, and declares they would assist the same as a godly work, and crave the same to be ratified in Parliament so oft as it shall occurre." Nothing can be conceived more distinct than this deliberate opinion of the Church as to the extent of their powers. They would assist in the godly work, so obviously for the spiritual edification of the people, but as obviously beyond their power to authorize, since it was equivalent to establishing a new parish, although the parishioners undertook to support the minister at their own expense; and they go still further, for they say that Parliament alone could ratify it. So distinct a declaration as this it is difficult to get the better of; yet the Respondents know they must do so, and they attempt to do it by the assertion that this only referred to proper parishes, but not to such as have been recently denominated parishes *quoad sacra.*[4] They maintain, that this celebrated declaration of the Church as to the extent of her powers in this matter, embraces only the erection of parishes properly so called, and parochial churches, and that the Church has full power to establish additional ministers officiating in new churches, and sessions for the exercise of government and discipline, and for the administration of ordinances, and to assign special limits as the peculiar sphere of their pastoral superintendence and spiritual jurisdiction, without regard to their not possessing a civil benefice or parish erected by the Court of Teinds, and that this power has been constantly exercised and acknowledged from the establishment of the subsisting platform of Presbyterial government in 1592 down to the present day. But I must say I can discover no ground for this gloss, and I should have expected some allusion to have been made to this power, if there had been room for it, when

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* This is the true reading as given in the Bannatyne Club edition from an original copy subscribed by the Clerk of Assembly. Some later copies substituted *or* for *and;* but the framers of this Book never proposed that the Kirk alone should name these Commissioners. Like every other proceeding regarding the policy, they claim no higher power than that it was to be a joint act.

[1] Book of the Kirk, p. 33. [2] Ibid, chap. 12, § 4. [3] Ibid, p. 1025. [4] Case for Respondents, p. 18.

disclaiming the other, more especially when it is quite clear, that if the Church had the power they have since assumed, they could have granted all that the applicants wished, which was permission to build a new church at a different part of the parish, and provide a minister at their own expense. They do not say they wish a new parish erected, nor the minister made a member of the Church courts,—they do not even ask for the establishment of a session for discipline. If the Church had then been in the practice of erecting *quoad sacra* parishes, they certainly would have done so on the present occasion, or made the offer do so, or at least would have qualified their disclamation of power to erect a new parish by a reservation of these existing rights, if they really had them. And further, the Respondents add, "not only at the date of the act 1592, but for many years afterwards, a large proportion of the ministers of the Church had no civil connexion with a parish or benefice, and no legal provision whatever"—were, in short, ministers of *quoad sacra* parishes. I may notice, in passing, the new term which is here used—civil benefice, and civil connexion with a parish. Our law-books speak of it always as an ecclesiastical benefice, and that the minister has an ecclesiastical connexion with his parish; but on the use of the term civil, and on the assumption that, in the records of the time, "kirks" does not apply to parish kirks, nor "ministers" to parochial ministers, the strange view is attempted to be maintained that the Church of Scotland was a church which had ministers not connected with parishes, not endowed by the State, nor seeking endowment from it, but supported by voluntary contributions of the congregations, not parochial congregations, to which they ministered,—in short, ministers with parishes *quoad sacra*, or quoad *spiritualia*, the model of such as has been authorized at Stewarton, and that these ministers sat in the Church courts.

This is entirely a matter of history, and I cannot conceive any historical statement so utterly void of truth, as this view of the early economy of the Scottish Church. When the State sanctioned the Presbyterian church government in 1592, the Church was a parochial church, and the clerical members of its Church courts were parochial ministers only. The only difficulty that I shall find, is to condense and select, from the mass of materials, the proper evidence for the disproof of the assertion that the Church was not entirely a parochial church,—so that when we read of ministers and kirks at this time, we must always consider them as parochial ministers and parish kirks, and that there were no other.

I think I may begin with stating, that perhaps the only part of the constitution of the ancient Church, which our Reformed Church adopted, was its parochial form: the object being to induce the State to abolish the one, and place the other in its room. No Reformed Church that I am acquainted with, when adopted by the State, ever thought of appointing any minister to the pastoral charge of a congregation other than of a parish. It was the Puritans in England, who, first in Britain, conceived the idea of congregations not parochial. In Scotland it was then quite unknown. This is a fact in history, which cannot be disproved by mere assertion to the contrary. The very first recognized meeting of the Reformers ordains "every commissioner, alsweil of townes as of paroch kirks to landward, to bring a roll with them of the whole teyndis, &c. of the paroch kirks next adjacent to them."[1] In the First Book of Discipline it is rather implied than distinctly announced, that the reformed clergy were to fill the parish churches,—any other notion having never entered into the imaginations of the Reformers; and it would be singular if they had done so, when they were claiming the manses and glebes, the benefices and the patrimony of the Church for themselves. Thus, speaking of the stipend of a reader, it says—"to a reader that is lately entered we think 40 marks, more or less, as the parishioners can agree, sufficient; providing that he teach the children of the parish." As to the poor, they say—"The poor must be provided for in every parish, for it is a shameful thing they should be so universally contemned and despised."[2]

In the Second Book of Discipline, again, that the Church was a parochial church is distinctly stated, but incidentally also: to enumerate this as a distinct proposition would have been thought absurd. The 12th chapter is entitled "Certain speciale Headis of Reformation quhilk we crave." The 3d is in these words, "Seeing the haill countrie is devidit in provinces, and thir provinces agane ar devidit in parrochis, alsweill in landward as in townis, in everie paroche of reasonable congregationis, ther wald be placeit ane or ma pastures to feed the flock." The next article is, "And because it

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[1] Book of the Kirk, p. 7.

[2] Chap. v. sec. 5.

wil be thocht hard to find out pastures or ministers to all the parroche kirkes of the realme, alsweill in landwards as in townis," &c. The necessity of providing ministers for any other than parish kirks never is contemplated.

It is said in Chapter vii. 14—"Quhen we speik of elderis of particulare congregationis, we meane not that every particulare parroche kirk can, or may have thair awin particulare elderschip, especiall to landward; bot we think three or four, ma or fewar, particulare kirks, may have ane common elderschip to thame all, to judge thair ecclesiasticall causis." It appears very distinctly from these quotations that, in the language of this period, congregation meant the people belonging to the parish, kirk the parish kirk, and minister the minister of the parish, and no other.

In 1581, a Confession of Faith, especially directed against Popery, generally termed the negative confession, was drawn up and first subscribed by King James and his household, with sundry others; and all commissioners and ministers were, by the king, commanded "to crave the same confessione of their *parishoners*."[1] It is obvious that this was intended to embrace the whole nation, and all are supposed to be included as the parishioners of some minister. But it is impossible to suppose that the ministers of the voluntary congregations would have been omitted, if any such had then existed. An obligation upon them also to subscribe would have been inserted.

In the same year an act of Parliament is passed, "Anent provisioun of ministeris and certane stipends for thame at all *parroche kirkis*, and appointing of Commissioneres for ordering thairof," and it enacts—"That *everie paroche kirke*, and samekle boundes as sal be found to be a sufficient and a competent parochrie thairfor, sall haue their awin pastoure with a sufficient and ressonable stipend, according to the state and habilitie of the place."[2] And a commission is granted to certain persons, named by Parliament, to convene with commissioners from the kirk "to consider and ordoure the estate of the saids kirkes and stipendes."

Now, it never was questioned that this was a general measure applicable not only to every minister then planted in any church in Scotland, but "to all kirkis and ministers, that are lickly and apparent to stand and continue, as if the present possessours were dead."[3] It included all the reformed ministers then officiating, all of whom were to be provided with stipends, and these are expressly called ministers of parish kirks, there being no others then known. It included also all other parochial churches, although not then planted with reformed ministers.

The poor laws afford an important illustration, to show that the Church was a parochial church. All poor people were, by 1579, c. 74, to repair to *the parish* where they were born, a catalogue was to be made of them, and the inhabitants of the parish taxed and stented for their maintenance: and on the establishment of Presbytery, power is given "to the minister, elders, and deacons *within every parish*," to nominate one or more persons for executing the above act, who are appointed justices of peace to that effect. This was done by act 1592, c. 149, and the execution is further entrusted to the kirk-session *in every parish* by 1597, c. 272. These acts were certainly to embrace every corner of the country; so also was this which follows: The General Assembly of 1588, had issued an ordinance on the ground that there is "neither religioun nor discipline among the poore," giving a sad catalogue of crimes committed by them, "Therfor it is thocht expedient that all ministers, *in thair paroch kirks*, sall make intimatioun and denunce to all poor, that either be parochiners, or resort to them, &c., exhorting also all thair *parochiners* that they rather extend thair liberalitie to such as be of the household of faith,"[4] &c.

A point of discipline, which early attracted the notice of the General Assembly, is a proof that the Church had never a conception of any thing else than occupying the ancient parishes: for, on 27th December 1565, "The haill Assemblie, in ane voyce, statutes and ordaines, that no minister receive the *parochiners of ane other paroche* to be maried, without a sufficient testimoniall of the minister of *the paroch* wherefra they came, that the bands are lawfully proclaimit, and na impediment found;"[5] and this is enforced against a minister on 26th February 1568, who, the Kirk declares, has broken the act, "That na minister sall marie the parochiners of another parochin, without a sufficient testimoniall."[6]

It would appear that for some purpose or other it had been wished to have a register of deaths, and an act and order was made by the Lords of Session in 1574, requiring

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[1] Book of the Kirk, p. 518. [2] Vol. iii. p. 112. [3] Book of the Kirk, p. 555. [4] Ibid. p. 731. [5] Ibid. p. 72. [6] Ibid. p. 135.

the names of those deceasing "within their *parishes* yearly,"[1] to be presented by the Reiders of ilk Kirk to their Superintendents, to be reported by them to the General Assembly, who were to make the return required. This was, of course, to be general, and executed throughout the whole country: and by the Assembly and Commissioners, present in 1576, "to the effect that the same may be universally keeped and observed in times coming, It is thoght meitt that *in every parochin*, there be persons appointed to break the earth, and to make sepulchres, that sall notifie the names of the persons deceissit to the Reiders, that they may present the same to the Commissioners to report the same to the General Assemblie."[2]

It is well known that the first edition of the Bible in English, printed in Scotland, was by Alexander Arbuthnot and Thomas Bassenden. It was published in 1579. They had applied to the Bishops, Superintendents, Visitors, and Commissioners in the Assembly, March 1574, to support them in their undertaking, they promising to furnish a copy for L.4, 13s. 4d. Scots, paid in advance; and accordingly the General Assembly agreed "That every person (parson) that is provided of old, as weill as of new, be compelled to buy a bible *to their paroch kirk*, and to advance therefore the price foresaid, and the said prices to be collected and inbrought be the said Bishops, Superintendents, and Visitors within each bounds and shire within their jurisdiction, betwixt and the last day of June."[3] But as the jurisdiction of the Church could not extend beyond the reformed ministers of parish churches, and could not reach the Popish parsons still in the benefice, the Assembly proceeds thus—"And because the said act appertains, and is expedient to be ratified be my Lord Regent's Grace and the Lords of the Secret Council, and an act of council to be made thereupon, the Assembly ordains" certain of their members to "trauel with his Grace and Lordships for obtaining the samine, together with the priviledge of the said Alexander and Thomas for imprinting of the said work." This act of Council was obtained; but not exactly in the terms proposed. It has been printed, and a fac simile given of it (Miscellany of the Maitland Club, vol. ii. p. 15), and it ordains five pounds to be collected "from the principallis and headsmen of every parochin, alsweil to burgh as landwart," as it said in "everilk *parish* kirk their be a Byble remaining in sic forme as sal be thocht expedient be the Kirke, and allowit and sett furth be our authoritie." Now the object of the Assembly clearly was to provide a bible for the use of every Parish kirk, and this must be presumed to comprehend every church in the kingdom; for since the burden was to be laid even on the popish beneficiary, with the view of embracing every parish church, it cannot be supposed that the churches, supposed to be not parish churches, would have been omitted in so important a measure for the spiritual edification of the people, as that of providing a bible for their use. Some difficulty seems to have occurred with the printer, for we find, in 1580, among certain articles proponed to his Majesty and Council, this one—"That order may be taken with Alexander Arbuthnot, that the bibles may be delyverit according to his receit of money from *every parish*."[4] The ordinance, then, unquestionably intended to include every church in the country when it prescribed it at every parish church. Probably the same mode was adopted with us as had been in England a few years before. There a bible was provided for every church, and by a chain secured to the reading-desk; and, besides the use of it by the clergyman, those who could read, used to read portions out of it to those who could not, thus making up to them to a certain degree, for the inconvenience of having no bible, nor the ability to read one. Accordingly, in an address by the Assembly to the King in 1579, when the bible was finished, they say—"Great part of the honour of advancing this work pertaneth unto you, be whose authority it was of a certain tyme by past ordained, That this haly book of God should be set forth, and prented of new within your own realme, to the end that in every parish kirk there should be at least one thereof keeped, to be called the Common Book of the Kirk, as a most meet ornament for such a place, and a perpetual register of the word of God, the fountain of all true doctrine, to be made patent to all the people of every congregation, as the only right rule to direct and governe them in matters of religion, as also to confirm them in the truth received, and to reforme and redress corruptions wheresoever they creep in."[5] In short it is impossible to doubt that every congregation in the kingdom, benefited by the ordinance requiring a bible to be kept in every parish kirk.

In like manner, when the act 1572, c. 34, ordains "the persones (parsons) of all paroche kirks within this realme to furnish bread and wine to the communion how oft

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[1] Book of the Kirk, p. 310. [2] Ibid. p. 372. [3] Ibid. p. 328. [4] Ibid. p. 462. [5] Ibid. p. 443.

the samen sall be ministratt with the samen kirkes," it is clearly understood that this applies to every church in which the sacrament is administered, and that these are the parish churches. It will be vain to look for any act or ordinance providing for this expense in any other church. There is none such.

The same observation applies to the act 1617, c. 6, which "ordains that all paroch kirks within this kingdom be provided with basins and lavours for the ministratioun of the sacrament of baptism; and of cups, tables, and table cloathes for the holy communion."

So perfectly was it understood that the Church was to be parochial, that the ministers were to be beneficed in the ancient parishes, that no other ministers were to be recognized in the Church, and that when the benefice was bestowed on a reformed minister there could be no other in his parish; that in 1571 this question was put in the Assembly, "Whether, when a benefice which is at the kirke's gift *pleno jure* vaikes, superintendents and commissioners may give the same to any other than to such as serve for the time in the ministry where they vaike."[1] This is referred to the discretion of the superintendents and commissioners of counties, "requesting them to have consideration of these that travell in the kirks, and that they be preferred to others *cæteris paribus*."

This matter is again discussed in the Assembly 1580, in the case where the Church had not the patronage; for among certain articles proposed to his Majestie and Counsall, "by certain commissioners who are to present them most humblie supplicand and requyreing his Majestie and Counsall's good answer therunto, and to travell effectuouslie and with earnest sute for granting the same,"[2] is this one—"5. That all benefices vaikand, quher ministers are planted, be given to the ministers serving the cure quher they vaik, they beeand able therefor; and that no presentation, given to any other persone, be receivit, unlesse the minister serving the rowmes be first found unable."[3] It does not appear that this request of the Assembly was ever agreed to, or the right of patrons so greatly infringed on. It is plainly implied, that when the presentee was admitted into the benefice, on the death of the Popish incumbent, the reformed minister who had been planted in it to do the duty of the parish, would be displaced. I may remark in passing, that, according to the views now entertained by the dominant party in the Church, they had the power to secure their own object, and maintain the minister in the parish where they had planted him, by coming to the resolution that they would not proceed on a presentation to any other person. But the Assembly at that time had more correct notions of their duty, and felt that they had not the right to adopt such a resolution, as it would have been a violation of the agreement so recently entered into between the Church and the State, that they should admit the qualified presentee of the patron. They fully acknowledged that this rule could only be relaxed, even in this peculiar and temporary case, by an act of the State.

In 1597 the Commissioners of the Assembly, only five years after the Presbyterian form of church government had been sanctioned, sent a missive to the various Presbyteries, pointing out what had been done for the Church; and they say—"We found it requisite to insist in such articles as have been craved be the Kirk at Parliament in tymes bypast; and namely wee urged the article anent the Kirk's vote in Parliament, *and the article anent the universal provision of the whole Kirk with stipends*. In both wee found great opposition be the far greatest part of the Lords: but the King's Majestie conveyed our suits with such wisdom and dexterity in our favours, that in end, after many hard answers, his Majestie procured that he might dispone the whole great benefices to ministers, and that such ministers as should be admitted thereto, should have vote, but prejudice alwayes to the present discipline and jurisdiction of the Kirk in any point:"[4] And these measures, they add, "his Majestie thinks shall be a mean in short tyme, to vindicate the ministrie from their present contempt and poverty; and this is already perceived be many to their grief, who fear their hurt in our credit." It is historically true, that, by the labours of King James, and the arrangement brought about under the decreets-arbitral of Charles I., the parochial ministers of the Church of Scotland have, each of them, stipends secured to them by the State; that they are not dependent on their congregations for their support; and moreover, that they are the best endowed parochial clergy at this moment in Christendom, and thus best able, without distraction, to attend to their all-important spiritual duties in their respective parishes. This was the remark of Burnet even in his time; how much more is it applicable now![5]

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[1] Book of the Kirk, p. 241. [2] Ibid. p. 461. [3] Ibid. p. 462. [4] Ibid. p. 938. [5] History, vol. ii. p. 384.

The Church early showed a strong disposition to concern itself with affairs of State, and to guide and influence the counsels of the nation, under the plea that their duty was to root out all enemies to the true faith. In the year 1596, certain overtures were given into the Assembly "for resisting of the enemies of religioun and estate of the countrey, as weill forraine as intestine;" and the third of these was, "That ther be chosen *in every paroch*, be his Majestie's authoritie, and vott of the minister, sessioun, and principalls of every paroch, Captaines knowen to be most meitt, and of best affectioun, to convein the haill paroch in armis monthlie in mustures, and to see that they be all sufficiently armeit according to their abilitie, and trainit up in the exercise of their armis."[1] I do not know that this plan of putting the whole militia of the country at the disposal of the Church was adopted; most probably it was not; but it was clearly intended to be a general measure throughout the whole country, and this is provided by the applicability of the parochial system to it. It was thought enough to ordain that the minister and session of each parish, should vote for the appointment of a captain in each, to have the whole force of the country armed and trained for service. But this was just after the establishment of the Presbyterian Church, when it is said that there existed churches not parochial, and congregations not circumscribed by parishes. Were the people frequenting such churches not to increase the power of the Church, under the notion of lending their aid to repell the foreign and intestine enemies of the country?

Our Reformers most properly set themselves about correcting the evils arising from the careless observance of Sunday, as practised under the ancient form of religion. On King James assuming the government in 1578, certain articles were presented by the Church,[2] and one of these was, "That the Sabbath-day be universally observed; mercats, playes, and all other impediments which may hinder the people to conveen to hear the word, be discharged." The frequent notices of offences against the proper keeping of Sunday which we find in the records of the times, show the laxness of manners which had crept in among us in this respect, and the difficulty of new-modelling the habits of a people in a matter of this kind. A conference having taken place between delegates from the Assembly and the Privy Council,[3] the result was, "that a supplication sould be giuen to the Council, with the judgment of the Assembly thereanent."

This we may suppose was done, and was the foundation of the act passed in the next Parliament (1579, c. 8), "discharging of mercatts and labouring on Sondayis, or playing and drinking in the tyme of sermone;"[4] and it will not be disputed that this was intended to embrace every member of the community, high or low, throughout the land. This is the act:—"Forsamekle as it is statute and ordanit, be a gude and godlie act made in the days of King James the fourt, our soverane lordis grandsir of worthie memorie, that thair be na mercattis nor fairis haldin upoun halydayis, nor yet within kirks or kirkyairdis, upoun halydayis or uther dayis, under the pane of escheating of the guidis; Quhilk act our soverane lord and his three estaitis ratifeis and approvis, and ordanis the same to have effect and execution in tyme cumming. Ande seing that the Sabbath-dayis ar now commounlie violat and brokin, alsweill within burgh as to landwart, to the greit dishonour of God, be halding and keeping of the saidis mercatts and fairis on Sondayis, using of handy labour, and working thairon as on the remanent dayis of the oulk, be gaming and playing, passing to tavernis and ail-howsis, and wilfull remaning *fra the paroche Kirk*, in tyme of sermone or prayers on the Sonday; Thairfoir his majestie and his thrie estatis in this parliament statutis and ordanis, that thair be na mercattis nor fairis upon the Sonday, nor yet within kirks or kirkyairdis that day, nor ony uther day, under the pane of escheating of the guidis to the use of the puyr *within the parochyne*; and siclike that na handy labouring or working be used on the Sonday, nor na gamying and playing, passing to tavernis and ailhouses, and selling of meitt or drink, and wilfull remanyng *fra thair paroche kirk* in tyme of sermone or prayers on the Sonday, be used under the panes following." And the act concludes thus:—"And for executioun heirof, the kingis majestie's commission of justiciarie sal be grantit to some persone *in every parochyne*, best affected and maist able to performe the same at the requeist of the minister." Subsequent acts of parliament show how difficult it was to have this duly observed; and M'Kenzie informs us, that "the part which forbids mercats in kirkyards is not observed."[5]

I shall close my references on this head with one which will be thought to be very apposite to the present case, being no less than an ordinance as to the constituent

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[1] Book of the Kirk, p. 860. [2] Ibid. p. 405. [3] Ibid. p. 408.
[4] Acts, vol. iii. p. 138. [5] Obs. p. 115.

members of the General Assembly. It was, in the Assembly June 1563, resolved that Commissioners should be sent as representatives to the General Assembly. The numbers, both of ministers and elders, had now increased so much that only a certain number of each was to convene, as commissioned respectively by the shires (previous to the formation of presbyteries), by the Royal Burghs, and by the ministers; and accordingly it was ordained, "That every superintendant, within his awin jurisdiction, cause warne shyres, tounes, and *paroch kirks*, to send ther commissioners unto the Assemblies in tyme coming, declaring unto them the tyme and place; and als, that every superintendent convein, the first day appointit for the Assemblie, under the paine of 40 shillings, to be distribute to the poore, without remission thereof."[1] Thus it appears that only parish ministers could be clerical members of the General Assembly—parish kirks only were warned to meet and send a commissioner, for in truth there were no other kirks in the Church but parish kirks, and no other ministers but members of such parish kirks. Hence Erskine observes—"Upon the suppression of popery (in Scotland), the Reformed clergy were entirely made up of parochial ministers and a few superintendents.[2] While the popish incumbent survived, the benefice remained with him; but he was silenced, his pastoral duties were at an end. A Reformed minister was planted in the parish, to perform pastoral duties to the whole parish, which he was not now allowed to discharge. To this minister, as now the legal incumbent in the parish, he was obliged to resign his manse and glebe, or provide a house for him; and he was also called upon to give one-third of the fruits of his benefice for support of the reformed clergy. These were in fact parochial clergy as much as the beneficed reformed ministers, and by these and of these were the clerical Commissioners to the Assembly chosen. It will be observed that the superintendents were constituent members of Assembly. They were to attend each Assembly, even under a penalty. This was one of thirty differences which have been pointed out, between the superintendents and ordinary ministers, in 'The Fundamental Charter of Presbytery Examined,' (pp. 120–139,) a work which Dr Cook much commends for the ability and knowledge of the subject which it displays. These differences embrace almost every matter of jurisdiction which characterizes the Episcopal office, except that of ordination by imposition of hands, which was not then practised in the Church: but presentations were to be addressed to Superintendents, and he gave admission to the presentee according to such form as was then observed.

In order to complete the resemblance to the *quoad sacra* ministers, and to find a prototype for them in the early history of the Church, it is next said by the Respondents, that at the date of the act 1592, and for many years afterwards, a large proportion of the ministers "had no legal provision whatever."[3]

That the Church was very scantily provided at first; that the Reformed clergy found great difficulty in getting a provision assigned to them, and still greater difficulty, in many instances, in getting payment of this provision; so that they must often have been supported by the voluntary liberality of their people, is well known; but this will not admit of the conclusion, that the Church of Scotland was to be an unendowed Church, or was to consist partly of ministers depending not on a public fund secured by the State, but on the voluntary payments of their congregations. Having been acknowledged as the true Kirk, and no other face of a Kirk being tolerated in the land, they claimed right to the patrimony of the ancient Church for support of the ministry, of schools, and of the poor. This was put forth broadly in the First Book of Discipline, and was one of the main causes why it was not immediately sanctioned by the State. But the Church never ceased to claim endowment, and were successful so far, that their right to it was fully admitted, and a fund was provided by the assumption of thirds of all benefices throughout the kingdom, all of which, we are told, was disposed of by warrants under the Queen's own hand, a portion of the fund being employed in the provision of the superintendents, ministers, exhorters, and readers, then employed in the service of the Church.[4] Scanty was this provision for the clergy; and when I mention that such a man as the Earl of Murray, the zealous professor of the Reformation, who had attained his power through the aid of the Reformed party, took care to get an assignation to the thirds of his priories of St Andrews and Pittenweem, the first being one of the richest ecclesiastical benefices in the kingdom, and the latter no mean one; and that this example was followed by many others of the professors of the new faith,

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[1] Book of the Kirk, p. 36.
[2] B. ii. tit. 10, § 17.
[3] Case, p. 18.
[4] Keith, App. p. 188.

we need not look further for the cause of the scanty provision, at first, of the Reformed Church.

Finding it difficult to get payment regularly, the Church wished to have the distribution of the thirds in their own hands; and, accordingly, in the Assembly June 1563, a supplication is made to the superior powers "for remitting the thirds, or a part thereof, to the bishops appointed by the Assemblie to be commissioners to plant kirks within their own bounds;"[1] and in the following year, they apply to the Council "that the ministers be provydit decentlie with ane assurit appointment, where they sall receive their livings, asweill bygane as to come, and not to live as beggars, as presentlie they doe."[2]

The fund for their endowment was increased by an act of Council in October 1566,[3] assigning also such small benefices under 300 merks as should become vacant; and in December of the same year, a further sum yearly of £10,000 and 400 chalders of victual from the rents of benefices, was assigned for the support of the ministry.[4]

These assignations were accepted, under the protestation "that this acceptation of the foirsaid assignatioun for the reliefe, as said is, prejudges not the libertie of the Kirk to sute for that thing that justlie pertaineth to the patrimonie of the same, in tyme and place convenient, in any time hereafter."[5]

Accordingly, on that very same day, these questions were proposed in the Assembly—"Whither, if the teindis properlie pertaines to the Kirk, and sould only be applyit to the minister's sustentation, to the poore, maintaining of schooles, repairing of kirks, and other godlie uses at the discretioun of the kirk?"

"Answerit affirmativé without contradictioun."

Thirdlie, "Whither, if the Kirk may justly require, of all possessours, the teyndis to be payit to the Kirk only, and inhibit all others to intromitt therewith; and in case of disobedience, what ordour sall be usit be the Kirk against them?"

"Answerit, after dew admonition usit, and no obedience found, to use the censures of the Kirk."[6]

These afford no great indications that the Kirk was to be an unendowed Church, or that they were to be very scrupulous in the means of securing their stipends, considering the very serious consequences, both civil and ecclesiastical, which attended the censures of the Kirk.

On the commencement of the new reign, with their friend Murray as Regent, the Reformers met in the Assembly of July 1567, and on the first day of the session "it was ordained that the brethren of everie shire should chuse some out of their number, and the ministers likewise chuse so many from among themselves to reason and confer upon the affairs of the Kirk."[7] It may be observed in passing, that the lay and clerical members were kept distinct in this vote, both bodies being recognized as constituent members of the conference to prepare matters for Parliament. Certain articles were accordingly drawn up and approved of, and subscribed by the noblemen, barons, and others, and one of these is—"that the act, already made, towards the thirds of the benefices within this realm, principallie for sustentation of the ministrie, may be dewlie put to execution, according to the booke of the appointment of minister's stipends, as weill for them that are to be appointed as for them already placed * * * quhill an perfyte ordour may be tane and establischit, toward the full distribution of the patrimonie of the Kirk, according to God's word."[8]

Accordingly, by 1567, c. 10, Parliament enacted that the thirds should be paid into the hands of the Church, and the General Assembly appointed collectors throughout the kingdom for that purpose, and out of this fund "the Kirk in ane voyce gives their full power and commission to every superintendant and commissioner of kirks within their awin bounds, that they and every one of them, be advyse and consent of the commissioners of provinces appointit in the synodall conventions, give and make particular assignations to every minister, exhorter, and reidar, within their awin bounds, as they sall find the same expedient * * * and to the effect this act may take full perfectioun, the Assemblie present requyres most humbly my Lord Regent's Grace and Secret Counsell to interpone their authoritie hereto; that the assignations foresaid, general and particular, as they sall be presented to his Grace, may be sped, in forme of provision *ad vitam*, under the privie seal," &c.[9]

Answers are given in by the Regent and Council as to this act and other requests of

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[1] Book of the Kirk, p. 34. [2] Ibid. p. 47. [3] Keith, p. 561. [4] Ibid. p. 562.
[5] Book of the Kirk, p. 83. [6] Ibid. p. 83. [7] Ibid. p. 100. [8] Ibid. p. 107. [9] Ibid. p. 149.

the Church, which are recorded in the Book of the Kirk, and as to the assignations, it is ordained, "that the assignation be put in form, and thereafter presented to the Exchaqre, to be seen and considered by the Lords' auditors thereof; to the effect, that the order being found good and reasonable be them, and such of the Kirk as shall happen to be present with them, provisions may thereafter be made and expede thereupon, according to the meaning of the said act."[1] It was quite in accordance with what became the State, to see that the ministers of the National Church were properly endowed, that they might be enabled to perform the sacred duty which they owed to the State, by instructing the people in the doctrines and morality of the Gospel—teaching them obedience to their rulers and the law. It of course comprehended every minister, not merely those appointed to benefices as they became vacant, but wherever ministers were planted in parishes to do that duty which the Popish beneficiary was now prevented by law from doing.

These desires of the Church, to obtain endowment for her ministers, produced the act 1581, c. 100, already noticed, which provides that "every paroch kirk, and sa meikle boundis as sall be found to be a sufficient and competent parochin theirfor, sall haue thair awin pastour with a sufficient and reasonabel stipend."

It may be thought that I have dwelt too long on these details, in order to show that our Reformers claimed the privilege of being the National Church, and the only Church tolerated within the land, and with this view, that Reformed ministers should occupy the parochial charges of their predecessors, and further asserted their right to endowment from the patrimony of the ancient Church, and that they succeeded in this claim for every parochial minister belonging to the Church, and that there was no other class of ministers but these. But in truth it is the foundation of the plea of the Respondents, the basis on which their whole case rests, that at the establishment of Presbytery in 1592, there were, besides the beneficed ministers, other ministers within parishes supported by the voluntary contributions of their flocks, not parochial ministers, nor having the pastoral charge of the whole parish, but said to be the model, example, and justification of the *quoad sacra* ministers, instead of these being entirely a modern invention, the produce of the ecclesiastical agitation of these latter days.

On this point, I cannot resist referring to what must be well known to the Respondents, as it is an incident in the life of a very eminent man in the early history of the Church,—one of the most eminent of the pupils of the first Reformers, who was long a commissioner acting in the place of a superintendent, had been by the Church put in leet for that high office, was afterwards named by the king a bishop, and moreover was, by the General Assembly, permitted to accept a seat on the bench of the Court of Session, —Mr Robert Pont. The town of St Andrews being destitute of a minister, the General Assembly, then claiming the right of appointing the ministers of such principal burghs, passed an act in October 1581, authorizing the prior and the town of St Andrews to nominate one of the brethren to serve the cure, and propone him unto the ministers of the king's house, the ministers of Edinburgh, and certain others, both clerical and lay members, to whom the Kirk gives commission, or to any eight of them, to give assent in their names thereto. The people of St Andrews chose Pont "to be minister of this paroche," and a committee was appointed "to pass to my Lord Erle of Marche, priour of Sanct Androis, and "travell with his L. for ane resonable stipend," 6th December 1581. —Report on Church Patronage 1834, p. 473.

Pont accepted the office of minister, went to St Andrews and officiated; but the prior never could be prevailed on to agree to pay a stipend to him. Accordingly we find in the Assembly, April 1583, "Mr Robert Pont declarit that with lose of his heritage and worldlie commoditie, he had proponit to sitt down in Sanct Androis, and had servit on his own charges a whole zeir, and could not have any equall conditiounes of living, no, not the least provisione that any had that past befor; and now altogether his heart is abstracted from them, praying the kirk not to lay the charge upon him against his will."[2] Now here was one of the ablest and most zealous members of the Church, a very learned and amiable man, who had the boldness to protest against the acts of Parliament of the next year, which were so offensive to the Church—this man not having been able to obtain a stipend from the prior of St Andrews, there seems never to have been an idea, either in his mind, or in that of the Town council, or session, or congregation, that they should provide a voluntary stipend for him. Yet St Andrews must have been one of the places most imbued with the principles of the Reformation. The profligacy of

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[1] Book of the Kirk, p. 147. [2] Ibid. p. 620.

Beaton, the martyrdom of Wishart, the preaching of Knox, who officiated there for some time prior to his appointment to Edinburgh in 1560, had so prepared the way, that on the first settlement of the Church, St Andrews afforded such a congregation of the Reformed, as to induce the Assembly to place Goodman there, who had accompanied Knox from Geneva, as their minister, while the Priory furnished, in Wynram the sub-prior, a superintendent for Fife, when as yet the Church could find only four other men qualified to act as superintendents, and seven others as ministers. But the inhabitants never thought, even after more than twenty years of the ministrations of a Reformed clergy, of securing the spiritual labours of such a man as Pont among them, by providing a voluntary contribution for a stipend to him!

After this, will it be said that it was ever intended that the Church should in any degree be a voluntary Church, that there should be ministers not parochial, but with portions of parishes, supported only by the contributions of the congregation ministered to, and that it was not to be in all respects a parochial state-endowed Cnurch?

It is really singular that such a view of the early state of the Church should have been adopted, which implies a superabundance of reformed clergy beyond the supply required to fill the benefices as they became vacant. I do not mean to say, that when the superintendents and visitors of countries went to plant churches, they did not sometimes place a minister in a parish, the benefice of which was yet full; when they did so, however, the whole parish was put under his superintendence. But usually it was not so, and their chief duty, as their commission bore, "was to receive the presentation by the rightful patrons when any benefice vaiks, to try the presentee if he be qualified, and admit him into the parish if he be so." There are few, if any, instructions as to planting churches except where they are vacant. The order of the Assembly 1567, noticed in the case for the Respondents, distinctly applies to vacant churches. And the commission, granted to commissioners in 1574, "to plant ministers, readers, elders, and deacons, schoolmasters and others, members necessar and requisite *for erecting a perfect reformed kirk*" in Caithness and Sutherland, requires them also "to search and inquire the names of all those that possess benefices within the said bounds, at whose provision they have been; and if any vaike, or happen to vaike within the commissionary, to confer and give the samine to the person qualefeit, and being presented be the just patrons of the samine, the due examination preceding."[1] I notice, in passing, that as to the power of visitors of counties in 1576, it is declared that, on presentation of patrons, the visitors shall, with the advice of six ministers, give his letters testimonial to the presentee, "providing always that the consent of the flock, whereto he should be appointed, be had, or else a reasonable cause be there shewn why not."[2] Thus there was at that time no absolute *veto* without cause shown, and consent was always implied where no relevant cause was assigned for withholding it.

Instead of there being a superabundance of Reformed clergy, it is quite clear, as we might have expected, that there was at first a great deficiency of properly qualified ministers. This was foreseen by the Reformers: and accordingly, the First Book of Discipline authorized readers to be put into small parishes, for which a fully qualified minister could not be provided. His duty was to read portions of the Scriptures and the common prayers to the people; and the practice seems soon to have been introduced, that such of the readers as were found qualified, might have a higher duty committed to them, and they were termed exhorters. They were allowed to celebrate marriages and baptize, but not to administer the other sacrament. This was a temporary appointment, on account of the scarcity of ministers, as to which there are constant allusions in the Book of the Kirk.

Thus an act of Assembly is made in 1573 as to appointing sundrie kirks to one minister; it is declared that he is to reside at one of them, which is properly to be his charge; and as to the rest, he is to have such oversight and give such help as the bishop, superintendent, and commissioner shall think expedient, "and this ordour only to remain quhill God of his mercie sall thrust out more labourers unto his harvest." This regulation was in consequence of the ordinance of the preceding year, that superintendents and commissioners may "appoint ministers, exhorters, and readers to moe kirks than one, according to the necessity of congregations and rarity of ministers."[3] It may be noticed in passing, that even readers were not appointed but to parish kirks, a portion of a parish was not even submitted to the teaching of these very inferior members of the Reformed Church.

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[1] Book of the Kirk, p. 361. [2] Ibid. p. 357. [3] Ibid. p. 361.

There was no union here of those churches. It was nothing more than giving a minister the chargo of two or more contiguous parishes, till qualified men could be found for each parish. The distinction is obvious.

And in 1581, among the instructions presented by the King's commissioner to the General Assembly, is this—"That the Assemblie declare how many sufficient and well-qualified ministers ther is presentlie in Scotland, and in what place they wisch them ratherest to be."—"And that they give their advyce, how the remanent kirks, quherunto ministers *cannot be had presentlye*, may be servit, quhill mair ministers may be had, and that the present auld possessors of the benefices be departit this lyfe." [1]

In the Assembly 1596 it is stated, that there are "above foure hundredth paroch kirks destitute of the ministrie of the word, by and attour the kirks of Argyle and the Isles." [2] It must be recollected that there were not above 900 parishes in Scotland at this time.[3]

As a proof that there was no superabundance of ministers, after supplying the benefices as they became vacant, to form that other portion of ministry which is said to have then existed on the voluntary system, I may allude to a complaint brought before the Assembly from the parish of Calder. At the first formation of the Church, the lack of qualified men was such, that the Assembly could only appoint five out of the ten superintendents with which the Church was to be provided; and to do this, it was even found necessary to take two beneficed clergymen who had reformed, Carsewell, minister of Kilmartine, and Spottiswood, minister of Calder. The first was made superintendent of Argyll and the Isles, and the other, superintendent of Lothian. They were inaugurated (as it is called) to their office, by a form drawn up by Knox, and used by him at Spottiswood's admission, which is to be found in what is generally called Knox's Liturgy. They were appointed, as the First Book of Discipline declares, "for the erecting and planting of churches, and appointing of ministers;" and it is added, "these men must not be suffered to live idle, as the bishops have done heretofore, neither must they remain where gladly they would, but they must be preachers themselves, and remain in one place above three or four months; after which they must enter in visitation of their whole bounds, preach thrice a week at least, and not to rest till the churches be wholly planted and provided of ministers, or, at the least readers."

This duty necessarily occasioned in Spottiswood, long and frequent absences from his parochial charge; and the parishioners of Calder in 1562 complaining "that they were defrauded divers times of the preaching of the word, since their minister was elected superintendent of Lothian, desired the superintendent to be restored to them again, or some qualified minister to be provided to them. It was answered, the profit of many kirks was to be preferred to the profit of particular," and the excuse is, "which could not be otherways helped in this rarity of the ministry." They renew their complaint in the following year, that Spottiswood, "be reason of his public office and exercise, is abstracted from his cure at the said kirk, the most part of the yeare, desired therefore as before to cause him renounce his superintendentship, and returne to his former vocation, or ellis to demitt the said parsonage, to the effect ane other qualified man might be presented, in consideration that it is impossible that one man may brooke and exerce two offices in the Kirk of God, but one of them must be neglected." [4] Now it sufficiently appears from this, that it did not then occur that another minister could be placed in a parish when the benefice was full, and that the notion had not been conceived of appointing any but a parish minister to a congregation. Spottiswood, it appears, was most anxious to be released of the duty of superintendent, for in this very Assemblie "he requested libertie to return to his former cure, because he was not able to discharge so great a burthen as he was burthened with." But the Assembly, having no one able to supply his place either in the one cure or the other, refused both requests; the only satisfaction the parishioners of Calder having got, was this:—"The Assemblie judged the former answer, 4th Julie 1562, sufficient."

Spottiswood had no great encouragement to continue his laborious duties; as, besides being laborious, they were extremely ill paid; for although a very handsome stipend was assigned to him as superintendent, he complains in 1568 that he had not obtained payment of it "for the three years bypast," [5]—and again his stipend had fallen much in arrear, as he stated in 1580 that he had served on his own expenses for these nine years.[6] When even one of this class and station in the Church, found such difficulty in

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[1] Book of the Kirk, p. 479. [2] Ibid. p. 876 [3] Birrel's Diary, p. 37. [4] Book of the Kirk, p. 42.
[5] Ibid. p. 135. [6] Ibid. p. 464.

obtaining his stipend, it may be seen how ill the provision to the ministers in general would be paid.

But though ill paid as well as small, every minister, exhorter, and reader, had a stipend assigned to him by public authority. The Respondents cannot surely be unacquainted with "The register of ministers, exhorters, and readers, and of their stipends after the period of the Reformation," printed in 1830; and if acquainted with it, we may well wonder at the statement that there was then in the Church a class of ministers not parochial, and solely dependent on the voluntary support of their congregations. It affords much information as to the early state of the Reformed Church. The name of every minister, exhorter, or reader employed in the Church is entered, and the parish or parishes in which he is to minister is set down, with the exact amount of stipend which is to be paid to each, and occasionally the source from which it is to be paid. Thus not only every minister, but every exhorter and reader has a stipend from the State. It is altogether a very important record. Its date is brought down to 1572, and among other things, it shows abundantly the rarity of ministers. Take, for instance, "Tweedaill." There is a minister at Peebles who is to "minister the sacramentis to the haill schyre," his stipend being 200 merks; and the reason of this is, that all the other churches in the district are served by seven exhorters and eight readers, except Eddlestone, where we find a "minister and persoun,"[1] that is, the popish beneficiary who had reformed, and been admitted as minister. His stipend as a reformed minister is set down as the third of this benefice, and of another that was attached to it (of course he was also intitled to the other two-thirds,) "providing alwayis he assist diligentlie in the ministerie, and als caus his kirk, quhar he makes not continuall residence, to be sufficientlie servit, and that he charge the kirk with no farther stipend."

In Galloway there are four ministers, sixteen exhorters, and thirty-six readers.

In Murray there are eight ministers, eighteen exhorters, and twenty-two readers.

In Glasgow there are sixteen ministers, eleven exhorters, and thirty-one readers, showing that even then, twelve years after the Reformed Church was established, the number of ministers was few compared to those who were stationed in parishes to read or exhort, because more qualified ministers could not be found for the wants of the Church. Some of the exhorters and readers are designed also persoun or vicar, showing that, though formerly beneficed, they now serve the Reformed Church in this humbler capacity in their parish, their former Popish orders being entirely disregarded. Several of these also were admitted as ministers; and in the parish of Blantyre, (as he is designed minister and priour,) the prior had reformed, and his stipend is his "owin thryd." Indeed he is one of those who subscribe the Confession 1581, along with the king and his household.

By this time it must appear pretty clearly, that there was no supply of ministers beyond the demands even of the parish kirks as they became vacant, to afford that class of ministers who are supposed to be more numerous than the ministers of parish kirks, and which are said to afford warrant for the Church now erecting new parishes, and admitting other than parochial ministers as members of the Church courts.

Notwithstanding all this, however, it is said that there are eight instances, at this early period of the Church, of the erection of new parishes by the Church; and from this it is argued that the power, though it has been ever since in abeyance, nay, a contrary practice followed for above two centuries, may be revived, and that these instances warrant the recent acts of the Church. In answer to this I might content myself with saying, that in so far as these instances are prior in date to the disclamation by the Church in 1600 of any such power, they can only be regarded as irregular acts, while it was doubtful whether it was lawful or not for the Church to do so; and in so far as they were subsequent to this declaration, that they are usurpations of a power not belonging to the Church. But even if these eight instances could not be otherwise accounted for, I would hold them of little value, occurring as they do during the first half century of the history of the Church of Scotland. At the commencement of the Reformation, in almost every country in Christendom, irregularities occurred from the obvious necessities of the case, greater or less according as the State reformed with the Church, or the people forced its adoption on the State; and the wise and the good, in every future age of the Church, lamenting the divisions which now so sadly mar the beauty and unity of the Church, and seeking to introduce harmony and restore peace among the separated and often hostile Reformed communions, which was the bitter fruit

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[1] Book of the Kirk, p. 42.

of that otherwise most auspicious event, the Reformation, have sought to overlook these early irregularities. That in Scotland, the character of its Reformation produced a larger harvest of such, than have occurred in some other countries, need not be wondered at, as the whole was new-modelled, and it was long before its Presbyterian form was finally established.

I have already noticed it as the opinion of our Reformers, that one policy was not appointed for all ages and places. This was in conformity with the views of many of the continental Reformers, and it is a singular fact that, I rather think, it was Cartwright and the Puritans in England, and Melville and his adherents among us, who first maintained, that from the Scriptures alone the external policy of the Church is to be ascertained, and that that form is the Presbyterian. Now the first form of Church government with us included superintendents, who were appointed when there were but few ministers over whom they could act as overseers, Knox declaring that they were appointed, "that all things in the Church might be carried with order and well;" and in his sermon at the inauguration of Spottiswood as superintendent of Lothian, he preached on the necessity of having such overseers in the Church; and the Church repeatedly pressed for the appointment of more superintendents, which was not yielded by the State, apparently on no other account but because a high stipend must be assigned for them. Thus in the Assembly 1568, certain articles were presented to Regent Murray, one of which was "to advyse with my Lord Regent's Grace and counsell that in the rowmes and countreyes quher no superintendents are, they may be placed." The Church order and discipline could not be carried on, according to Knox's model, without the Synodal Assembly, which the superintendant summoned, and in which he presided, as the intermediate Church court between the kirk-session and the General Assembly; and hitherto, at least, the privy council had granted a warrant for the appointment of the superintendent. Hence the reason of the application to the State to enable the Church to fill up its necessary church officers. The answer of the Regent was, "Forsameikle as superintendents cannot presentlie be appointed, the kirk man appoint commissioners for the selfe-same purpose, as they sall think good to give commission, quhill the next General Assemblie."[1] This advice was accordingly followed; the Church, and the State as represented by the Regent, concurring in this new appointment.

It was now (1568) arranged that in the General Assembly "none have place or power to vote, except superintendents, commissioners appointit for visiting kirks, ministers brocht with them, presentit as abill to reason and having knowledge to judge. With the fornamit sall be joynit commissioners for burghes and shyres, together with commissioners of universities.

"Ministers and commissioners for shyres sall be chosen at the synodal conventioun of the dioces, be consent of the rest of the ministers and gentillmen that sall convene at the said Synodal conventioun. Commissioners for burghes sall be appointit be the (L.) counsall and kirk of their awin townes."[2] These ministers are the parish ministers of the Ordinance 1563, formerly noticed.[3] And I may notice this as an instance, of which there are so many, of the Kirk presuming to prescribe in a matter which did not belong to them, and which was not conceded to them. Always attempting to extend their own powers, they proposed that the commissioner from burghs should be elected by the town-council concurrently with the kirk of the burgh. But in this they did not succeed: their ordinance exceeded what has been termed their legislative powers; it was disregarded and never had effect.

But besides this duty at the synodal convention, which was held twice in the year, in April and October, it was "statute and ordainit be the haill Assemblie, that ministers, exhorters, reidars, or other persons, hereafter trouble or molest not the General Assemblie with sik things as superintendents may and ought decyde at their synodall conventions; and if any chance to doe hereafter in the contrair, their letters sall be rejected."[4]

How little does it appear that this policy was intended to be temporary only, as Calderwood and other historians have stated!

In 1572, bishops were introduced at the instigation of Morton, a measure which Knox and the original Reformers approved of, provided that they exercised no higher jurisdiction than the superintendents, following out their idea that the external policy of the Church, the face which the true and invisible Church was to assume, was a matter for arrangement between the State and the office-bearers in the Church. For in the last letter which the zealous Reformer addressed to the Assembly, shortly before his death,

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[1] Book of the Kirk, p. 128, 9. [2] Ibid. p. 124. [3] See p. 19. [4] Book of the Kirk, p. 131.

he sent certain articles of advice to the Church; the 3d is, "To sute the Regent, That no gift of any bishoprick or other benefice be given to any, contrar to the tenor of the acts made in the time of the first Regent of good memory, * * * and that all bishopricks vacand may be presented, and qualifiet persons nominat thereunto, within a year after the vaiking thereof, according to the order taken in Leith."[1] This measure was expressly assented to by the Church, and the reasons for doing so have been well explained by the historian of the Church.[2]

It is in vain to allege that Knox was against this change, for he actually preached in St Andrews when his old friend and brother reformer, Douglas, was inaugurated Bishop of St Andrews by Wynram; although it is true he did not, as indeed he could not, approve of the share, which the Regent obtained from him, of the revenues of the see. Moreover, we find that in 1574 the General Assembly accused the Regent of undue delay in carrying this measure into effect, for, among certain articles proponed to the Regent for redress, is this one—"Because there are sundry bishopricks vacant, such as Dumblaine, Rosse, and others, that his Grace would take order that some qualified persons be provided thereto with diligence."[3]

Melville had but just arrived in this country, and had not obtained the influence he afterwards acquired, nor had he yet indoctrinated the Church with his Genevan notions as to civil government, and more than Genevan notions as to church policy.

At this time there was no Church court between the kirk-session and the synodal assembly, which met twice each year under the superintendent or commissioner. The clergy, planted in the parishes, had meetings among themselves for mutual instruction called the Exercise, but these meetings were irregular as to time, the members of each not defined, and no jurisdiction assigned to them. King James suggested to the Assembly that regular Church courts should be established in room of the Exercise, to which was given the name of the Presbytery, and to one or other of which every parochial minister and his parish should belong and be subject for discipline. This was first proposed by a letter from the King to the Assembly, 1581. The history of this measure is narrated in the case for the Suspenders;[4] and it is well known that here too the Assembly acted in concurrence with the State, so that even the number of the presbyteries and the churches of which each was to consist, was the joint act of both.[5] In 1581 the Assembly appoint some of their members to confer with commissioners of the King, "that his Hienes may understand their willing concurrence with his Majestie's good intentione in establishing good policie with the Kirk. That the Assemblie praiseth God greatly for his Majestie's zealous and Christian affectione for promoving of good order within his Kirk, with thanks to his Hienes for the labours which had been taken for constitution of Presbyteries, union, and *divisione* of Kirks."[6] An act of the Secret Council, to further this measure, was issued 9th May 1581. Much difficulty occurred in carrying out this plan, from the small number of ministers even yet in the Church; but the first presbytery in the Church was established this year in Edinburgh.[7] Articles were drawn up in 1582 by a committee of the Church, "to be soght at the King's Majestie and his Counsell," and the second of these is—"That the presbyteries, consisting of doctours, pastours, and such as are commonly callit elders, now according to God's word and the King's Majesties's direction, appointit in diverse parts of this realme, for discipline, ordour keeping, and judgement keeping in ecclesiastical affaires, be approvit and establishit be authoritie, and paines prescryvit to them that stubbornly oppones themselves."[8]

The third is—"That the Synodall Assemblies, consisting of diverse presbyteries, and General or Nationall consisting of the haill, be approvit; and be vertue of acts of Counsell presentlie, and Parliament heirafter, have power to conveine," &c.

These Church courts, accordingly, were sanctioned by Parliament in 1592, expressly at the request of the Church. So fully did the Church recognize and seek the support and enactment of the State, in the adoption of its external form of government and formation of its Church courts under every varying form, and so unqualifiedly did she admit that, without this sanction, she had no power to establish these Courts. I may notice in passing, that the Doctors mentioned above must not be confounded with the academical honour of Doctor in Divinity, which was then and long afterwards unknown in the Church, as inconsistent with Presbyterian parity. They were Doctors or Teachers, the

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[1] Book of the Kirk, p. 248. [2] See Cook's History, vol. i. p. 181-186. [3] Book of the Kirk, p. 306.
[4] Case, p. 55. [5] Book of the Kirk, p. 514. [6] Ibid. p. 519. [7] A.D. 1581.
[8] Book of the Kirk, p. 601.

Professors of Divinity in our Universities, who still are members of Presbytery, and may be chosen members of Assembly. The pastors are the parochial clergy of the parishes comprehended within the Presbytery, of whom alone commissioners to the Assembly are, by the act 1563, already referred to, to be composed. This constitution, then, is thus sanctioned by the State.

But still the small number of ministers rendered the formation of Presbyteries difficult, in some places impossible. Hence it is reported to the Assembly 1582, that in Teviotdale, "be reason of the raritie of qualifeit ministers there, a Presbyterie cannot presently be had; and in the mean time, till a better order be tane, the said country to resort to the Synodal Assembly of the Lothians."[1] The same occurs in Merse and Tweeddale, and in other parts of the country.[2] This delayed the settlement of Presbyteries. In the Assembly 1586, the rolls made up by the brethren "of the names of the kirks, as they might be casten into Presbyteries, were delyvered to my Lord Clerk-Register, quhom the Kirk requestit to visite and considder the same, and give his judgement therof;"[3] and those brethren who had any objection to the order, "are ordained to repair to the Clerk-Register, who being satisfied with reason, the order may be established."[4]

And when it is finally adjusted, the roll is entered in the Book of the Kirk, as "presentit be my Lord Clerk of Register, and sett downe be his Lordship's travells, at the requeist of the Kirk."[5]

It was said, at the debate, that these were not all parish kirks, and three were mentioned, the Castle of Edinburgh, St. Catherine's, and the Bass. These do not now exist among the parishes of Scotland, and it may be, because at first they were included by mistake. I do not undertake to account for every proceeding of the Church at that time; but I may notice this, that so much was it the notion of the Church that it was to consist of parish churches alone, that the minutes of the Presbytery of Edinburgh speak of "a paroche kirk within the Castell of Edinburgh,"[6] where, however, there was no separate minister, but John Brand, the minister of Holyroodhouse (Canongate), officiated in it. For his ministrations in the Castle he is allowed forty merks. (See Register of Ministers, Exhorters, and Readers, p. 73).

Thus, the external form of the Church, whether it was founded on superintendents, or bishops, or on presbytery, was the joint operation of the Church and the State. Even the formation of presbyteries was so. The Church held that they could take no step in these arrangements, without the full concurrence and sanction of the State; and I think it follows, as a corollary from this, that no change can now be made on the constitution of these Church courts, without the express agreement and act of the State.

I cannot avoid noticing, in addition to the changes of opinion which took place as to Church government, that through necessity a certain time occurred, before order was put to some matters which might be thought of more importance. It has already been observed, that readers were appointed, because qualified ministers could not be found at first to place in the parish churches. They were appointed to read the common prayers and the Scriptures to the people, but were not in the ministry. In the Assembly 1564, "it was ordained that every minister, exhorter, and reader sall have one of the psalm bookes latelie printed in Edinburgh, and use the order contained therein in prayers, marriage, and ministration of the sacraments."[7] This is the book which usually goes under the name of Knox's Liturgy, and was long used in the Church.

In 1568, superintendents were ordained "to command readers to abstain from all ministrations of the sacraments."[8] Their powers were afterwards enlarged; for, by an ordinance in 1571, readers were allowed "to ministrat the sacrament of baptysme, and mak marriages, after proclamatione of the bannes lauchfullie and orderlie as effeirs."[9] In 1576, again, it was appointed, "that no reader, within the realme, minister the halie sacraments of the Lord, except sick as hes the words of exhortatioun in their mouths;"[10] so that those readers, who were called exhorters, only had the privilege of ministering the sacraments. In 1581, it was resolved, as the office of reader was not an ordinary office in the Kirk of God,[11] "That in no tyme comeing any reidar be admittit to the office of reidar be ony having power within the Kirk,"[12]—those already in office being continued. This was renewed in 1586.[13] In 1597, readers were prohibited from baptising or marrying, the increased number of the clergy removing the necessity of placing

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[1] Book of the Kirk, p. 567. [2] Ibid. p. 588. [3] Ibid. p. 649. [4] Ibid. p. 656. [5] Ibid. p. 688. [6] Jan. 6, 1595-6. [7] Book of the Kirk, p. 54. [8] Ibid. p. 124. [9] Ibid. p. 211. [10] Ibid. p. 372. [11] Ibid. p. 513. [12] Ibid. p. 661. [13] Ibid. p. 927.

these offices in the hands of readers, and "slanders arising from baptising the bairns of excommunicated persons." Such were the fluctuations at this time as to the duty and powers of readers.

It was in this year also (1597) that the General Assembly, at the earnest suit of the King, ordained, that in the ceremony of admission to the ministry, imposition of hands should be used. In the First Book of Discipline it was not required, as it was said, "Albeit the Apostles used the imposition of hands, yet seeing the miracle is ceased, the using of the ceremony we judge not to be necessary." In this respect our Reformers were not singular, although others did not assign the same reason. When it was charged against Beza, in the conference at Poissy, that the Reformed clergy in France were not duly ordained, he replied, that imposition of hands was no necessary note of a lawful call, and they (the Reformers) "could not expect it from bishops who opposed the truth, and persecuted those who preached it."[1] Some of the Reformed Churches in Germany, I believe, do not use it at this day; and even Cranmer, at one time, thought that this might be dispensed with in the Church of England. Melville brought Calvin's views on this subject with him from Geneva, and introduced it as a requisite in the Second Book of Discipline, to be performed as a presbyterial act. It was not, however, till 1597 that the General Assembly "ordaines that there be ane uniformitie in the ordination of the ministrie, throughout the haill countrey, be imposition of hands,"[2] and that they be admitted to certain flocks. It must be attended to, that being prescribed by the Second Book of Discipline did not bind the Church, without this special enactment at the earnest solicitation of the King. A long and curious account of the difficulty with which the celebrated Mr Robert Bruce, one of the ministers of Edinburgh, was induced to submit to the ceremony, and only after a declaration from the Presbytery of Edinburgh (2d May 1598,) that previous to any such ceremony he "was a lawful pastor of the Kirk at Edinburgh, having his calling of the Generall Assembly thereto," is to be found in Calderwood's Manuscript History. The conferences between Bruce and King James, in this matter, are truly characteristic of both.

As might be supposed, under such circumstances, the form and constituent members of the General Assembly, as well as their powers and jurisdiction, remained long unsettled. This is an important subject of enquiry in the present discussion.[3] At first, it would appear,[4] that all attended who chose, as it was necessary, in the then struggling state of the Church, that as many of the nobility and barons as were professors of the Reformed faith should attend the meetings of Assembly, to give countenance and weight to their deliberations. Hence, in the Assembly of 1563, we find a number of peers, members of the Secret Council, barons, superintendents, ministers, and commissioners mentioned.[5] This Assembly is the first where a moderator is elected, and he is appointed "by the Lords of the Secreit Counsell, with the haill brethren of the Assemblie."

The Assembly 1564 send two of their number "to the Lords of the Secreit Counsell, to request their honours to assist the Assemblie with their presence and counsell."[6]

In the Assembly June 1566, we find that there were present "the Privie Counsell, with the superintendents, ministers, and commissioners for townes and particular kirks."[7]

And in the Assembly 1567, were present "erles, lords, barons, superintendents, ministers, and commissioners of townes;"[8] and "they ordained a General Assembly of the haill professors, of all estates and degrees within the kirks of Scotland," to be held on the 20th of July. Those who were present at this important Assembly, so summoned, are to be found mentioned in the Book of the Kirk, consisting of a great number of lords and barons.[9]

An earnest address is made to the Regent and Lords of the Privy Council in 1573, narrating, "that twa godlie Assemblies of the hail General Kirk of this realme sould be ever ilk year, asweill of all members therof in all estates, as of the ministers," and therefore praying that they would attend the Assembly, and authorise it by their presence, "as the most noble of the hiest estate" in former Assemblies, "hes joinit themselves as members of ane body, concurreand, voteand, and authorizand, in all things, their proceeding with their brethir."[10]

In the Assembly 1574 were present earles, lords, bischops, superintendents, commissioners to plant kirks, commissioners of provinces, townes, kirks, universities, and ministers. James, bischop of Glasgow, moderator.

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[1] Contin. of Sleidan, p. 99. [2] Todd's Life of Cranmer, p. 305. Burnet's Reformation, vol. iv. p. 127. [3] Book of the Kirk, p. 925. [4] Petrie, p. 339. [5] Book of the Kirk, p. 38. [6] Ibid. p. 52. [7] Ibid. p. 77. [8] Ibid. p. 93. [9] Ibid. p. 110. [10] Ibid. p. 292.

If it be asked under what authority, elders, as commissioners from the burghs, sat in the Assembly, the answer is easy. The same power which called the Reformed Church into existence authorised this. It was the Lords of the Congregation who protected the first preachers of the Reformation, in their laudable attempt to reform the ancient Church, but which, from the resistance they encountered from the Queen Regent, ended in abolishing and putting it down altogether. It was under their sanction that our Reformers, adopting lay elders and deacons, in imitation of the Swiss Churches, set up churches in one or two principal towns, with these kirk-officers as assessors and supports to the minister, and for discipline. When the State recognised them as the true Church, and sanctioned their Church court, it came to be modelled in accordance with the State, so as to consist of all estates of men within the kingdom, in imitation of the Parliament or Convention of Estates. Thus there were superintendents and parochial clergy for the ecclesiastical estate, and lords and barons; and, to complete the representation of all estates, commissioners of burghs alone were wanting. These, accordingly, were introduced at a time when the early dawnings of a Church, the face which it was to obtain, were cheered in their deliberations by the presence of the Lords of the Secret Council, who, after the death of the Queen Regent, and during the absence of Queen Mary in France, held the sovereign rule in this country, and who, it will always be remembered, were chiefly those who figured as the Lords of the Congregation. It is to be remarked that in the Convention of Estates, 1560, which first recognised the Reformers, we do not find them coming forward as a church already constituted; the Convention proceeds more deliberately, and requires, as the first step towards recognition of them, the exposition of their Confession of Faith. They exhibit it not as held by a constituted, already organized church, but as that which is "professed and believed be the Protestantes within the realme of Scotland, publischeit be them in parliament, and be ye estaites thairof ratifiet and approvit.'[1] The record of this important act, furnishes the Confession with this address, "The estaits of Scotland, with the inhabitantes of the samyn, professing Christ Jesus, his holy evangell, to thair natural countrymen, and to all otheris realmis and nationis professing the samyn Christ Jesus, with thame." Thus the Confession is put forth and published by the Convention of Estates; it is not put forth in name of the Church, or by the Church, for it was not yet recognised; it had as yet assumed no face which the State was called upon to sanction. That, I think, was first done in the following year, when, after the meeting of the Protestants in December 1560, the Lords of the Privy Council issued their warrant for the election and inauguration, expressly by name, of Spottiswoode, Wynram, Erskine, Willock, and Carsewell,[2] as superintendents; naming, too, the dioceses, as they were called, which each was to superintend, thus sanctioning and carrying into effect the plan of church officers, proposed at the first recognised meeting of the Reformers, and which Knox and his fellow Reformers by all their acts show was intended to be a permanent office in their new Church, for he preached at the inauguration of Spottiswoode, and tells us himself that he showed not the expediency, but the necessity, of having such high ministers for preserving order and discipline.

It appears, that even so late as 1582, the Assembly desired the King to send commissioners to the Assembly "to sie the proceedings there, and vote in his name."[3] Two commissioners are sent next day, and their commission by the King, which is recorded by the Assembly, bears that they are "to report the matteris proponit and entreatit to us, for our allowance and ratification of the same, as appertaines."[4]

In 1586 the Assembly is held, in presence of the King, in the Chapel Royal at Halyrudhouse, "the King sitting at the end of the table, and the ministers on furmes round about him," and, as when he sent commissioners to represent him, they voted in his name,—so here his Majesty asserts this right in his own person. He voted first for the moderator, "so the votes went after."[5]

In 1597 the King is again present in the Assembly, and the moderator is elected by his authority; and this takes place on subsequent occasions also.[6]

I formerly alluded to a regulation of the Assembly in 1563, whereby superintendents were to warn the shires, towns, and parish kirks, to send their commissioners to the Assembly. These commissioners were chosen at the Synodal Convention "by the consent of the ministers and of the gentlemen that shall conveen at the said Synodal Convention." Nay it appears that the superintendents and commissioners of counties

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[1] Thomson's Acts, vol. ii. p. 526. [2] See evidence of Dr Lee in Patronage Committee.
[3] Book of the Kirk, p. 586. [4] Ibid. p. 588. [5] Ibid. p. 646. [6] Ibid. p. 944.

were held responsible for the attendance of members. The commissioner of Ross in 1580 is "found fault with that he had chosin no comissioneris to the General Assembly. He excused himself be the slackness of the gentlemen of the country, sickness, and occupation of others, and poverty of them that bear charge of the ministrie, wherewith notheless the brethren found fault."[1] At the Assembly at Dundee in 1597, in which the King was present, it was appointed that commissioners should be named by each Presbytery, the superintendent, who had formerly selected them, holding no longer any office in the Church; for it was there enacted, "That in all time coming three of the wisest and gravest of the brethren be directed from every Presbytery to the Assembly, * * * and likewise that one be directed from every Presbytery in name of the barons." Now these brethren were the parochial clergy only. We find no change introduced as to this. Indeed not a vestige of evidence of any other kind of clergy, from whom members could be sent to the General Assembly, is to be found.

This number, so arranged with the State, continued unaltered in the Presbyterian Church till the General Assembly which was authorised to meet in 1694. For the act 1693, c. 22, recommended to the Assembly "to appoint ministers to be sent as commissioners from every presbytery not in equal numbers, which is manifestly unequal where presbyteries are so, but in due proportion to the churches and parishes within every presbytery." Under this sanction, the rule was established which has subsisted down to the present day. Now, it is an unquestioned fact, that in 1693 there was not a single church, in any presbytery, but the parochial churches; and, accordingly, that this is a statutory recommendation to appoint the number of members of Assembly in proportion to these churches, and to none other.

Thus, then, whatever might be the character or privileges of other members of the General Assembly, the clerical commissioners, from the shire first, and afterwards from the presbyteries, were always ministers of parochial benefices, and no other description of members was admitted to sit in the Church courts till these recent innovations of the Assembly which have called for the interposition of this Court.

I have noticed these particulars in the early history of the Church, while, as yet, its external policy and jurisdiction was unsettled, both to show that not a step was taken without the concurrence and authority of the State, and because I do not think that any practice of these times as to these matters, not observed during the subsequent periods of its history, still more if opposed by it, can be considered a safe guide in estimating the just powers and prerogatives of the Church. But truly, when we consider the instances in which it is said the Church courts erected parishes *quoad sacra or spiritualia*, they really are of no weight; on the contrary, they all demonstrate the insufficiency of the power of the Church, and the necessity of the sanction of Parliament, to effect the object of erecting a separate parish, to any effect whatever.

I must again remark, that we do not find, in any document of the time, the idea of the existence of a parish *quoad sacra*. I am not aware that such a thing ever existed in any country in Christendom. The term is the invention of modern times, and our own country has the merit of it. For although the gloss put upon the very precise and important declaration of the General Assembly in 1600, is, that although the Church could not erect a parish to the effect of civil consequences and privileges, she could erect one so far as regarded spiritual consequences, it will be observed that there is not, in the declaration, any thing to this purpose, nor a hint that they could do any thing but approve of what was proposed, and recommend it to Parliament; and, moreover, in not one of the instances, mentioned as erections of parishes *quoad sacra*, does it appear that it is intended to rest on what the Church shall do, or that what the Church shall do in the matter, is not simply preparatory to the application for an act of Parliament, without which the new parish could not be erected to any effect whatever; and I wish it to be distinctly observed, that Parliament, or its Commission, never erect a parish *quoad civilia*, or recognise any thing as having been done by the Church, beyond recommending the erection.

The first mention of a new parish that is on record, is Greenock; and it is important to attend to the circumstances. It appears from the act itself,[2] that the King by charter gave Shaw of Greenock "special facultie and licence to erect and big ane kirk, designe ane manse and yaird thairto * * *, quhairat his haill tennentis sall be haldin to convene, to heir Goddis word, and ressave the sacramentis in all tyme cuming, ordayning

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[1] Book of the Kirk, p. 450.

[2] Act 1592, c. 21; Connell, App. No. 1.

the samyn to be callit the paroche kirk of Grenock;" and exempting him and his tenants "from frequenting thair auld paroche kirk;" undertaking also, *in verbo principis*, not only to provide a stipend to the ministers, "bot als to ratifie and approve the erection of the samyn kirk, haill privileges and liberties grantit thairto, in his Grace next Parliament;" on this narrative, the ratification is made by Parliament confirming the foresaid letters of erection. It appears that Shaw had been encouraged, both by the General Assembly and the Synodal; but the act of Parliament proceeds without reference to any such as an authority.

Two years afterwards, another act of Parliament is passed, providing a stipend for the new parish, separating certain lands from the original parish of Innerkip, the emoluments of which were to appertain "to the parsonage and vicarage of Grenock."[1]

Now in all these proceedings, there is really no interference by the Church. It is assumed and acted upon, that Parliament alone can constitute a new parish, or warrant the erection of a new parish church. No doubt Shaw had received the approbation of the Church, which was very necessary, as without their concurrence no minister could be placed in the new kirk; and in the lack of ministers they might have thought that the services of a qualified minister might be more requisite at some old parish than at this new one; but it is quite clear, that all the parties looked to the authority of Parliament, as the only power which could erect this new parish.

So is the erection of the parish of Cameron by act of Parliament, but without any allusion to any approval by the General Assembly; and the act expressly grants "all liberties, privileges, and commodities, that any other paroche kirks within this realm hes."[2] It is not pretended that either of these stood, a moment, on any other authority than that of Parliament, or ever were intended to do so. These instances, then, are quite against the idea that it was customary to erect churches and parishes *quoad sacra* at that time.

It appears that four new parishes were erected by Parliament in 1606. In none of these is there the slightest allusion to any prior erection by or application to the Church. But it is said that three of these were previously *quoad sacra* parishes. The first of these is North Leith. Prior to the Reformation, the whole regality of Broughton, of which this was a portion, was within the parish of Holyroodhouse. It appears from the records of the Presbytery, that there was a reader placed in that portion of the parish till September 1599, when Mr James Muirhead was admitted as minister of North Leith, the people having built a church at their own expense. How his stipend was provided for, does not appear; but probably from the teinds of the Platt, in terms of the act 1581. It is erected into a parish church in 1606, with all the privileges of one, and dismembered from the parish of Holyroodhouse.[3] I do not know that, prior to this, the minister had a session, though probably he had; neither is it said that, during these six years, he sat in the Church courts, which is the important matter. I can see nothing else than a preparation, in all that is done by the Presbytery and General Assembly, for its erection by Parliament. The circumstance of there having been a reader, accounts for the act of Parliament mentioning that the people had had ministers for twenty years back. The minister had been settled only a few years; and all that can be said is, that some little delay had taken place in completing the erection.

Ferry-Port-on-Craig is just another instance where, a portion of a parish being at a considerable distance from the parish church, the inhabitants wish a new parish to be erected for their accommodation. They apply in the first place for the sanction of the Church courts in 1602, to see whether the Church would allow of a minister being planted there, in the continuing scarcity of qualified men; and then, when the church is built, the minister provided, and a stipend secured to him, an act of Parliament is obtained, not referring to any of these prior communings with the Church.[4]

The third instance is the most important, because it does appear that, prior to the act of Parliament erecting Preston, the minister sat as a member of the General Assembly;[5] it is the only instance that has been given of this, and this is founded on, as a most convincing proof that, in those days, *quoad sacra* ministers sat in Church courts.[6] But it turns out that Preston, before the Reformation, was a separate benefice, a vicarage belonging to Holyrood; the church had been burnt down by Lord Hertford, in his destructive expedition in 1544, and the inhabitants had frequented the church of Tranent

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[1] 1594, c. 43; Connell, App. No. 2. [2] 1592, c. 20; Connell, App. No. 3. [3] 1606, c. 7; Connell, App. No. 4. [4] 1606, c. 30; Connell, App. No. 5. [5] 1606, c. 29; Connell, App. No. 6. [6] Additional App. for Suspenders, 27th June 1842.

without any union of the parishes, but merely till the church should be rebuilt. After the Reformation, accordingly, the inhabitants, desirous to have Mr John Davidson for their minister, (who had founded a school for teaching Latin, Greek, and Hebrew there,) rebuild the church, and Davidson is admitted, 5th January 1595-6, as minister of the parish. The Popish incumbent was at this time alive; but on his death we find—"Presentation to Mr John Davidson, minister at Preston, to the vicarage of the lands and barony of Prestoun and Pannis thereof, vacant by the decease of Alexander Forrester'—27th Dec. 1597.[1] Thus it was not the erection of a new parish, but his appointment as minister to an old one, which entitled Davidson to sit in the General Assembly 1596; and the only conclusion, which can be drawn from the act of Parliament 1606, is, that since the disclamation of the Church in 1600, the parishioners of Preston had wished their rights to stand on a different footing from the mere act of the Church, though reviving an ancient parish—besides, the foundation of the school was also to be ratified and approved, which probably was the occasion of the act. It is quite clear, that the recognition by Parliament was not to give right to the benefice or its fruits, for that was full at the time, and would be secured by a presentation from the Crown, the patron, on the death of the incumbent, as happened accordingly.

It has certainly not been discovered that the erection of Stranraer had been sanctioned by Parliament, but I think it most probable that it was, and that in this respect it forms no exception to the regular mode of erecting a new parish.[2] Notwithstanding it is said, that the lands, proposed by the Synod of Galloway to form the new parish of Stranraer, now constitute to this day the parish of Stranraer, I am inclined to doubt the accuracy of this statement, and would require some better authority for it. In truth, I believe the plan was not carried through at the time, and that the building of the church and the formation of the parish do not at all rest on that authority. The new statistical account of the parish bears, that "the parish consists entirely of the burgh, the buildings of which cover a space of ground extending to about forty acres. In the year 1617 it was erected and created a royal burgh by authority of the Crown, and a portion of the parish of Leswalt, as also Soulseat, now called Inch, were disponed to the burgh."[3] On examining the sasine on the charter 1617,[4] I find that it erects Stranraer, which was formerly a burgh of barony, into a royal burgh, and dispones the superiority of the four-merk lands of Stranraer, and the superiority of the merk land of Marslaire, in the parish of Leswalt, and St John's Croft, extending to six acres in the parish of Soulseat, to the magistrates of the new burgh. As yet, no new parish of Stranraer had been formed, nor even such a preparation made for it as building a church; for the charter further gives "special power to the saids provost, baillies, councillors, and community of the said burgh, present and to come, to build, have, and hold within the said burgh, in all time coming, ane kirk to the honour and service of God, with the paroch allready allocate to the said burgh by the Church and bishops of this our kingdom." This clearly cannot refer to any proceeding in 1600 when bishops did not exist, but must refer to some recent proceedings, Episcopacy having been fully established in 1612—more especially, as it does not appear that the lands, designed by the Synod of Galloway, either now or ever formed the new parish of Stranraer. These would have formed a very respectable parish, extending far beyond the narrow bounds of the burgh. These were "the 20 pound land of the parochin of Inche, lyand towards the coast of Ireland, pertaining to the Lairds of Garthland, Stranrawer, Kirkhill, and Sorbie, with the 29 mark land of the parochin of Salsett, the 5 mark land of Auchterlure, and 5 mark land of Stranrawer."[5] Clearly this was not carried into effect. Neither is it certain that the erection of this parish rests on this royal charter alone, and the practice which has followed upon it, because it appears that, in 1633, an application was made to Parliament for a ratification of this charter; and a remit is made to the Secret Council, with Parliamentary powers, to consider the application, and to award accordingly.[6] The burgh still retains its privileges. We may, therefore, presume that this charter was confirmed, and that thus was obtained a Parliamentary sanction, as well for the burgh, as for the parish and the church of Stranraer.

The erection of the parish of Carmylie[7] was evidently held to be ineffectual without the act of the State. Parliament ratifies and approves the erection, conform to the acts of the Kirk, and of new erects the said church into a parish church. This does not

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[1] Register of Privy Seal. [2] Case for Respondents, p. 43. [3] Statistical Account, No. xxi. p. 95. [4] Registered at Edinburgh, Lib. 48, No. 287. [5] Book of the Kirk, p. 1025. [6] Acts, vol. v. p. 53. [7] 1609, c. 26; Connell, App. No. 26.

bear that the Church courts had proposed to erect it *quoad sacra*. It had been simply an exercise of the power disclaimed in 1600, with that unsteadiness of purpose, and desire of power, the natural characteristics of such a popular Assembly; and the Act of Parliament was interposed to validate an act which was plainly *ultra vires* of the Church, which was the establishment of a new parish with all the privileges of a parish. In truth, any division of these privileges was then unknown: there was no separation between the civil and ecclesiastical interests of a parish, so that the one could exist without the other. Christendom cannot show an example of this. So that, when Parliament of new erected the parish, it just did what the act of the Church professed to do, but could not do.

The case of Denny, erected by Parliament,[1] turns out to be just such a case as Preston. It was originally a separate parish, and the patronage of it appears as of a separate benefice, in the titles of the Linlithgow family.[2] It had been joined to Falkirk, probably in consequence of the great rarity of ministers after the Reformation, without any formal union; but soon after 1600, the inhabitants having provided funds for a minister, a minister had been planted in the old kirk and parish of Denny. For it will be observed, that the Act of Parliament says nothing about the parishioners having built a kirk. His appearance as a member of synod, then, is quite regular; he had the same right that every other minister, planted in a parish kirk, had, to be a member of the Church courts—so this affords no instance of a minister, not a parochial minister, enjoying the privileges and performing the duties of one.

This disposes of all the instances supposed to be erections of parishes *quoad sacra*. As already observed, Parliament never erects a parish *quoad civilia*, which would be recognizing what had been done by the Church courts: so it is important to notice, that the Church courts never professed to erect a parish *quoad sacra*. Whatever they do, and whether we hold that they meant their act to stand by itself, or to be a recommendation merely for the recognition of the State, as the only authority which could confer the rights, and privilege, and status of a parochial minister, they never, in all their proceedings, use the term *quoad sacra*, although that term was quite familiar, by the annexation of lands, ecclesiastically, to a different parish from that to which it originally belonged.

It seems almost unnecessary to allude to the case of the kirks of Rickartoun and Dundonald, in 1565,[3] where certain of the heritors promised to provide stipends; nor to that of the burgh of Lanark, in 1567, where the magistrates would not give a provision to their minister; neither to the case of James Melville, minister of Anstruther. These indicate nothing but what is very well known, the great difficulty of getting stipends for the Reformed clergy at the commencement of the Church; and the latter further shows the great rarity of ministers, as even in 1568, Melville was obliged to undertake the pastoral duty of no less than four parishes. But all of these were ancient parochial cures—there is no erection of a new parish here; and when he succeeded in getting separate ministers put into three of them, these ministers would take their place in the Church courts, just as the minister of Denny was entitled to do, before the additional sanction acquired by the Act of Parliament 1641.

Now, then, such are all the cases of alleged erections of parishes by the Church, during the first half century of its existence, while it was struggling for establishment, endowment, policy, and jurisdiction; and when these matters, so necessary for the existence of a church, were scarcely settled at the end of this period. But what have we afterwards? The power to erect new parishes had been disclaimed by the Church, and was declared to be in the Parliament: Was this power subsequently conferred upon the Church, or was it even assumed by the Church, and acquiesced in afterwards? On the contrary, as an act properly within the province of the State, it was assumed by the State, and specially provided for. By 1617, c. 3, Parliament grants power to certain commissioners to unite small parishes. By 1621, c. 5, commissioners are empowered to divide large parishes, and erect new kirks, with consent of all having interest By 1633, c. 19, the power of uniting and dividing kirks is granted to another commission.

The conduct of the Church, after the successful overthrow of Episcopacy in 1638, when compared with the claims and pretensions of the General Assembly, as recently set forth and acted upon, presents a most singular contrast, and affords by far the most

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[1] 1641, c. 73. [2] Retour, May 22, 1622. See Additional App. June 27, 1842. [3] Case of Respondents, p. 22.

convincing proof that the claim is new, and an encroachment. The Assembly 1638 had abolished the Episcopal form of Church government, and re-established Presbytery; and the commission for the plantation of kirks fell with the church of whose members it consisted. Presbyterian power was then at its height—the friends of the Church predominated in the Scottish Parliament, and might have obtained their sanction to any thing they asked; yet the Church did not then ask to have the power of erecting new kirks and of dividing parishes. Nay, there was no one to control them if their Church courts had chosen to assume this power, and I do not believe that the assumption would have been resisted. Yet it has never been alleged, that at this period the Church courts erected new parishes. The respondents claim no exercise of such power during the whole period which succeeded the triumph of Presbytery, which has been denominated the Second Reformation in this country. But the instruction to be derived from the proceedings of the Church, at this time, is far greater than the mere negative evidence which their conduct affords; for I think it has not been noticed, that their actings afford positive disclamation of any such power, and an ample acknowledgment that it resides in Parliament alone. The Church, as well as the political community, is liable to periods of excitement. It is incident to human nature when acting in combination, associated together for any important object powerfully affecting their interests; and good is often educed out of seasons of turbulence and confusion. Such was the period of 1638. A new-born zeal urged on the leaders of that great movement, to seek to increase the means of religious instruction for the people; and the plan of building new churches occurred in many places. Now, there was no commission, exercising this power, in existence at this time; and the Church courts did not assume it. They did not attempt to erect a new parish ecclesiastically, as it has been termed in the new nomenclature which has been invented for this novelty, and then leave the parishioners to seek for further confirmation of it by Parliament. On the contrary, application is always made to Parliament, as the sole power which could do any thing towards the formation of a new parish, whether the supplication be at the instance of the heritors, with the previous approbation of the Church courts, or without it, or by the Church itself; for upon examining the proceedings of Parliament 1639, we find supplications in all these different situations presented, and all disposed of on 11th September, 1639, by the Lords of the Articles, by a "remit to the Commission to be appointed for the plantation of kirks."[1] It is instructive to look into these proceedings, which have not been hitherto noticed in this discussion. One of these is, "to disjoin Denny from the church of Falkirk, and to erect the same into a separate parochin." It has already been shown that this was only restoring an ancient parish. Another is, for ratification of the decree by the Commission for the erection of the parish of Anwoth; also one for erecting the church of Elie, and another for the church of Anstruther Easter. The first of these supplications is by the minister: it is not stated by whom the others were presented, and therefore it may be supposed by the heritors of the projected parishes. But the following are expressly by the Church courts, by supplications in their own name. There is an article presented by the Assembly, and a supplication from the minister, craving the parsonage of Meigle to be dissolved from the bishoprick of Dunkeld; also an act, on a reference from the Assembly, desiring the kirk of Carsphairn to be erected into a parish church; a reference from the same, that the lands of Glenlyon be dismembered from a parish, and erected into "ane severall paroch kirk;" a supplication by the provost and bailies of the chanonry of Ross, upon supplication from the Assembly, to be erected into a separate parochin; and finally, a supplication from "the Assemblie, craving the kirk of Ferne to be erected into ane paroch kirk."[2] These are all, as I have already said, disposed of by the Lords of the Articles, by a remit to the commission which was to be appointed. Now, it is very observable that the Assembly does not profess to do any thing towards the erection of a new parish, but supplicate for it. They do not erect it ecclesiastically, and crave to have this confirmed, and its civil rights conferred by Act of Parliament. Both those interested, and the Assembly—and whether the latter has been previously applied to or not—plainly admit that the erection can only be by Parliament. It must never be forgotten, that at this time the idea of having a chapel of ease in a parish had not been adopted. This does not date beyond the middle of the last century. A church could only exist as a parochial church, and with all the privileges of one. These, it was never imagined, could be divided, and that parishes of different kinds could exist over the same territory. And it is clear, that while there was but one

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[1] Acts, vol. v. p. 257. [2] Acts, vol. v. p. 258.

description of parishes known, it was as fully recognized that the right to establish a new one did not fall within the jurisdiction of the Church, but of Parliament alone.

Accordingly, the first commission, empowered by Parliament under the new system of Church government, was by 1641, c. 56. It bears to be issued "on the humble supplication of the General Assembly, presented by the commissioners thereof;" and it gave power "to disjoin too large and spacious kirks, and plant them severally; and to cause build and erect new kirks;" and all that the Church stipulated for, was this proviso, that this should be done "upon the special recommendation of the Presbytery, Synod, or General Assembly, given in writ, and after the commissioners have cited and heard the parishioners of both kirks thereanent, and no otherwise." None of the proceedings of this Commission have been preserved. Similar applications, however, still continue to be made to Parliament, by which Court in 1641 two new parishes are erected, and two others in 1649:[1] the procedure is uniform: the Church courts approve of the erection, and refer the matter with their recommendation to Parliament, and Parliament erects the church and parish. It is not alleged that the Church first erected these parishes *quoad sacra*, and merely sought the sanction of Parliament for their civil privileges. There was no erection, to any effect, by what the Church did.

I beg here to remark, that it is not likely that the Church at this time would neglect to claim the full power in this matter which was thought expedient, or which they had ever exercised; and I cannot help entertaining the opinion, that at no period the Church ever claimed or exercised any higher power, than that of preparing and recommending a new erection, to be effectual only if sanctioned by Parliament, and that it is an entire mistake to suppose otherwise. I found this, on the absence of any evidence of a parish being established with less than all the customary privileges, and on the circumstances under which the declaration in 1600, so often referred to, is made. It was made, it will be recollected, in the Assembly, immediately upon disposing of the supplication of the Synodal of Galloway for building a kirk at Stanraer, and annexing a parish to it, "unto the quhilk erectioun and annexation the heritours and kyndlie tennents of the said lands hes alreadie given thair consent;" and, in the Book of the Kirk, it immediately follows the deliverance upon this supplication, and stands the very next entry to it.[2]

Now, the application as to Stranraer, which is the first of the kind noticed in the records of the Kirk, seems to have suggested the discussion, whether the Church might not of itself authorise a division of a parish, and a new church to be built, and a minister to be placed in it; or whether all that the Church courts could do was, to prepare matters for the State, so that both Church and State should concur in this measure. Hence when the Assembly say they can only declare it "a godly work, and crave that the saim be ratified in Parliament how oft it shall occur," I conceive that this is the best commentary on what they had just done in approving the proceedings as to Stranraer; and that, whether this was afterwards ratified by Parliament or not, the Assembly did not mean to do more than prepare for such ratification, and never intended or expected the erection to stand, to any effect whatever, on the act of the Church courts alone; and I am, therefore, of opinion that this was the utmost ever claimed by the Church in relation to this matter.

It is not alleged that, perhaps with the single exception of Stranraer, there existed at this period a single *quoad sacra* parish, or that the Church had been erecting any. I am the more inclined to the above opinion, when I observe in this same year a supplication by the Presbytery of Meigle as to the union of two parishes, and this deliverance on it—"The Generale Assemblie ratifies and approves the unioun forsaid; and sicklyke ordaynes the brethren appointet to gang to the Conventioun at Perth, to crave the said unioun to be ratified in the said Conventioun."[3] Now, to unite two parishes is certainly a less exercise of power than to erect a new one; yet the Church admitted that this required the authority of the State—that they could only approve of it, which they express by ratifying it, and thus prepare it for Parliamentary ratification.

I may notice here a reported case, which I think has not hitherto been alluded to in this discussion. It would appear that King James had, by a charter, disjoined lands from Coldingham, and erected Eyemouth into a parish church, just as he had done in the case of Borthwick; but it had been omitted to get this erection sanctioned by Parliament, as had been done in that case. Accordingly, a "warning made at Coldingham was sus-

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[1] Kilmarnock, Anstruther Easter, Bo'ness, Easter Kilpatrick. [2] Book of the Kirk, p. 1025.
[3] Ibid. p. 1037. [4] See Connell, App. No. 7.

tained by the Lords, although not made at Haymouth, notwithstanding the kirk of Haymouth was erected by the king to a parish kirk, and the same was planted with a minister, and the word and sacraments had been used divers years before the warning, because no new parish kirk can be erected but by Act of Parliament."—Douglas v. The Parishioners of Haymouth, 14th Feb. 1627; Supp. to Dict. vol. i. p. 232.

This is an important declaration with regard to the power of the State, as being that power which can alone erect a parish church.

The commissions granted by Parliament, subsequent to the Restoration, by 1661, c. 61, and subsequent statutes, did not require the previous approval of the Church courts; and, finally, this power to disjoin too large parishes, and erect new churches, is, by 1707, vested in the Court of Teinds; but there must be the consent of three parts of four of the valuation of the parish, before they can do so.

I noticed formerly that the Commission 1641 was appointed by Parliament at the earnest request of the Church, thus disclaiming all power either to unite small parishes, or to disjoin large ones and erect new parishes. So also was the present Commission. When the discussions preparatory to the Union commenced, the Presbyterian Church, so recently re-established, most naturally was anxious to see that her interests were duly attended to;[1] and, among other matters, it is a special instruction to the Commission in 1704 and 1705, as well as to that in 1706, to apply to Parliament for a Commission for Plantation of Kirks.[2] This is accordingly done, and we have "The Representation and Petition of the Commission of the General Assembly to Parliament," which contains this anxious clause:—"IV. That in case the proposed Union be concluded, the Church will suffer prejudice, unless there be a Commission for Plantation of Kirks and Valuation of Teinds, and making up the Registers of that Court which were burnt, and a Judicatory in Scotland for redressing grievances and judging causes, which formerly were judged by the Privy Council, such as the growth of Popery, and other irregularities, and with which Judicature the Church may correspond anent Fasts and Thanksgivings." Now, what were the powers asserted and acted on by the Church at this time as to plantation of kirks, when they applied for a Commission for this purpose? Clearly none to erect new parishes, either *quoad sacra* or *civilia*, or *quoad omnia*—a distinction totally unknown in the constitutional history of the Church. Their latest interference towards such an erection, apart from the recommendation authorized by 1641, which has been alleged to be in 1602, in the two cases of North Leith and Ferry-Port-on-Craig—both, however, erected by Parliament in 1606. Now, with this long surcease of any such jurisdiction, and, on the contrary, aiding commissions for the purpose for which they had themselves supplicated, their friends in Parliament, on their application, apply for a commission for this purpose; and, in order to have it a genuine Scots commission, uninfluenced by the feelings or opinions of the united legislature, it was resolved, at the first reading of the overture, on 12th February 1707, to remit the plantation of kirks to the Lords of Session;[3] and it was finally passed in that form on the 21st.[4] In deciding how this judicatory for erecting new parishes should be constituted, Defoe mentions,[5]—"Some were for having it vested in the Church itself, and committed to the General Assembly; but it was alleged, that were to make the Church judge in her own cause, and put too much power into the hands of the Assembly; others were for desiring it to be in the hands of the Crown, to grant commission to proper persons, as Parliament did before; but that was objected against, as dangerous to the safety and constitution of the Church; at length it was devolved on the Lords of the Session."

As it cannot be alleged that the Church at that time exercised a conjunct power of erecting parishes to every effect, except that there was no legal claim to a provision out of the teinds, nor to manse and glebe, I presume it will not be pretended that their supplication informed Parliament that they had inherent jurisdiction to this effect, although they had not exercised it for more than a century, during all the changes and revolutions which the Church had undergone in the course of that long period, having also solemnly disclaimed it in 1600. When pressing for a permanent commission, it would have been but fair to mention such a power, if they actually possessed it; and if Parliament had chosen to sanction it, it is very clear that the same consent of the heritors would

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[1] See Acts of Assembly.
[2] Defoe's History of the Union, p. 18.
[3] Thomson's Acts, vol. xi., p. 427.
[4] Ibid. p. 433.
[5] Hist., p. 505.

have been required to the erection by the Church, as to an erection by the Teind Commission.

The practice of the Church, since the Union, till within a few years, shows incontestably their sense of their powers in this matter; for, during all this long period, for two centuries and more, and during all its changes from Episcopacy to Presbyterianism, again to Episcopacy, and finally to Presbyterianism at the Revolution, the Church never attempted to interfere with the right of the commissions of Parliament to erect new parishes—they did not erect a single parish *quoad sacra*—and when the increasing population of the country made it desirable, in some parts of Scotland, to obtain additional church accommodation, chapels of ease were authorized by the General Assembly, on their original footing prior to the Act 1834. Parishes and sessions were not assigned to these chapels, nor were their ministers admitted as members of the Church courts. If the Church had all along the powers which are now claimed for her as inherent in her constitution, how can it be accounted for that chapels of ease were planted instead of new parishes *quoad sacra?* Why was it, also, that when the Parliamentary Highland churches were to be built and endowed by Government, and a district was to be assigned to the minister, in order to lighten the labour of the parish minister within his extensive parish, they were not made new parishes, although it was with the approbation of the General Assembly that this important measure was accomplished, and some of whose most influential members assisted in framing the Act of Parliament, (5 Geo. IV. c. 90,) which it was intended should define and regulate the duties and status of these additional ministers? The Act declared that the district is not disjoined from the parish, nor erected into a separate parish—the minister was not to have a session, nor exercise church discipline, nor be a member of the Church courts. Not being the minister of a parish, he was exactly in the situation in this respect of the minister of a chapel of ease. It was thus the opinion of the Church in 1824, that this should be the position of these ministers. They did not desire Parliament to erect new parishes. I must say, then, that it has always appeared to me a very unwarrantable assumption of power by the General Assembly in 1833, to upset the constitution of these Parliamentary ministers, and to give them parishes and kirk-sessions, and the status of parish ministers in the Church courts, contrary to the express intentions of Parliament, sanctioned as it was by the Church at the time of their establishment; and I hold it to be as much beyond their power as in the case of the chapel ministers, and a direct encroachment upon the privilege of the State, which alone can erect new parishes, as had been admitted by the Church itself, during every phase of its existence, for the long period since the year 1600 down to 1833.

That the Church courts have arranged presbyteries, and sometimes have detached a parish from one presbytery and joined it to another, is perfectly true, but affords no proof whatever of independent jurisdiction in the Church, to the effect now claimed. It is easily accounted for. When presbyteries were introduced at the suggestion of King James, and adopted and arranged by the Church in conjunction with him, the plan could not be immediately carried into effect throughout the country, on account of the numbers of the Reformed clergy, planted in the parishes, being too few to form presbyteries. Thus, the injunctions of the King, as head of the State, could not be immediately complied with, and the General Assembly was obliged to content themselves, with as near an approximation to the agreed upon measure, as the circumstances of the Church then admitted; and the complete order could not be carried into effect till a sufficient number of Reformed clergy were admitted to form presbyteries throughout the land. Hence we find the Assembly making arrangements of presbyteries, and of the parishes to belong to them, such as in the case of Dumbarton in 1597,[1] but only to complete what the situation of the Church did not admit of being done at the time, in compliance with the wishes of the King, at whose suggestion, and by whose instrumentality, the Court of the Presbytery was adopted. And the same occurred after the Revolution settlement, particularly in the country north of the Tay, where the number of Presbyterian clergy were too few to fill up the ancient presbyteries, so many of the Episcopal clergy continuing to officiate in their parishes under the sanction of the Act 1695, although they could not be members of the Church courts without certain compliances, which they declined. There, too, it was necessary for the General Assembly, or the synod, to arrange presbyteries according as Presbyterian clergymen were appointed to vacant parishes. But the exercise of such a power as this, when acquiesced in, goes a small way indeed in sup-

[1] Book of the Kirk, p. 917.

port of the pretensions of the Church as to establishing new parishes and new members of Church courts—thus interfering with the commission of Parliament, to which now, for more than two centuries, the power of erecting new parishes has been exclusively entrusted.

Neither will the appointing second ministers, or even separate parishes for ministers in towns, which has sometimes been exercised by the Church, supposing it legal and not usurpation, justify the much stronger step now taken in advance within the last ten years, contrary to all previous practice. When a second minister was appointed in a town, there was no erection of a new parish, or constitution of a new session, it was merely a colleague provided to the minister in consequence of the labour of the charge. Towns never consisted of more than one parish. The provost of St Giles's was the minister of Edinburgh, and the rector of Glasgow was the minister of the only parish of that city, at the era of the Reformation. When additional clergymen were provided, they had no separate parishes and kirk-sessions, even although they might preach in separate churches. Knox was at first the only minister in Edinburgh; but Craig was soon conjoined with him in this charge; and when Craig wanted further assistance in his duty, he desired, "that John Carnes, who had read prayers and exhorted four years, and is now able to be admitted to the ministrie, might be joined with him as colleague in the kirk of Edinburgh."[1] At the end of the century, there were four ministers in the town, afterwards increased to eight. As yet Edinburgh comprised but a single parish. In 1625, in consequence of a letter from Charles I., the magistrates and town-council formed the town into four parishes, and appointed two ministers to each. This arrangement was ratified by the privy-council. There is no appearance of the Church here.[2]

A second minister for Montrose is authorized by the commissioners of teinds in 1634.[3]

The next case we find, is the appointment of a second minister to the town of Haddington in 1636. It was in consequence of a voluntary agreement between the town and the heritors,[4] who made a joint contribution for the stipend; and it seems to have been carried through, by the authority of the bishop and the presbytery alone. At least there is no trace of it in the records of the teind commission. This has always been a favourite instance referred to in support of the power of the Church. Under other circumstances, it would have been reprobated as an example of prelatic usurpation. Still it was not the erection of a new parish, nor even the building of a second church.

Edinburgh was, in 1641, divided into six parishes, by what authority it is not said. In 1649 it was resolved to have twelve ministers, and this was sanctioned, first by the Committee of Estates, and then by Parliament of that year—but only ten were appointed.[5] In 1656, probably to follow out this enactment, the city was divided into ten parishes by act of council. The arrangement bears to have been made with the approbation of the ten ministers, and each is to have a kirk for his parish; but it does not appear that the presbytery authorized it. It is well known that at this time the General Assembly could not be consulted, as it was not allowed by the Protector to hold its meetings.

In 1646, a second minister was appointed in Cupar by the Church courts, and in Dundee about the same period, but by what authority does not appear.[6]

But in the very next year (1647) the General Assembly recommend to the commissioners to sanction a colleague minister at Ayr. It is true there was an agreement to pay him a stipend from the common good of the burgh, provided the surplus teinds were made over to the magistrates, which the commission authorized.[7]

We are told that "about thirty years after the Union, a practice became prevalent of applying to the court of teinds for the erection of new churches in towns; which applications were always followed by regular decrees of erection."[8] And there cannot be a doubt that this was the regular course, when a new parish was to be erected, and a new member added to the Church courts; for the commission makes no exception as to the erection of town parishes. Accordingly, new parishes are erected in 1736 in Paisley,[9] which the presbytery approve, and recommend the erection to the teind court. The like occurs in Greenock in 1741;[10] the presbytery "most cheerfully concur in the said design, and earnestly recommend the proposal to the teind court." The parish of Gorbals is erected in 1771, and Newtown of Ayr in 1779, by similar procedure. The parish of St Enoch was erected in 1782, upon the express statement, "that the said kirk cannot be properly established, and the minister who shall serve the cure thereat

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[1] Book of the Kirk, p. 81. [2] Connell, p. 84. [3] Ibid. p. 113. [4] Ibid. p. 25.
[5] Report of Municipal Corporation, p. 294; Dec. 5, 1656. [6] Connell, p. 86.
[7] Ibid. p. 115. [8] Ibid. p. 87. [9] Ibid. p. 89. [10] Ibid. 91.

cannot be entitled to the privilege of members of the Church of Scotland, nor can the right of patronage be properly secured unless the authority of the teind court shall be interponed to the proceedings."[1]

I may notice the case of Perth. It had, prior to 1807, two ministers and two churches; but it constituted only a single parish with a single session. It had remained so from the Reformation. In that year it was proposed to add two additional ministers with churches, and to divide the original parish into four. This was approved of by the presbytery; and it was carried into effect by a decree of the teind court, 11th March 1807.[2]

I shall not prosecute this matter further. There may have been some irregularities committed, as is said to be the case particularly in Edinburgh, when increasing the number of burgh ministers and burgh parishes; this matter is amply discussed by Sir John Connell, and in the cases for the parties; but I shall only add, that they did not induce one of the most acute and zealous assertors of the rights of the Church, very deeply read in its constitutional history, to hold that the Church had the power to erect *quoad sacra* parishes. This name seems first to have been devised in 1821. It is stated by this most competent authority, "that down to the present time there is not one example upon record, of the erection of a parish *quoad sacra tantum*, either by the Lords of Plantation of Kirks or by any Presbytery of the Church."[3] Attend to the 6th reason of dissent—"Because the Act of Parliament in 1707, by which the present court for plantation of kirks was established, professes to remedy 'the prejudice which had before redounded to this nation through the want of an established and fixed judicature' for the plantation of kirks and valuation of teinds; and gives to the court, which was by that act created as a fixed and permanent judicature, the power, without limitation or reserve, of transporting kirks, disjoining large parishes, and erecting and building new kirks, under the conditions specified in the act; and it seems to be an irresistible conclusion from the language of that act, that it could not have been in the contemplation of the legislature, that there were to be still existing in the kingdom no less than seventy-eight co-ordinate courts besides, who were to have the power of exercising a large proportion of the same jurisdiction." And also the 9th—"Because there are a variety of civil rights vested in every parish legally constituted, to the exercise of which a parish erected contrary to law might be completely incompetent; and because, in all the circumstances, it was very inexpedient that the presbytery should have assumed a power of erecting a parish, to which so many serious and legal objections can be stated."

This dissent was given in by Sir Henry Moncreiff in support of his motion, "That the presbytery should find it inexpedient and incompetent for them, as a presbytery, to grant the prayer of the petition of the governors of Heriot's Hospital, and recommend it to them, if they shall judge it proper, to apply to the Lords of the commission for the plantation of kirks."

These views must have led this most able man to have resisted the recent pretensions of that portion of the "Church" whom he alike illustrated and controlled; and indeed the measure which has occasioned the present discussion, the admission of dissenting ministers with their congregations into the Church, as parochial ministers and members of the Church courts, seems never to have crossed his imagination. He was as earnest as any man could be, that their separation should cease, and that they should join the Church, from whose doctrine and discipline they had never dissented; but the utmost he contemplated is contained in the following query—"Would it be either degrading or unfriendly to the Established Church, if she were to declare her willingness to receive into her communion, on the same footing as her own chapels of ease, such of the seceding ministers and their congregations as might be willing to return, sustaining their ordinations, and leaving their congregations to provide for them as they do at present?"[4]

A word only on "The Act to regulate the appointment of ministers to churches in Scotland, erected by voluntary contribution."[5] The object was to remove doubts as to the right of patronage in such churches, but not to legalize their parishes, or the right of their ministers to be members of the Church courts. Neither the one matter nor the other is mentioned from beginning to end of the act. It may have been suggested and framed by those who held that the Church courts might erect parishes *quoad spiritualia*; but that is neither its object nor its effect. I trust it was not intended by impli-

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[1] Connell, p. 97.
[2] Ibid., p. 101.
[3] Protest by Sir H. Moncreiff, Nov. 21, 1821; Add. App. for Suspenders.
[4] Account of the Constitution of the Established Church of Scotland, p. 90.
[5] 4 and 5 Will. IV. c. 41.

cation to obtain a recognition of an illegal act. But this point seems to have been saved by an addition made to the original bill; for when first introduced, in describing the Church, the patronage of which was to be regulated, the bill bore, "where any church, &c. built, &c. by voluntary contribution, shall be erected into a parochial church, either as an additional church within a parish, &c., whether the same be established and erected merely *quoad spiritualia*, by the authority of the Church courts of the Established Church of Scotland, or also *quoad temporalia* by authority of the commissioners of teinds," an addition was made, whereby, while the patronage, the right of appointing the minister, was regulated, the question of the legality of these churches, so far as regards their right to the privileges of parochial churches, was expressly saved; for the words "according to the provisions of the existing law,"[1] were inserted in the bill as it now stands; so that if the provisions of the existing law are found not to authorize the erection of parishes and parochial churches, with seats in the Church courts for their ministers, this act, merely to regulate the appointment of the ministers, will not legalize *quoad spiritualia* parishes. They will remain on a footing similar to chapels of ease; but the patronage cannot be claimed by the patron of the *Ecclesia Matrix*. There was obviously no intention to modify or alter the existing law as to the erection of parishes; for there was a clause in the bill, as originally brought in, expressly repealing that part of the Act 1707,[2] which "requires the consent of three parts of four of the valuation of any parish or parishes in Scotland to authorize the Lords of Council and Session, as commissioners of teinds, to divide such parish or parishes, and to erect new parishes, and plant churches thereon," But this clause was omitted, and now forms no part of the act; and, on the contrary, this addition was made—"provided also, that nothing herein contained shall be construed to limit or affect the powers of the Commissioners of Teinds, exercised under and according to the provisions of the Act 1707."

But the Respondents know well that this act implies no legislative recognition of the powers assumed by the Church, otherwise it was unnecessary for them to do more than refer to it, and rest upon it as unanswerable.

Upon the whole, then, I am of opinion that the power of erecting parishes was not claimed by the Church, nor given to it as a branch of its jurisdiction; but that it was considered by the Church to be the province of the State to do so; and, accordingly, that Parliament, or commissioners appointed by Parliament, have for more than two centuries exercised this power with the full approbation of the Church courts, and with their express recommendation generally in each particular instance; and I hold it to be a manifest encroachment on the prerogative of the State, that this power has been assumed by the Church within these last ten years.

I proceed now to the matter of jurisdiction, the right of the Court of Session to consider the question brought before us in this suspension, and to grant the relief craved. This is argued at full length in these papers. I do not feel called upon to consider the general question as to the right of the civil court to control the proceedings of Church courts, for I look upon the point here to be a much narrower one—Whether the right to constitute a new parish, and to make its minister a member of the Church courts, be not vested in the State alone, and whether the Church courts have not encroached upon the exclusive jurisdiction of the State in the power they have so recently assumed of erecting new parishes? This being the case, I shall not be tempted to discuss the question of jurisdiction; but a few observations may be made to show, that if I decline it for the present, it is not because I admit the grounds, on which the respondents rest their claims to independence of all control, in matters which they assume to be ecclesiastical.

The argument urged by them seems to be mainly this:[3]—They admit "that the Sovereign is in Scotland as in England the source of all secular judicial power," that "there was also in this country, as in England, a supreme court of the same extent of authority with that of the *Justiciarius Capitalis* in England, presided over by an officer of the same designation—the Justiciarius, or Justice, or Justice-General, as he was sometimes called, 'who,' (observes Erskine,) 'had an universal supreme jurisdiction over the whole kingdom.'" It is further said, that 'the Queen's Bench in England is the Sovereign's own Court, in which the full and supreme judicial power inherent in the Sovereign was originally exercised; and this Court retains its original and supereminent power, by virtue of which it corrects the excesses of all such tribunals and

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[1] See the clause in Case for Suspenders, p. 77. [2] Journal of the Commons, session 1834, p. 513. [3] Case, p. 70.

jurisdictions exercising any part of that judicial power which flows from the Sovereign. The Court of Session has no such power or character."

The Court of Session, it is further said,[1] was established by express statute, just as the Court of Common Pleas had been established in England "to decide upon all actions civil. This, of course, excludes the power claimed for it, on the analogy of the authority of the Queen's Bench in England, to quash the proceedings of other tribunals in matters not being 'actions civil,' or such as, on the merits, it might by its original constitution have decided."

Now, I believe the respondents are quite mistaken in confining the power of issuing prohibitions against the proceedings of ecclesiastical courts in England to the Queen's Bench. I know that, upon the Reformation, the Church, in Queen Elizabeth's time, wished to have the power of issuing prohibitions restricted to the Court of Chancery,[2] and that such should not be granted by the Common-Law courts, complaining particularly "of being let, in the administration of justice, by prohibitions from the Common Pleas." The same request was renewed in the third year of King James's reign, "That all kinds of prohibitions, being original writs, ought only to issue out of the Chancery, and neither out of the King's Bench or Common Pleas." To this the Judges replied, "that it was that which by law they ought to do, and always had done, and which by oath they were bound to do," and thus no change was made.[3] Indeed I am surprised that the respondents should have maintained that the Court of King's Bench alone exercises the power of issuing prohibitions, when they would have found it otherwise laid down in so accessible a book as Blackstone's Commentaries, where it is said,[4] "A prohibition is a writ issuing properly only out of the Court of King's Bench, being the King's prerogative writ; but, for the furtherance of justice, it may now also be had in some cases out of the Court of Chancery, Common Pleas, or Exchequer." Accordingly, in Hobart's Reports alone, there are many instances, at least twenty, within the period of these reports,[5] where prohibitions have issued to the Spiritual court from the Court of Common Pleas. One of these affords a rather curious illustration of the point in question. A prohibition had been applied for, to the Court of King's Bench, in the case of Searle,[6] a parson who had been convicted of homicide, and it had been refused by the Court, as it is said, inadvertently. In consequence of this, the party again applied for a prohibition, but now presented his application to the Court of Common Pleas, where the case was heard, and a prohibition granted, contrary to the previous judgment in the King's Bench.[7] This is a noted case, and is always referred to as Searle's case. Now, as the power of granting a prohibition against the proceedings of an ecclesiastical court, was not, in England, confined to the King's Bench, the origin assigned to this power, or the ground on which it rests, cannot be correct; and as the respondents place the Court of Common Pleas and Court of Session on the same footing as to jurisdiction, and the first exercises this right in England, it will be difficult to see why the other should not do so also.

The respondents say[8]—"It would rather appear that (in Scotland) the power of keeping all other tribunals in their proper places, and correcting the wrongs committed by them, came early to be vested in the Privy Council;" and they probably think they are safe in making this admission, as they add—"all whose judicial functions ceased, shortly after the Union, without being transferred to any other court." But the respondents forget how much of the jurisdiction of the Privy Council has come to be exercised by the Court of Session: not such matters, certainly, as regard the public administration of the State, but wherever the private rights and the welfare of the subject require the exercise of these powers to be kept up. I do not, for instance, say that this Court would exercise the prerogative which the Privy Council exercised subsequent even to the Revolution settlement of the Presbyterian Church, of calling and of adjourning the meetings of the General Assembly by proclamation. The first Assembly was called by act of Parliament 1690. It met accordingly, and on its dissolution, the Commissioner called a new one to meet on 1st November 1691; but it did not meet that day, having been adjourned by a proclamation dated 26th October 1691. It met on the day to which it had been adjourned, and having disappointed the expectations of King William, it was dissolved on 13th February 1692, against the wishes of the Church. The Commissioner

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[1] Case, p. 71. [2] Strype's Life of Whitgift, vol. ii. p. 540. [3] Coke, 2 Inst., p. 609. See also Hallam, vol. ii. p. 317; and Cardwell's Annals, vol. ii. p. 82. [4] Vol. iii. p. 211.
[5] See Index, *voce* Prohibition to the Ecclesiastical Court. [6] Croke's Reports, p. 430.
[7] Hobart's Report, 288. [8] Case, p. 270.

was asked to appoint a new meeting of the Assembly. This he declined to do; and the Moderator appointed one, for the third Wednesday of August 1693. But no Assembly was held of that date. No notice was taken, either by the Privy Council or the Church, of the Moderator's appointment, and by both it was held utterly nugatory; and a new Assembly was called, by a subsequent proclamation of the Privy Council, to meet on 6th December 1693; but the same authority, on 28th November, adjourned the meeting of the Assembly till 29th March 1694. This meeting was held, and at the close of it, the Commissioner indicted a new meeting on the first Thursday of April 1695; but before that period arrived, the Privy Council adjourned it by proclamation till 11th July, and another adjournment till 20th November took place by the same authority, all issued by special warrant from King William; and yet a further adjournment took place on 7th November to the 17th December, on which day, accordingly, the General Assembly met, and never thought of remonstrating at these frequent adjournments by royal authority.[1]

I previously noticed a Representation of the General Assembly to Parliament at the time of the Union, where they allude to the injury that would arise in consequence of the cessation of the judicature of the Privy Council, "with which the Church might correspond anent Fasts and Thanksgivings." These ecclesiastical acts, it was at that time admitted to be in the province of the State to direct; and it is very apparent, that as to these and other matters, the abolition of the Scottish Privy Council has tended greatly to the silent and gradual enlargement of the Assembly's powers. This Court no longer exists, which thus regulated the meetings of the Assembly, by indicting them and adjourning them at pleasure. The immediate oversight over the proceedings of the Church by this administrative organ of Government, holding its meetings in the same place with the General Assembly, would have checked any undue assumption of power or notion of authority, which has led to the present pretensions of the Church, and their unhappy consequences.

But though the Court of Session may not inherit this power from the Privy Council, there cannot be a doubt that it has power to restrain the Church courts, so as to keep them within their own province. Bankton most distinctly says—"I do not see but redress will be competent, by suspension or reduction, before the Court of Session, or a prohibition may be granted in the way of advocation, inhibiting them to proceed in such matters."[2] And in like manner Erskine, in reference to some of the powers exercised by the Privy Council, observes—"If they were not now transferred to the Court of Session, there would be a defect in our constitution, and many wrongs would be without a remedy;"[3] and he fortifies this opinion by the authority of Lord Kames, who says —"with respect to the wrongs in particular that came under the jurisdiction of the Privy Council, our Legislature, when they annihilated that court, must have intended that its powers should so far devolve on the Court of Session; for the Legislature could not mean to leave, without a remedy, the many wrongs that belonged to the jurisdiction of the Privy Council."[4] It is very true, as these authors say, that there must be in every State a supreme court, with power, as far as possible, to prevent wrong and injustice under colour of law. I do not say that every wrong must have a remedy; because I know that there are wrongs, most palpable wrongs, which may be committed by a Church court where the Civil court can give no redress. Nor do I rest upon this aphorism solely as the foundation of the right to control the Church courts, when they exceed the limits of their own jurisdiction and encroach on the province of the State, or commit excess in their own province. I will not, however, discuss this matter further than to observe, that the respondents are quite mistaken in assuming that this power was enjoyed by the Privy Council alone; for, so far as regards the present discussion at least, it was also exercised by the ordinary Civil courts of the country. It was so by this Court, in the case of Haddington, in 1680,[5] when an interdict was granted against a Presbytery, at a time when the powers of the Scottish Privy Council were in full force: and the interdict, we know, was not contemned, or ever thought to be illegal.

But it is quite unnecessary here, to consider the circumstances which authorise the supreme Civil court of a country, to proceed by a prohibition or interdict against an Ecclesiastical court; which are treated of largely by jurists under the titles *De Imperio Summarum Potestatum circa Sacra*, and *De Recursu ad Principem:* for if I am right

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[1] Constitution of the Church of Scotland, by Alex. Peterkin, 1841, p. 112-124, wher et warrants and proclamations are printed at length from the Records of the Privy Council.
B. iv. tit. 22, § 24. [3] B. i. tit. 3, § 23. [4] On Courts, p. 231. [5] M. p. 9903.

in holding, and have satisfactorily established, that the Church of Scotland is a Parochial Church, that her ministers are ministers of parishes, that the clerical members of her Church courts consist solely of parochial ministers, that no new parishes can be erected by the Church, but that these can only be erected by Parliament, or commissioners authorized by Parliament, then there cannot be a doubt that the Presbytery of Irvine, in proposing to do what is complained of by the suspenders, were interfering with the privilege of the State, and assuming a power which the Church never claimed or exercised till 1834. And if the Church courts encroach on the powers or prerogatives of the State, the State must be entitled to prevent this and vindicate its authority. This is a fundamental principle, without which there could be no good government. In an absolute monarchy, the resistance to such illegal encroachments is by appeal to the civil magistrate himself, and redress will thus be obtained; in a limited monarchy, the legislative, the judicial, and the executive functions of government are separate and distinct; but each respectively, in its own department, has the power of the State devolved on it, and exercises that power in name of, and in virtue of, the prerogative of the State. The State conveys to its Supreme Court of Justice all its judicial power; the Court acts in its stead: and the same right, to interpret the proceedings of the legislature and to enforce them, in order to adjudicate on the rights of the community, must belong to the courts of justice, which would be in the State, if it had not devolved this duty upon them. Therefore it is nothing, to say that the Court of Session is not the State: it represents the State in its judicial character, and possesses its judicial functions. The Supreme court of the State, then, must have jurisdiction to restrain the Church court from stepping beyond the limits of its jurisdiction, and coming into the undoubted and admitted province of the State, and must be entitled to declare the proposed act illegal, and interdict them from doing it. This seems to be unquestionable. Now, the Church courts have attempted to exercise a power only competent to Parliament, and they try to legalize their proceeding by a mere evasion: because they do not give right to stipend, manse, and glebe, but confer every other prerogative and privilege competent to a parochial minister, as pastor of a parish and member of the Church courts, they think they escape from the disclamation of their predecessors in 1600, which has been acted upon in every subsequent period of the Church till the recent movement. But I think the modern invention, of calling it a parish *quoad sacra*, will not warrant this assumption of power, and enable them to avoid the effect of the uniform course of law and practice, which secures to the State, and not to the Church, the power of erecting new parishes. When the State adopted the Reformed Church, and finally sanctioned its Church courts, and required the subjects of the State to conform to the new church established in the land, to resort to its ministers, and to yield obedience to the decrees of its courts, the clerical members of these courts were parochial ministers only, ministers of the ancient parishes, or of parishes subsequently, duly and constitutionally erected. I think I have shown that such was the constitution of the Church courts, agreed to by the State in concert with the Church. Now a parish is a civil as well as an ecclesiastical division of the country, and as much for civil as ecclesiastical purposes; and it is unknown in practice, and inconsistent in theory, and would be highly inexpedient, to divide the one set of purposes from the other. A parish can only exist to all effects whatever: at least so it has always been in this country. It cannot be said to be an ecclesiastical act, and that it requires a Church court to erect a new parish. The Church of Scotland has always disclaimed this, and till of late has acted upon this notion; and the attempt now made by the present rulers of the Church, to create parishes *quoad sacra tantum*, seems to be utterly illegal, obviously intended to effect the object without being trammelled by the opinions of their predecessors, or the appearance of interfering with the prerogative of the State. This exercise of power, then, which is quite a novelty, the State cannot be bound to recognize, and the Courts of the State are bound to pronounce it an encroachment on the rights of the State and its legislature, unless Parliament shall agree to yield up this jurisdiction and confer it on presbyteries.

In making such a declaration, this Court has a very different duty to discharge, and exercises very different powers from what it was called upon to do in some of the previous cases, where its remedial powers, by way of interdict, have been called for; and whatever difficulty there may be supposed to exist in some of these, it must be quite obvious that the present case is entirely free of any such. If once it be ascertained that the Church never claimed the right to erect new parishes, but on the contrary disclaimed it, and distinctly admitted that the power resided in Parliament alone, and concurred in recommending such erections to be completed by Parliament, never contemplating the possibility of establishing a parish, of its own authority, to any effect whatever, then, to

declare this to be the constitutional law of the country, and to prevent the Church from assuming such a power, never heard of till the nineteenth century, must be the duty of the Court, in order to retain this power to the State, and to prevent any encroachment on it; and when the Court does so, there cannot be a pretence for saying that there is any interference with any spiritual function of the Church, or a commanding or forbidding the exercise of any of its spiritual functions.

I am therefore of opinion, that the interdict, formerly granted in this case, should be declared perpetual.

LORD JUSTICE-CLERK.—I concur generally in the results of Lord Medwyn's opinion; and I have to add, that I find the grounds of my opinion comprised in the reasons of dissent, by the late Rev. Sir Henry Moncreiff Wellwood, against a proceeding proposed in the Presbytery of Edinburgh, very similar to that complained of in this suspension. These reasons of dissent contain propositions which appear to me to be a sound and constitutional exposition of the law upon the subject—admirably expressed, and recommended as the deliberate opinion, upon a question as to the powers of the Church, of one who was at once a most sincere and firm supporter of Presbytery, an eminent divine, and a man of enlarged mind and pre-eminent talent.

I think it necessary to add to my general concurrence in the opinion of Lord Medwyn, a statement of what was actually done in this case by the Presbytery, and of the effect of what was so done—some remarks on the remedy prayed for—and on the nature and extent of the plea maintained by the respondents, on the powers and jurisdiction of the Church. On these points, however, I propose only to give a summary of the views I entertain—for, any exposition of the grounds of my opinion, would be too great an encroachment on the time of the consulting Judges.

The latter question, viz. respecting the powers of the Church, must, however, be viewed, as now stated for the consideration of the Court, in a very different light from that in which it was presented in the case for the respondents.

The leading counsel for the respondents, in his argument at the bar, *expressly disclaimed* the notion that the jurisdiction, claimed by the Church, *could rest on any other foundation than on the statute law of the land*, and while he also contended that the Court could not interpret or enforce these statutes to the effect of controling the Church in any assumption of power, or of redressing any wrong committed by the Church in violation and perversion of these statutes, yet he anxiously declared that he rested the powers contended for, solely on the authority of the acts of the legislature in reference to the Church. This, after full consideration, was the ground of argument stated at the hearing before the whole Court. On this view, then, alone of the subject, I understand that we were ultimately desired to consider the case. And it is material that the ground, on which the case of the respondents was ultimately in the final argument made to rest, should be distinctly understood.

This view of the subject—the only one to which a court of law can listen—reduces the question on the merits to a very simple point; and, as I conceive, makes the question of jurisdiction to depend wholly on the decision of the other point respecting the interpretation of the statutes which are said to confer the power claimed on the Church. For the latter part of the plea, that although the power is claimed in virtue of statute alone, yet whatever violation of statute may be committed, whatever civil wrong done, whatever may be the usurpation of power, to the extent even of vesting with a *munus publicum* and a seat in courts which may decide matters of civil right, persons whom the statute law of the land does not recognize as holding such office—in short, that however extravagant and dangerous the assumption of power, and however fundamental the changes made in the constitution of the Church, still the Supreme Court cannot declare the illegality and prevent the wrong, is a proposition to which assent cannot, on legal principles, even be seriously claimed.

The foundation on which the powers of the Church were in argument rested, is, further, the only view of the subject consistent with historical truth. The Church of Scotland derives nothing from the church which preceded it. It has no origin as an establishment but statute. It is wholly, as an establishment, the creation of statute. And hence Mr Erskine, (as zealous a Presbyterian as a sound lawyer,) in speaking even of the *spiritual* authority which it may exercise in condemning heretical opinions, or for the government and discipline of the Church, emphatically adds—"provided their resolutions be consistent with the *laws of the realm, from* WHICH *our national Church derives its* WHOLE *authority.*"

In this great principle—fortunately acted upon and carried out most consistently,

cautiously, and firmly at the Reformation in Scotland—is to be found the only safeguard against the tendency of every ecclesiastical establishment to usurp power. And galling as the restraint may be to many, such is nevertheless the condition on which alone the establishment in Scotland was instituted.

Like every other body instituted by statute with powers and privileges, the Establishment is, in my opinion, subject to the decisions of the Courts appointed to interpret and enforce the laws. Accordingly, there is not one expression, in any one statute, which implies any exemption of the Church courts from the jurisdiction of the Supreme Tribunal of the country, *in the event of wrong being done by excess of power, or of duty being violated.* Neither is there any one expression which vests in the Church any legislative authority whatever, by which any changes can be made in discipline, government, doctrine, or constitution, or by which any alterations whatever can be introduced, different from the nature and elements of the Establishment as originally erected, and as it is known to the Courts of Law.

On the question of jurisdiction pleaded in this case, I hold the judgments in the Auchterarder case to be authorities *à fortiori* to the present question.

If the Church has received no authority from the Legislature to erect parishes *quoad sacra*, I hold that the principles of these judgments determine conclusively that the wrong may be repressed in the Supreme Court.

But in every case I hold it to be clear that the question may be tried in a court of law—whether the exercise of spiritual authority in any matter wholly ecclesiastical is in the *particular case competent and legal*—for the spiritual authority of an Establishment cannot exist *in law*, except in so far as the Legislature has allowed or sanctioned that authority. The Establishment, without the particular authority which may be claimed for it, may be very defective and imperfect, if viewed as a branch of the Church of Christ. But it does not follow that it *has* received the authority which it claims, merely because it *may be thought* that it *ought* to possess such authority: Nor does it follow that the *authority given* may not have been *incompetently and illegally exercised* in the *particular* case. But still more in such a question as the erection of a parish—the institution of a new office of parish minister, and of a new kirk-session, to possess all the powers generally of minister and session, sitting in presbyteries, deciding on matters of civil right, and exercising ecclesiastical discipline and jurisdiction over the lieges; it does seem to be utterly extravagant to contend that if wrong is done, and power illegally usurped and exercised, there is exemption in favour of the Church courts from the authority and jurisdiction of the Supreme Tribunal of the country, so that such wrong shall not be prevented, nor such abuse repressed.

I must add that in some expressions in Lord Medwyn's opinion, which appear to admit of the possibility of a proper *conflict* of jurisdiction between the Church courts and the supreme court of law, I cannot concur. I allude to these expressions, not because I suppose that there is any real practical difference on the subject, but in consequence of the risk of misconception as to the inferences which may be drawn from these expressions, and in order to state my own opinion distinctly on the subject.

I cannot admit that an establishment, instituted by statute, can claim or legally possess any authority from a divine source, which the State, constituting the establishment, may not have thought fit to acknowledge as belonging to it. And, of course, I cannot admit that an establishment can ever possess an independent jurisdiction, which can give rise to a conflict as between two separate and independent jurisdictions. The establishment being instituted by the State, the competency of *all* its acts must be subject to the determination of the supreme court of law. If it were admitted to possess any power as an establishment not sanctioned by the provisions of the state, and so to possess from a separate source jurisdiction, producing a proper conflict of authority, then it would follow that the Church must be entitled to determine for itself the extent of that authority, and hence no one act which the Church chose to ascribe to that authority could be inquired into in a court of law. What powers a Church *ought* to possess as "a Branch of the Holy Church Universal" in spiritual matters, and what powers in spiritual matters the state has *chosen to acknowledge* as residing in the Established Church, are two very distinct questions. On the former view, if it is to be admitted as entering into consideration in the question as to the powers of Church courts, I do not see how there can ever be any establishment which is not wholly and in all respects independent of the State—whose powers may not vary and expand according to the views which its clergy may, at the time, take of the powers which it *ought* to possess—and whose acts in all matters which they say are spiritual, are not to be exempted from the tribunals of the country. Who could decide, but the Church, what powers an esta-

blishment derives from a Divine commission, if statute is not the measure of its claim? Mankind would ever be divided on that, the most fruitful source of interminable controversy. It necessarily follows that the Church alone is fitted to decide such a question, if it is admitted constitutionally to arise. But I cannot understand how a body, instituted by statute, can be entitled itself to judge of the extent of the authority committed or conceded to it by statute, and itself to interpret and define the meaning of such statutes. Such a proposition appears to me to be an absurdity, whether as a point of law or of common sense.

A State may have committed great error in denying to an Established Church authority and powers, which sounder views of such matters (in so far as Scripture gives any directions as to church polity) might teach us to hold must reside in a church. Be it so. Let the legislature alter the foundations of the establishment, and correct the evil. But till that is done, the only question is, to what extent did the legislature acknowledge, when instituting the Church establishment, that it possessed power and authority in matters called ecclesiastical or spiritual, and what matters did the legislature admit to be of that character. The extent of the powers and authority of a body established by law, must be the subject of enquiry in the courts of the country in which it is instituted. As to many points, the very name and character of a church, may imply the clearest acknowledgment of its authority and exclusive jurisdiction. But still, even in such matters, the authority is *admitted only as the result of the statutes* instituting the church; and these statutes may fall very far short of the notions which another age, or a portion of the community, may form, as to the government of the church. For instance, the Second Book of Discipline framed a scheme of ecclesiastical policy, and of spiritual authority, which was specially based on the divine commission to the Church, and was declared to flow from that source. On that footing the Church wished its authority as an establishment to be admitted. As the foundation of the powers of an establishment, the Scotch legislature saw the impossibility of sanctioning such a doctrine which is incompatible with any limits to the power of the church. Hence that doctrine was rejected: Those portions of the Second Book of Discipline were specially left out in transferring other parts of it, into the statute 1592. And then the legislature further specified what the matters were, in which the establishment was to have authority and jurisdiction, in terms most cautiously and carefully framed, so as to exclude the pretension to unlimited power in what might be said, at any time, to be spiritual matters. Hence, by making even the authority in spiritual matters the subject of direct legislative enactment, it follows,—1. That the extent of the powers of the Church is a question on statute for the Civil court; and 2d, That conflict of authority there can be none.

It is very instructive, in reference to this subject, to notice the marked distinction observed in the acts of the Scottish legislature between the mode of dealing with the duties and functions of individual ministers in their respective parishes, and with the powers and functions of Church courts. In the earlier statutes, in order "that the word of God shall be preached, and sacraments administrate in puritie and sincerite," provision was made for having ministers in each parish, but very little, if any, attempt was made minutely to describe the duties incumbent on them, beyond giving them authority, and charging them with duty in general terms. But even as to the primary duties of the ministry, the Scotch Parliament, in instituting the establishment, justly held that the authority for administering ordinances as a public institution and as a provision to be made by the State for that purpose, must be sanctioned and granted by the State. And hence, in 1579, in the well-known statute "Anent the Jurisdiction of the Kirk," (Thomson's Acts, vol. iii., 137,) the statute bears, "Our Soverane Lord, with advise of the thrie estaites of this present Parliament, has declarit and grantit jurisdiction to the Kirk, whilk consistes and standis in the preaching of the trew word of Jesus Christ, correctioun of maneris, and administratioun of the Haly Sacramentis." Then it declares that there is to be "no other jurisdiction ecclesiastical" in the realm, "concerning the premises;" and at the close it appoints a commission "to search furth more specialie, and to consider what uther speciall pointis or clauses should appertene to the jurisdiction, privilege, and auctoritie of the said Kirk, and to report their declaratioun thereanent to our Soverane Lord and the thrie estaites of this Parliament, so that they may take ordour thairintill, and authorise the samyne be act of Parliament, as sal be found aggreable to the Word of God." The remark of M'Kenzie on this statute proceeds on the omission of the word "grants," he reading the statute as if it were "declares" only. But whether the one word means more than the other, of which I conceive there can be no doubt, still Parliament describes, specifies, sanctions, and authorizes the

jurisdiction, even as to the great primary duties of the ministry. And the latter part of the statute, in connexion with the first, appears to me to exhibit the plan and principle of the scheme in a very striking manner, and most unequivocally and emphatically to stamp the whole establishment with statutory origin, and to trace and derive all its jurisdiction from the enactments and decisions of the State. Still, in regard to the great and primary duties of the ministry—that is, the functions of the parochial ministers within their parishes—the legislature had no jealousy, and therefore interfered less.

But as soon as a scheme of ecclesiastical polity was to be instituted—as soon as Church courts were to be established, and to be recognized as tribunals having a certain authority and jurisdiction, the legislature instantly and most anxiously began to define, specify, and restrain—specifying the exact duties and purposes of each Church court, the powers which they were to receive, and the functions they were to perform—specifying in order to sanction, and defining in order to restrain. The great object of the scheme was—not the establishment of a great ecclesiastical polity—but to secure the faithful performance of pastoral duties by each minister within his parish, and with that the legislature did not much interfere. The institution of Church courts for discipline, opened up the perilous matter of ecclesiastical power and spiritual authority, and then the legislature saw the necessity — duly warned, too, by the pretensions already advanced of that necessity—of declaring exactly the functions, for which they admitted of such Church courts, and of defining carefully the functions and authority with which they were to be entrusted. The language of the legislature became at once more peremptory, and the definition of functions more pointed and precise (see 1592)—the terms employed denote the limit of the authority given, as well as the object and duty for which it is given—and in the very manner in which the matters "to be intreated of" by the Church courts are specified and defined, the restraints of the law are more distinctly assigned. A perusal of the statutes from 1567 to 1592, as well as at the Revolution, must impress the mind very powerfully with the marked distinction acted upon with such wisdom in the institution of the Scotch establishment, whenever the legislature approached the subject of the authority and power of Church courts. One must read and reflect much on such subjects, in order to take a full and connected view of the proceedings of that period, and the more one studies the subject, the less will he be inclined to infer unlimited authority from casual terms.

What are precisely the matters so committed to the Church courts, and whether particular acts are within their competency, may at times be difficult, or rather important questions; but these are all questions on the statutes, and are quite separate from the general question, as to the jurisdiction and duty of the Supreme Court of Law to interpret and enforce the statutes of the land. Yet are these two matters constantly confounded together; and the understanding of the Church, as to its powers under the statutes instituting the Establishment, is referred to, as bearing on the alleged exclusion of the courts of law from the function of interpreting these statutes. But all questions, as to the powers of the Church courts, are questions on the meaning and interpretation of the statutes establishing these courts, or assigning to them certain functions and duties—proper questions of law; and when determined by the Supreme Court, if the decision is adverse to the power claimed, there remains no authority whatever in the Church court in regard to the matter, to the extent of such decision. Authority from any divine source, to be referred to in support of the pretensions and claims of an establishment, against the interpretation of statutes by the court appointed to decide all such questions, cannot be admitted without utter disorder, and is wholly inconsistent with the principle of an established religion—which is, that the State may adopt, sanction, and institute exactly what it chooses, on every point connected with the establishment, to the exclusion of all other powers and claims.

To admit the possibility of a conflict of jurisdictions, admits that there resides in the Church, as an establishment, a separate authority which acts of Parliament cannot limit or restrain, and consistently would lead to the entire independence of Church courts in all matters assumed by them to be included within the scope and ends of that authority, as understood and explained by themselves. If such authority can be pleaded *against* the decision of the Court, it might as justly be applied *against* the authority of the legislature, and *against* the competency of the State either to define or declare the powers of the Church when once established, or to restrain any exercise of power which the Church may ascribe to its divine commission.

The sound view on this subject was well stated by Lord Brougham in a remark, very strangely misunderstood at the time, when he said, at the close of the argument on the Auchterarder case, that a conflict of authority never could in such questions arise. A

conflict can only arise when it is *admitted by the State* that the Church courts *have an authority and jurisdiction* in itself *beyond control,* and which, *not being derived from the state,* cannot be subjected to the control of the judgments of the Courts appointed to enforce the laws made by the State. If such authority is not declared and admitted at the institution of the establishment, then there can be no *conflict.* Resistance to the law there may be—usurpation and illegal abuse there may be—but conflict there can be none. The decision of the supreme court terminates and excludes the notion of a conflict, unless an independent and divine source of power in an establishment is admitted against the state which instituted it. If that is not admitted, then, after final judgment, there may be, on the part of those who remain for their own benefit in the establishment, but will not conform to the restraints imposed on it, flagrant disobedience of the law, there may be open resistance to and defiance of the law; but there cannot be a conflict of jurisdictions.

1. The complainers in this case are—1st, The Patron; and 2dly, The proprietors of about three-fourths of the landward part of the parish.[1]

2. The parish has hitherto had one parish church, one parochial minister, and one kirk-session.[2]

3. A petition having been presented from the clergyman and managers of a Seceding congregation in Stewarton,[3] praying to be received into the union of the Church of Scotland, the following procedure took place on the same day:—The Presbytery of Irvine "received and admitted" the applicants "to the status and privilege of a minister and elders of the Church of Scotland respectively." The clergyman's "name was added to the Roll of the Presbytery, and he (Mr Clelland) took his seat accordingly." This was done without more enquiry, except Mr Clelland signing the Confession of Faith.

4. This procedure, if competent, professed to confer at once, upon the minister of this chapel, the office, rights, and functions of a parochial minister of the Church of Scotland —qualified to perform all the duties and to exercise all the powers of such—sitting in Church courts—exercising office in the Establishment, and performing all the acts competent to and required of members of Presbytery by statutes.

5. At this period, Mr Clelland had no parish or district to which he was annexed—no cure of souls—no benefice—no foundation on which he could sit in Presbytery as a parochial minister, and was not connected with any one part of the Presbytery, or with any one distinct district, more than with another. It turned out that even the fabric of the church, where his congregation met, belonged to others who still seceded, and was carried off from these applicants. It is not immaterial to add, that he was not required to take the oaths to her Majesty, and no provision seems to be intended by—none is contained in—the church arrangements for that *test* to Seceders.

6. This was done without any notice whatever to the patron or any of the heritors of the parish of Stewarton.

7. Two months *afterwards,* the Presbytery appointed a committee "to perambulate the bounds of a district *to be annexed to the said church;*" which church, the committee, when they met, were informed was claimed by the Seceding congregation. The committee were further informed, that *the minister of the parish opposed* any portion of the landward part of the parish being included in this district.

8. The matter having again come before the Presbytery, the patron and heritors then appeared to oppose the disjunction of the parish, and the Presbytery divided on a motion to proceed or to refer to the General Assembly. At this meeting of Presbytery, Mr Clelland, having neither church nor parish, voted as a member of Presbytery, presided as moderator of the Presbytery, and took an appeal to the Synod against even the delay of referring the matter to the General Assembly; and *upon his appeal* the Synod ordered the Presbytery to proceed in the disjunction of the parish.

9. The Presbytery proceeded by a resolution in direct violation of an interdict of the Court, in which act of the Presbytery Mr Clelland again voted.

10. The Presbytery, on 10th December 1840, for the first time, proceeded to attach a district to the minister and kirk-session (constituted on the 6th August 1839) by the following procedure:—"That in obedience to the Supreme Judicatories of the Church, to whom the Presbytery consider themselves bound to yield obedience in all spiritual matters, and also with the view of promoting, by increasing the amount of pastoral superintendence, the spiritual interests and the eternal welfare of the large population of Stewarton, the Presbytery *appoint the minister and kirk-session of the new church in*

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[1] See Record 1, and Answers. [2] Record 2, and Answers. [3] August 6, 1839.

Stewarton *to take care of the souls* and *to exercise spiritual jurisdiction over the persons inhabiting the district* comprehended within the following boundaries, viz. Stewarton Water, from Kirkford Bridge to the foot of Clarkland Burn, thence up the Clarkland Burn to the point where it is crossed by Crosshill road, thence along the road leading into the Dunlop and Stewarton road near Costlike, thence along the Dunlop and Stewarton road to the Cross of Stewarton, and thence to the Kirkford Bridge. That as the Presbytery cannot understand the interdict now served upon them to be intended to prevent them from doing any purely spiritual act, or to encroach at all on the spiritual discipline and government of the Church of Scotland, as by law established, and secured by the treaty of Union, but to refer entirely to the civil rights of the parties applying for the same, they declare and provide, as it is hereby expressly declared and provided, that no civil rights of these parties, or of any others whatever, shall be in any degree affected by the foresaid allocation; and they further declare, that the effect of this allocation is limited exclusively to matters of spiritual discipline and government; as also, that heritors and their tenants in that part of the parish of Stewarton thus set apart as a territorial district to the new church, having legal right to sittings in the original church, may, in their option, continue members of the congregation thereof."

Against these proceedings the minister of the parish, among others, objected.

Finally, The appearance made in this action opposing the suspension and interdict, as for the Presbytery of Irvine, and also the proceedings complained of, were carried by the votes of five persons, two of whom are ministers of *quoad sacra* parishes, and three of whom are elders of such parishes, while the majority of the regular parochial ministers disclaim these proceedings and the opposition which the heritors now encounter.

On the character and effect of the proceedings complained of, I have to observe—

1. That the supposed authority of these proceedings is said to be found in certain acts of Assembly of 31st May 1831, 29th May 1837, and 25th May 1839. The proceeding is not defended or maintained to be competent as an act of the Presbytery alone, but only in reference to these enactments of the General Assembly, which are printed at p. 96 in the appendix to the Case of the complainers. To these enactments the direction by the Commission of the Assembly, in August 1840, expressly refers. By these enactments it is declared, that parties, admitted as Mr Clelland was, shall enjoy *all the rights and privileges of ordained ministers and elders* of the Church of Scotland—*shall be parochial ministers to all intents and effects.* In these acts it is declared that the church shall be erected into a parish church, and that the minister shall exercise all the functions of a parish minister, in the district to be assigned to the church; and the original act of the Assembly in May 1834 declares that the session shall exercise sessional jurisdiction within the district. There is, accordingly, upon the face of the different proceedings of the Church courts, no distinction between the ministers and sessions of chapels of ease previously in communion with the Church, and ministers and sessions of seceding congregations after the same are admitted. The ministers of both classes sit in Presbyteries with the same authority—are acknowledged equally to have all the powers of parish ministers, and the sessions of both classes equally to have jurisdiction and discipline as sessions of the Establishment. Each of these sessions returns elders to Presbyteries, and so upwards to the General Assembly. The whole government and discipline of the Church may be exercised by these ministers and elders of both classes in the same manner as by the proper parochial ministers and elders, and in Presbyteries and Church courts their authority and powers are equal to those of the latter—while in some Presbyteries it was explained to us that they outnumbered the latter.

2. In this case the Presbytery "appointed the minister and kirk-session of the new church of Stewarton to *take care of the souls*, and to *exercise spiritual jurisdiction and discipline over the persons inhabiting the district comprehended within the following bounds*," being part of the parish of Stewarton.

3. This procedure, if it has any meaning at all, gives to the new minister and to the new kirk session, and to them exclusively, the *whole authority* over the district which any minister and kirk-session can have, and withdraws the inhabitants generally from the jurisdiction and discipline of the parish minister and kirk-session proper.

4. The declaration which accompanies this procedure, "that no civil right of these parties shall be affected by the allocation, and that the effect of the allocation is limited to matters of spiritual discipline and government," is groundless in law, if the procedure is competent, and is inconsistent with the act done. Subjection of the inhabitants of the district to the ministrations and discipline of a new minister and session, is a direct interference with the most valuable of all civil rights, and the loss of their claim upon the

services of the parish minister, is also a direct interference with civil rights—while the introduction of the new minister and elders into Presbyteries and Church courts, at once invests those who are not legally entitled so to act, with the whole jurisdiction of the Church, and with power over its government and discipline—matters in which every subject has a deep interest.

5. The declaration, that heritors and their tenants in that part of the parish of Stewarton thus set apart as "a territorial district to the new church, having *legal rights to sittings in the original* church, *may*, in *their option*, *continue members of the congregation* thereof,"[1] taken along with the exception in the 9th head of the 3d regulation of the act of Assembly, May 29, 1837, appears to me completely to prove that the district is, to every other extent, wholly withdrawn from the original parish minister and session. The Church courts could not, of course, attempt to exclude from the original church those who had legal right to sittings therein. But so complete is the erection of the separate parish, and its severance from the pastoral services of the minister, that it was actually thought necessary to insert a *permission* to those, who had a legal right to sittings in the original church, to *remain members of the congregation*—that is, to be entitled to receive ordinances from the minister, and to claim his services. Without this exception, it is plainly implied that they would not have had such right. All others manifestly are not so privileged. Hence the whole parishioners in the severed district, who have not a legal right to a pew or sittings in the parish church, are wholly cut off from that congregation—from the services of the minister and elders—and are transferred to the new minister and elders. And further, the parish minister, as to all such, has no right (according to the principles of the Presbyterian Church) to preach in that part of the parish—to catechise—to visit families—to baptise or marry—or discharge, as to them, any pastoral duty. All those who have not legal sittings, are at once deprived of their claim upon him for any such purposes. He has no right to continue such services: they none to demand them. And further, they are transferred wholly to the new minister for all the services and ministrations and pastoral superintendence which they are entitled to have from the minister of the parish church. They are placed exclusively under the new minister and session, and withdrawn from the parish minister and parish session.

Such I apprehend clearly to be the legal and necessary result of the procedure, if competent, and to be the only footing upon which it is possible to maintain that the new minister is a parish minister, and that he and his elders are entitled to sit in Presbytery.

6. There is at p. 89 of the Case of the respondents, after an attempt to represent the matter as nothing more than the practical arrangement which takes place in great towns originally one parish, but having now a number of churches, the following general and ambiguous sentence:—"And it must not be overlooked, that any supposed attempt at compulsion in regard to attendance at the one of the churches, or exclusion from spiritual privileges at the other, or from the services of the minister, is altogether inconsistent with the principles in practical operation in the Church. In fact, the whole pretended alarm of the suspenders at interference with, or exclusion from spiritual privileges, in whichever congregation the inhabitants of the newly allotted district may choose to select, is altogether visionary."

What this sentence exactly means may be doubtful. The Plea in law stated for the respondents is expressly that the Church courts, under the authority of the General Assembly, may *erect or divide* parishes *quoad spiritualia*. The Plea contends for the power of the Church to erect separate parishes. If there is a *separate* parish, *disjoined* from the original parish as to pastoral superintendence and spiritual jurisdiction, and erected into a parish, it necessarily follows, that for the inhabitants of the *separate parish* there is but one minister, viz. that of this new parish. And the special and limited exception proves that this is the design, and the understood and intended effect, of the measure. Accordingly, in the cases which have recently come before the Court of Teinds, of ministers claiming augmentation of stipends, part of whose parishes had been separated into parishes *quoad sacra*, the ground, upon which an increase of stipend was successfully resisted during the continuance of this state of things, was, that the parish minister had no longer any concern with the inhabitants generally of this district—that they had no longer any right or claim to his services, and he no right to attend

[1] Pursuers' Case, p. 100

them, and thus that his duties were less laborious: And in no case was this important point disproved, or even seriously denied.

7. But if a different view were to be taken of the matter—if the sentence above quoted did accurately represent the nature of the procedure according to the principles and effects of the Acts of the Assembly (which it undoubtedly does not)—and if the procedure has not the effect of withdrawing, as to pastoral superintendence, the district from the original parish, nor of appropriating the inhabitants thereof exclusively to the minister and session of that district, as their proper and only pastor and kirk-session, then the result would, in my opinion, militate even more strongly against the competency of investing the minister and session of a district, so understood and explained (that is to say, a district which is not a parish), with the rights and functions of a parish minister and of a regular kirk-session, and against introducing them into Church courts. Upon such a view of the matter, there is no parish at all—there is no separate cure or benefice—there is no pastoral superintendence of any distinct portion of the inhabitants of the country,—the minister just remains a chapel-of-ease minister as before, without any change at all, and the only pretence for introducing him into Church courts is at once destroyed. He is at present introduced as a parish minister. The procedure is defended, because it is a proper ecclesiastical parish, and because that is a sufficient foundation for his admission into Church courts, and into the exercise of all the powers and functions of regular ministers of the Church. If there is no separate parish in any sense of the term, or to any effect, there seems to be an end of the whole question which has been argued, and a complete exclusion of any such minister from Church courts.

8. It is justly stated by Sir Henry Moncreiff, that the *erection* of a *parish, quoad sacra tantum*, is altogether without precedent. It appears to me very plain, that there *cannot* be *such* a parish. The parochial division of the country is a matter of public and constitutional arrangement. It subsisted before the Reformation. When Presbytery was established, it was by means of a church of parish ministers. Its government was vested in kirk-sessions, presbyteries, and other courts. The only members recognised by the law were the ministers of parishes. And a parish, again, was a division and apportionment of a part of the country already subsisting, and subsisting for other purposes as well as for ecclesiastical arrangements. The parish is complete by itself:—exists without any dependence on any other—is wholly severed from all others: No other parish absorbs it for some purposes: Its minister has the sole and exclusive cure within it, and no one else can exercise within it the functions of the parish minister. A separation and erection of a district into a separate ecclesiastical parish, which *yet remains part of the original parish for all civil purposes*, and *for many ecclesiastical*, cannot, I conceive, be a parish at all in any sense of the term.

9. Again, no one has attempted to give to the Court a distinct notion of the character and status of these ministers of *quoad sacra* parishes. Have they any civil status? Are they to be taken as ministers under all the acts of Parliament requiring important duties from individuals holding the office of parochial minister, and giving to their acts certain civil consequences? Can they appear, or their acts be recognised as the acts of, ministers of parishes in such civil matters? This does not appear to me to be pretended. They have no charge of the poor. They and their session do not supersede, in legal proceedings, the proper minister and proper kirk-session. They could not appear at meetings of heritors and of the session. They cannot vote in the election of schoolmasters. They cannot keep registers. They could not perform the duties required by many acts of Parliament to be performed by the parochial ministers. In short, they have not *legally* the character of ministers of the Church. Nay, the Church itself does not consider them as such; for there has been no attempt made to treat them as ministers holding benefices, and to include them in the Widows' Fund: While, as to the Parliamentary ministers, who were also declared by the Church to be parish ministers *quoad sacra*, and admitted into Presbyteries, this Court held that they had not the character of parochial ministers.

10. Yet these parties are all brought into Church courts—have received the power of government in the Established Church. Presentations are to be addressed to them. They receive the power of judging upon the same—a statutory function, and a statutory duty. They claim the rights conferred by statute on the proper members of Presbytery. They claim to sit and act under special statutes, both as to schoolmasters and as to churches, manses, and glebes; and, in short, this body, without having proper parishes, and without pretending to possess many of the most important functions of parish ministers, are yet all introduced into the Church courts, and permitted to act in every thing as members of Presbytery.

11. Look again at the character of this alleged parish, which is the title or foundation on which the minister and kirk-session have been recognized and allowed to sit at Presbyteries. It is a parish *without any provision for permanency*. There is no security for maintaining the fabric of the Church. There is no endowment for any successor in the cure. There is no security even for the continuance of the parish itself, such as it is. If the people tire of the burden, upon the death or removal of the minister, there will be no succeesor at all. The parish will not be kept up. And then this supposed parish drops wholly out of the Church; and while the alleged decree of Presbytery stands, making it a parish *quoad sacra*, the people are left just as they were, the parishioners of the original parish. This really renders the notion of a separate parish ludicrous.

The statement of the facts of this case leads so manifestly to the conviction of irregularity and anomaly, that any separate statement of the grounds, on which the procedure complained of appears to me to be incompetent and illegal, is scarcely necessary. I shall only give a summary of the views which occur to me on the subject.

1. I consider the attempt to create a separate parish, and to institute a new minister, inconsistent both with the right of the patron, and with the effect of the deed of presentation previously sustained by the presbytery, and upon which they have given induction to the cure of the parish. That deed of presentation covers the whole parish, and by it the minister was specially appointed to the church and parish. Into that cure he has been admitted and received. Without his consent, and the consent of the patron, I apprehend no authority can restrain the effect of the presentation and induction, or disjoin and sever from his cure any part of the parish to which he has been appointed by the patron—unless an authority acting by the express warrant of the legislature. This is indeed a minor point in the case. But *on this ground alone* I hold the procedure of the presbytery to be utterly incompetent, and the attempt to sever a portion of the parish, to which the minister was appointed and inducted under a presentation applicable to the whole, from the cure, and to introduce, upon the title of a portion of the parish proper, a new minister and elder into the presbytery, to be clearly *ultra vires*.

2. The species of parish being unknown to the law, it seems to me impossible to recognize the minister of the same as holding a *munus publicum*, and as entitled to exercise legal rights, and to act in the character of a parish minister.

3. Statute has specially described the species of authority given to the Established Church. Its power of government is defined in different statutes, by terms which to my mind are clear and unambiguous; and in these statutes I find no legislative power granted to the Church, placing any changes within their competency. I do not find the recognition of any general and undefined legislative power. On the contrary, I think both the statute 1592, and the statute at the Revolution, restoring Presbytery and embodying the Confession of Faith, exclude the least pretence to such power in the Church. These statutes are framed with most jealous and deliberate caution, and I think they settle and establish the Church of Scotland within limits the most precise, and with authority expressly limited to purposes therein set forth.

4. Special authority to institute new parishes, it is not alleged, that the Church has received by statute. There is not an act of Parliament in which even an expression occurs, capable of being twisted into such a meaning; and this is the more important when it is admitted that the authority claimed, is of so singular a kind that the parish only subsists for certain purposes, and that its minister is incompetent to perform many of the functions of a proper parish minister.

5. On the other hand, there has been instituted, by successive acts of Parliament, upon the narrative of making adequate provision for the erection of new parishes by the division of those that were too large, a special tribunal receiving direct authority for that purpose; and this tribunal has subsisted for more than two centuries in the form and with the powers given by various statutes. The conclusion arising from this fact is justly said by Sir Henry Moncreiff to be irresistible; and I quite agree with him in thinking that the few anomalous or unexplained cases that are referred to, only prove the more the universal conviction that the Church had not the authority claimed, when the *final results* of these cases (applications to Parliament) are looked to. Indeed, the plea of usage seems to me the weakest and most insufficient ever attempted in an analogous question—assuming for the present such a plea to be relevant. The terms of all the acts of Parliament from 1621 downwards, conferring on the successive commissions certain powers as to disjoining parishes and erecting new parishes and planting churches, are very important. The last act of the Scotch Parliament on this subject,

1707, c. 9, entitled Anent Plantation of Kirks, &c., proceeds on the recital of the great prejudice that arises "through the want of an established and fixed judicature which may cognosce and determine in such causes and things as by former Parliaments were referred to their Commission for Plantation of Kirks and valuation of Teinds." It therefore specially confers on the supreme civil court a variety of functions—among others "to disjoin too large parishes, to erect and build new churches,"—according to the rules contained in former acts of Parliament, but with the consent always of the heritors of three parts of the valued rent of the parish—"the minister, in the meantime, to serve the cure in the present kirk of the parish,"—not an unimportant sentence in this cause. All the prior acts are also deserving of attention. By these acts, then, the legislature, in order to accomplish so desirable an object as more effectual provision for the pastoral superintendence of the people, and to make the parochial division of the country more useful, by obtaining a greater number of parish churches and ministers, as regular component parts of the establishment, conferred special powers first by temporary commissions, and then by a permanent commission or authority, of disjoining too large parishes and erecting new parishes. These acts prove completely, to my conviction, that the legislature held that the erection of new parishes could only take place in virtue of authority flowing from statute, and that there did not exist, as Sir Henry Moncreiff justly says, within the church, in each of the seventy-eight presbyteries then existing of the Church—a co-ordinate power and authority to do the same thing. The whole history of the applications to Parliament for the erection of new parishes before 1621 and 1633, serves to prove that the Church had not the power now claimed. And that part of the history of the question is of more importance, if the bishops of the Roman Catholic Church really possessed, as some authors confidently state, a power of of erecting new parishes, which the legislature and courts of law recognized.

The establishment by act of Parliament, of a special tribunal by successive acts of Parliament, passed at various times during the greater part of a century, for the erection of new parishes and disjoining too large parishes, has always appeared to me to be a constitutional fact which is conclusive of the whole question. I cannot admit that, by implication, the Church is to be held as possessing, at the same time, an inherent power of effecting these objects. And these statutes appear manifestly to prove that the legislature had not previously given, by any general terms, to the Church, the authority necessary for accomplishing the same ends, which it did give to other bodies, and that by such express and comprehensive terms.

6. A general argument was urged upon us, to the effect that provision for the pastoral superintendence of the people was wholly a spiritual matter—that it must be within the power of the Church to make due provision for that object—that this could only be done by the institution of parishes, and hence that the Church must have the means, by constituting such parishes, of erecting parish ministers for its own purposes, and bringing them into Church courts. This sort of reasoning is altogether inadmissible in a court of law, and contains assumptions, in every step of it, which a court of law cannot receive, in my opinion, from a body created exclusively by statute in its character of an establishment. There is also much confusion of ideas in the reasoning. The *exercise* of pastoral superintendence is the proper function of an ecclesiastical person. But to make provision and arrangements for sufficient pastoral superintendence; as, for example, by instituting parishes, is not only, according to my conception of the matter, not a spiritual thing, but is a point of legislative and constitutional arrangement, specially for the state:—And accordingly the State has so considered and treated it, by the numerous statutes instituting special tribunals for that very purpose. The whole reasoning, then, rests on an assumption contradicted by the statutes of the Scotch and the British legislature. The matter is not spiritual, according to *that* standard; and, what is of far more importance, it has not been entrusted to the Established Church.

There is no species of reasoning so hazardous in a legal question, as that which is founded upon certain views of great questions of national expediency. For instance, this reasoning assumes that the Church courts are the parties most qualified to make adequate and judicious provision for the extension of the establishment—a question upon which one-half of mankind may entertain a different opinion from the other half. Again, this species of reasoning assumes, that the best mode of providing for the pastoral superintendence of an increasing population is—not by chapels of ease, growing up according to the provision that can be made for them, and having a minister, qualified for all the purposes of religious ordinances, but not invested, while in a precarious situation and in an unendowed charge, with the status, office, and powers of a parish minister, but—by the indefinite multiplication of parishes and of parish ministers, instituted

whenever any congregation makes the application—without enquiry as to the debts of the chapel—without provision for the maintenance of the fabric or the endowment of future ministers—in short, without any security for the permanence of the cure. Now, upon that question also, one-half of mankind, and more, may reasonably entertain the most decided difference of opinion from the respondents. Are these assumptions, then, correct grounds for legal reasoning as to the powers of Church courts, or on which the authority claimed can be acknowledged?

7. It was further contended that the composition and constitution of Church courts is solely a spiritual matter, of which the Church courts are the supreme and exclusive judges. I hold it to be a matter of law settled by statute. The presbyteries of the Church are composed of parish ministers and elders from legal kirk-sessions; and that constitution is fixed by statute. And whether with a view to their ecclesiastical or civil functions, whether for the exercise of spiritual discipline, or for the validity of a decree respecting a church, manse, or glebe, the question, whether incompetent persons have been introduced into presbyteries as established by law, is in my opinion matter for the decision of a court of law. If any man in this country assumes an office and exercises an authority known to and created by the law, which he has no right to assume or exercise, his title may be enquired into in the Supreme Court, and the usurpation repressed if his title is bad. That the Church courts are to be sole judges of the parties who are to exercise the power of government in the Established Church, and may introduce any persons they choose into presbyteries, (for the plea, to be sound, must go that length, or it is plainly unavailing,) is an extravagance which no lawyer can countenance.

Indeed, even where the jurisdiction of any body is declared to be independent of any control, I apprehend the question, whether incompetent persons, not possessing the title required by law, are intruded into such body, and assume functions and powers, to which they have by the law and constitution no right, is one for the decision of the Supreme Civil Court. The Court of Session does not control the Court of Justiciary—though that proposition must be taken with the necessary qualification of cases of extreme constitutional excess of power. But if the Court of Justiciary were to admit a person to the office of "her Majesty's Justice-Clerk of Scotland" who had not the Queen's grant of the appointment, the validity of such an act could be tried in the Court of Session—the person interdicted from acting, and all the acts of the court declared null and void. Whether, therefore, the question as to the institution of new parishes is an ecclesiastical question or not, the instant that it resolves into a question as to the constitution of Church courts, and that persons are introduced into the same, whom a party, interested in and subject to their jurisdiction, offers to prove are not by law entitled to sit therein, and to exercise the functions of members of presbytery, there is then, of necessity, a point for the determination of the Civil court. I do not know any point more clear than this, viz., that if persons assume offices, and exercise the functions of members of courts, who are said not to have any right or title so to act, that point may be brought to trial in the Supreme Civil Court. This doctrine leaves entirely free the question as to the regularity of the forms of *returns*, to Presbyteries, of elders from sessions, or of representatives from Presbyteries, whether clerical or lay, to the General Assembly. These are matters of detail for the Church courts themselves. But the radical question, whether a person is entitled to the *status*, and to exercise the powers, of a member of Presbytery, in respect that it is alleged that he is not a parochial minister, and cannot by law sit, act, and judge in the Presbytery, is one on which the Supreme Civil Court has unquestionable jurisdiction. The constitution of the Church Courts is an essential and fixed element in the scheme of the Establishment as instituted by law. That the Church should have the power to introduce any number of preachers, deacons, missionaries, readers, or schoolmasters, into Presbyteries, or any other class of persons, merely by giving them the name of parish ministers, and to declare that they shall have the rights, powers, and functions of members of Church courts, and so be entitled to exercise functions specially conferred by statute on parochial ministers and on Presbyteries as constituted by law, and that such abuse is beyond control, is surely a point that in sober reasoning cannot be deemed worthy of any respect in a court of law.

The inference, founded upon certain expressions on the 4th and 5th of William IV. c. 41, need scarcely be noticed, for in the expressions of that act of Parliament, I think it is very clear that no acknowledgment by the legislature of the power claimed is expressed.

We were much pressed by the great number of these new parishes instituted since 1834. That fact only affects my mind to the extent of convincing me how very dan-

gerous and alarming are claims, which may be the means of altering totally the whole character of the National Church.

I think it right to notice those passages in the case of the respondents, in which they endeavour to represent that there was a general acknowledgment of the legality of the acts of the Assembly on this matter, by reciting ostentatiously the names of many, and among others of myself, who were members of the Assembly which passed these acts, and who had been named, it appears, members of some committee which is said to have considered at least the case of the parliamentary ministers. This statement, to any person who knows the way in which the business of the Assembly is conducted, is absurd. I never was present at any one deliberation either of the Assembly or of any committee upon any of these subjects; nor was I ever summoned even to any meeting of any committee in regard to either.

It only remains to notice the nature of the remedy prayed for, which is by suspension and interdict.

The competency of the proceeding, if the Court has jurisdiction, has not been disputed. Parties, whose civil rights may be affected by the judgment of the Presbytery, pray generally for suspension or stay of the whole proceedings; and for interdict against Mr Clelland sitting, acting, and voting, as a member of Presbytery, in any matters having reference to the parish of Stewarton. This had reference to the actual state of things when Mr Clelland had been admitted and received into the Presbytery. But if granted, it will equally apply in principle to any other party who has since come into the place of Mr Clelland. The second part of the prayer relates to the division of the parish, to the erection of a new parish within the same, and placing the latter under the pastoral superintendence of Mr Clelland, or any other person, or from constituting a new and separate kirk-session, with jurisdiction and discipline over this new parish; and generally, from altering the parochial state of the parish of Stewarton, either as regards its pastoral superintendence, its kirk-session, and the jurisdiction and discipline belonging thereto. If the complainers are right upon the merits of the case, they are clearly entitled to interdict upon both parts of the prayer;—The acts complained of being, on that supposition, illegal, redress must be given. The form of suspension—that is, to suspend and stop all the proceedings, in whatever stage they may happen to be, is a competent and appropriate remedy, according to the principles of Scotch law; And the interdict applied for is also a competent and appropriate remedy, whether against a person *acting in a situation*, into which he has been received, before the remedy could be applied for, or against the completion of proceedings begun before the note of suspension and interdict is presented. The recent case of suspension and interdict, held to be competent even to stop a jury trial before the Sheriff after the jury was sworn, is one of the many instances of the nature of this remedy in the law of Scotland. I specially notice this point, in consequence of a view thrown out in a recent case in the House of Lords, upon an objection not argued in this Court, as to the procedure of suspension and interdict, and which assumed the remedy of suspension and interdict *necessarily* to be the same as that of an English injunction, (which, from the explanation then given, appears to be essentially different), and to be governed by the same rules. In the present case, the competency of the proceeding was not in argument disputed, if the Court had jurisdiction. And to any Scotch lawyer, it is plain that the complainers are perfectly right in the form and nature of the remedy they have had recourse to.

Whether, even where there is jurisdiction, a party has not applied at a stage in which it may not be thought proper to interfere, is a different point, and is matter of judicial discretion in the particular case.

As I am of opinion, that the admission of a person, who is not a parish minister into the Presbytery, to act and vote as a member in matters connected with the parish of Stewarton; that the creation of a new parish, with a new minister and kirk-session, out of that parish, changing the pastoral superintendence of a part of it, and altering the ecclesiastical jurisdiction and discipline therein, are matters in which the heritors are interested—of which, if done by incompetent authority, and in favour of incompetent persons, they are entitled to complain—and of which, when proved to be of that character, the Court can take cognizance,—it follows, that, in my opinion, the prayer of suspension should be granted, and the interdict pronounced as craved: And in the stage at which the application is made to the Court, I see no difficulty, and indeed none such was urged upon us.

Lord Meadowbank.—I concur in the opinion of Lord Medwyn, but with the statement in addition and reservation made by the Lord Justice-Clerk. I think it, however, necessary to add, that, while I coincide with the general views which have been

taken by their Lordships regarding the present case, it humbly appears to me, that a portion of the special question, brought to issue when this process of suspension first came into Court, may be determined upon grounds in some respects less general, though hardly less important than those which have been relied on.

In order that this view may be better understood, I must shortly advert to the circumstances in which the case had its commencement.

One of the original chargers, a gentleman designed as the Reverend James Clelland, together with some others, having presented a petition, praying to be received into union with the Church of Scotland, the Presbytery of Irvine, upon his having signed the Confession of Faith, and without any other proceeding, received him and the elders of his kirk-session "to the status and privileges of a minister and elders of the Church of Scotland respectively," his name was added to the roll of the Presbytery, and "he took his seat accordingly." Thereafter, the Presbytery appointed a committee "to perambulate the bounds of the parish to be annexed to the said church,"[1] viz. the church in which, as a member of the Burgher Secession, Mr Clelland had officiated in the parish of Stewarton. The suspenders having learned that these proceedings were going on, entered their protestation against their being carried further; but, in the face of their opposition, and without the consent of the minister of the parish, it appeared that the majority of the Presbytery were resolved to proceed in allocating a district to the new church at Stewarton, any opposition notwithstanding; and in the various meetings which took place upon the subject, Mr Clelland sat and voted as a member of the presbytery. Under these circumstances it was, that the present suspenders applied to this Court to suspend the proceedings of the Presbytery—to interdict Mr Clelland from sitting and voting as one of its members in all matters connected with the parish of Stewarton, and the different members of the Presbytery from dividing the said parish in the manner which had been proposed.

I. I hold it, therefore, to be incontrovertibly clear, that the relation between the Established Church and Mr Clelland was held to have been completed, and that he was himself admitted to be a constituent member of the Presbytery of Irvine—1*st*, Without a presentation of any kind having been granted in his favour in any quarter whatsoever, and without any document corresponding thereto either in form or substance having been communicated to or laid before that reverend body; 2*dly*, Without his having been taken upon trials, and thereafter found qualified by the Presbytery for admission into the *status* of a minister of the Church of Scotland; 3*dly*, Without the "ceremony" of ordination having been performed; and 4*thly*, Without his having taken the oaths required by the act 5 Geo. I. cap. 29, to be taken by the probationers as well as the ministers of the Established Church, before obtaining respectively their license to preach, or their admission into it in the *status* of ministers.

The want of all, or indeed any, of these requisites, seems to me fatal to the legality of the proceedings in favour of Mr Clelland, and entitled the suspenders to the relief sought for, in so far as it respected that individual acting as a constituent member of the Presbytery in matters connected with the parish of Stewarton.

First, It appears to me to have been established beyond doubt, that from the earliest period of the history of the Reformed Church in Scotland, there never have been but two preliminary forms known, by which its ministers could be introduced into, and thereafter become constituent members of, its body, viz. either by a presentation from the King or the ancient patrons; or by a call, as it has since been termed, *first*, from the elders of parishes respectively, with the approval of the congregation, as in the period between the years 1649 and 1660, or, *second*, from the heritors and elders, as between the years 1690 and 1711.

It would be to little purpose to examine authorities, to prove that from the first establishment of the Church down to the year 1649, a deed of presentation was the only right under which any person could present himself for admission to a vacant benefice as a minister of the Church; for it is impossible to read the public statutes of the realm from the year 1567 downwards, or to examine the proceedings of the General Assembly itself, without being convinced that, however individuals might be dissatisfied with the law of patronage, it was admitted to have been legally and authoritatively established, and that the Church as a body did not contend for more than that the presentations made by the patrons should be directed to the Presbyteries, who should have the power of taking trial of the presentees, and collation and admission to the

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[1] Aug. 6, 1839.

benefices. But if such authorities are required, I would refer to the Record of Signatures for Crown presentations, beginning in the year 1567, to be found in the General Register House; and I may also refer, for the same purpose, to the records of every Presbytery in the Church now extant. But I would likewise mention a most valuable document not hitherto adverted to in these discussions—a Letter of the celebrated Clerk of Assembly, Archibald Johnstone Lord Warriston, a lawyer, and a strict Presbyterian, whose authority will, in a question of this kind at least, not be disputed, in which the authorities on the subject, then extant, are fully detailed. The letter is dated 26th December 1639, and will be found at the 451st page of the Letters of Robert Baillie, vol. iii., recently printed for the Bannatyne Club. By that document it is incontrovertibly proved, from the authorities referred to, that patronage, and of course the form of presentation, was originally settled by both Church and State to be a fundamental principle of the Establishment, and that so it continued till the country being in a state of rebellion, it was interrupted and overturned, for the time, by the General Assembly in the year 1649, which, under semblance of the authority of the pretended Parliament, but whose acts were afterwards rescinded, illegally usurped the power of repealing the statutes of the legislature by which it had been established.

But even then the form and essence of a presentation was preserved by the General Assembly, though the right of patronage was conferred on those in whom by law it was not vested. For though it was then termed a call by the elders, it was, in point of fact as well as form, a presentation, in virtue of which the presentee was taken on trials by the Church courts, and thereafter admitted to the benefice. The same was the case between the years 1690 and 1711, the right of patronage having, by the statute passed in the former year, been conferred on the heritors and elders; and from the latter period downwards, the form of presentation has by law been required at the hands of the legal patrons.

The mode of exercising the right, devolving in certain cases on Presbyteries, of presenting to vacant livings, forms no exception to the rule thus legally established and inveterately observed; because even in such cases the Presbytery is only constituted, *tanquam jure devoluto*, a statutory substitute for the legal patron; and proceeds accordingly. Hence, I find in a book of authority, entitled "Church Styles," a form of presentation which is given, as that which is legally required to be used in the exercise of a right of this description.

Under such circumstances, I cannot but regard the matter of presentation to be one, not of form but of substance, and to be one which, by law and the constitution of the country, is held to be a preliminary requisite, essential and indispensable to the original admission of a minister into the Established Church, while the absence of any thing even resembling it in the case of the charger, Mr Clelland, must be deemed fatal to his admission as a constituent member of the Presbytery of Irvine.

Secondly, I am of opinion that the Church, having been entrusted by the State with the power and duty of taking entrants upon trial, in order to ascertain their qualification for the ministry, those bodies are under a legal obligation to perform that duty, and have no right, at their own will and pleasure, in any case to dispense with it. Having, however, so acted, and without trial or examination of any kind, admitted the party complained of to be a constituent member of the Presbytery, it appears to me that the suspenders, and every one who might be affected by the exercise of those powers thereby attempted to be conferred upon the individual, thus recognised as a constituent member of their body, have, upon that ground, a good and legal right to the remedy applied for by this process of suspension and interdict.

Thirdly, Upon the recommendation of the King himself, and therefore under the express sanction of the State, it was ordained in the year 1597, by the General Assembly, that there be "ane uniformitie in the ordination of the ministrie throughout the haill countrey be imposition of hands."

What was the precise nature of the proceeding here contemplated and enjoined, it matters little to the present question to consider or ascertain. Whether it partook of that which was spiritual, or only that which was temporal, I do not therefore stop to enquire; but one thing is certain, that, by the joint act of the State and the Church, it was enjoined to be observed, as a prerequisite, in constituting the relation between a minister and the Established Church; and I have been able to discover no principle upon which the observance of a rule, so enjoined and so long observed, can be dispensed with. It seems to me just as essential in constituting the relation in

question as any of the other forms, the observance of which has been imposed on the Church.

But I understood at the hearing of the cause, that it was assumed—and indeed it was indispensable for the argument maintained for Mr Clelland—that the Church of Scotland, acknowledging the Burgher Secession as a part of the Church Universal, professing the same articles of belief with itself, recognises ordination by the ecclesiastical body of those Dissenters as equivalent to that conferred by itself, and that Mr Clelland had received the rite of ordination at his entrance into the Associate Synod.

Assuming, however, that this allegation would be admissible in a question of the present description, which I do not take it to be, I am humbly of opinion, that, before it could be entertained at all, this article, supposed to exist in the belief of the Church of Scotland, which is neither to be found in the Confession of Faith nor the other statutes of the realm, ought to have been established as matter of fact to the satisfaction of the Court, which it certainly has not, and indeed neither has it even been relevantly averred: And further, ordination by the imposition of hands being admitted to be a prerequisite to the admission to an entrant into the ministry, I think that it was indispensable, even if all the other steps of the proceedings had been legal, which I think they were not, and supposing the allegation relevant, that sufficient evidence of the ordination of Mr Clelland, and with the imposition of hands, by the Associate Synod, should have been laid before the Presbytery of Irvine, of which, however, there is not a trace to be found in the minutes.

But I am of opinion that the allegation is irrelevant. It appears to me that the ordinance of the General Assembly, enacted in the year 1597, provided for ordination by the imposition of hands by the ministers of no church except of that which had been established years before, which was recognised by and connected with the State, and of which the members of that Assembly were the sole and legal representatives. Indeed, none other could have been contemplated. The King and the Church alike repudiated all connexion with, or descent through the idolatrous church which had been overturned, and ministers of no other church having existence in the country, it is plain that, when passing that enactment, none other could have been in view.

But, indeed, Knox and the other founders of the Presbyterian Church having expressly rejected ordination by the imposition of hands as a spiritual rite, and only recognised it as a "becoming" ceremony to be observed when an entrant was admitted into, and set apart for the ministry, I have found myself at a loss to comprehend what the chargers exactly mean, in a question like the present, as to the legal effect which is to follow from the supposed performance of the ceremony by the Associate Synod.

There may be no difficulty in understanding, that in the case of two ecclesiastical bodies, avowing the same articles of Christian belief, and having each the same spiritual powers recognised as belonging to them, but constituting two separate churches, the one may admit a spiritual rite conferred by the other to be equivalent in effect to its having been bestowed by itself. Thus, it is easy to see how the Lutheran Church, or the Church of England, which believe in the transmission from the Apostles of the spiritual rite of ordination, should recognise the ordination of the Church of Rome, against the abuses of which alone they protested, and through which that transmission was necessarily made. But the case of those churches is altogether different from that of the Presbyterian Church of Scotland, which, holding the Church of Rome to be fundamentally idolatrous, rejected altogether the orders of its priesthood, and even denied its claim to be considered as a portion of the Universal Church. Having received nothing by transmission, the original members of the Church of Scotland, therefore, necessarily could not, and did not, contemplate the imposition of hands, which was required in the admission of entrants into the ministry, to be any thing more than a decent and proper ceremony to be observed at the constitution of the relation between the Church and its clerical members. But being a *ceremony*, it necessarily could only be performed by those upon whom that duty was imposed. The ordinance did not confer upon them the right of discharging their duty by deputy, which the power of recognition now contended for would have been in effect providing for. And, therefore, not only because I think that there is no evidence that the ordinations with the imposition of hands, if that be the form observed, of which there is no evidence, by Burgher Seceders, are held by the

Church of Scotland to be equivalent to its own, or of Mr Clelland having been ordained in that form by that body, as well as that the allegation in these respects, if true, would be irrelevant, I am of opinion that the objection, in this particular, to the legal admission of that reverend gentleman as a constituent member of the Presbytery of Irvine, was well founded.

The allegation, however, that the Church of Scotland acknowledges and recognises ordinations by the imposition of hands by the ministers of the Associate Synod, to be as effectual as its own, is not and cannot be true. The ministers by whom that body was founded and erected into a separate church, were men who, through disobedience to the laws both of the State and of the Church, were by the General Assembly, formally and legally deposed from the ministry, and thereby were prohibited and rendered incapable of performing the rite of ordination, or conferring upon others the privileges thence arising. But the present ministers of the Burgher Synod have themselves no title to the character of ordained ministers, except that which they derive from the founders of their sect, whose sentence of deposition and consequent incapacity stands at this moment unrepealed on the records of the Church. Did the Establishment, therefore, recognise generally, which it is not believed to do, the right of Protestant dissenting ministers to confer ordination, and to administer the sacraments, it could not acknowledge that right to be vested in those of the Associate Synod, without, at the same time, giving publicity to a practical libel upon its own proceedings, and rendering its discipline an object of ridicule and contempt.

Upon the same principle, indeed, those men who, in the face of the interdict of this Court, have usurped the power of deposing certain ministers of the Presbytery of Strathbogie, for no offence but giving obedience to the law of the land, must necessarily acknowledge the efficacy of ordinations conferred, and sacraments administered by those reverend gentlemen. But this recognition they not only have rejected themselves, but have attempted to punish others for not having done so.

Fifthly, The 5 Geo, I., cap. 20, expressly requires that "all and every person who shall present himself in order to trial for obtaining licence to preach, or to be ordained a minister of the Church of *Scotland*, shall, before he obtain such license, or be ordained a minister of the Church," take the oath prescribed by the statute, and have the same duly 'recorded in the Books of the Sheriff or Stewart-court, within the jurisdiction of which is the seat of such Presbytery where he shall present himself."

This enactment, as I read it, applies to the case of every individual whatever who may be in the way of obtaining a licence to preach—and of every one who presents himself for admission, or shall be received into any Presbytery as a minister of the Established Church. The obligation is absolute—there is no exception from it. Now, whether Mr Clelland is to be considered in the one character or the other, he was, in my opinion, subject to the provisions of this law. If his admission, as a constituent member of the Presbytery, had no other effect, it at least conferred upon him a licence to preach; yet before that could be granted he was legally bound to have taken the oath in question, which he did not take, and thereby incurred the disabilities created by the statute. But whether formally and legally admitted as a member of Presbytery or not, still he was declared to be such, and was received and acted as a member of the Presbytery without taking the oath; and until he did so, had all the other steps of his admission been formal and proper, which it appears to me they were not, I think that he can never be recognised or acknowledged as having been a legal and constituent member of Presbytery.

But it has been said that, in so far as ministers were contemplated, the statute applied only to the case of clergymen either who were to be inducted, or who have been actually inducted into a legal parish, and not to such as enjoyed no higher function than that of Mr Clelland; but I cannot so read its provisions. The words of the preamble apply generally to every ordained minister of the Church, and it would be a strange thing indeed if a statute of this description, enacted for the purpose of securing the loyalty of the clerical members of the Establishment, by an evasion similar to that which has now been attempted by the Presbytery of Irvine, could be rendered nugatory and entirely defeated. Indeed, upon the same principle the whole ministers in the new parishes *quoad sacra*, would be relieved from the obligation imposed by the statute upon the established and regular ministers of the Church—a result clearly inadmissible.

Upon the whole, therefore, I am of opinion that Mr Clelland was not a constituent member of this Presbytery, and that the suspenders were entitled to have him inter-

dicted from sitting, acting, and voting as a member of that Presbytery, in all matters, causes, or proceedings in any way connected with the parish of Stewarton.

II. Concurring entirely with the opinions to which I have formerly referred, as to the want of power on the part of the Church Courts to divide, for any purpose whatsoever, the parishes of this kingdom, I have little to say in addition to what, in these opinions, has been so amply and fully detailed.

But I may observe, in a few words, that an examination of the signatures for Crown presentations, to which I have had access, beginning in the year 1567, has left not the smallest doubt upon my mind, that in all and each of those presentations received, sustained, and acted upon by the Church—(residence, and the discharge of those duties incident to it being made an express condition of the grant, and on the other hand, the presentee being declared to have the sole right of administering ordinances in the parish to which he was presented)—the benefice and the cure were invariably conjoined, and that the enjoyment of the former was made to depend upon the performance of the duties required by the latter.

Secondly, By the presentations being always to the "kirk and parish," these documents afford incontestable evidence that the whole establishment of the Church was founded on a PAROCHIAL system; and by a right to the executorials of the laws being in every case bestowed for enforcing, without limitation or distinction, all the rights of the presentee which the Court of Session were required to issue, it is implied that a jurisdiction for dealing with all questions involving matters of law arising out of, or connected with, the presentation of a minister to a church and parish, was admitted to exist in the Supreme Civil Court by all the parties to that deed—the Crown upon the one side, the presentee and the Church upon the other.

It is proper to add, too, that in not one of those presentations is there the slightest appearance of its having been even imagined that the benefice and the cure were not inseparably connected, but quite the reverse.

In the next place, I would further observe, that it never, I believe, has been disputed, that the Commission appointed by the Legislature in 1707 possessed the sole power in the State, other than the Legislature itself, of dividing parishes *quoad omnia*—that is to say, both as to things which related to the temporal rights of the benefice, and to those which concerned the spiritual concerns of the cure, of the parishes to be erected under its authority. In like manner, during the century and upwards which has elapsed since the constitution of that Commission, the Court of Teinds has exercised without challenge or question the power of disjoining lands, *quoad sacra*, from the parishes to which they properly belonged, to the effect of annexing them, to the same extent, to parishes neighbouring and adjoining.

Now, as to this last matter, I would observe that it does seem very strange, or rather altogether unaccountable, that, if the Church itself possessed this power of disjunction and annexation *quoad sacra*—a power necessarily implied in the possession of that which they now claim, they should not have once been recognised as possessed of that right, or have once exercised it in so far as appears, in those cases in which they favoured the annexation, but could not obtain the number of consents of the heritors required by the act 1707 for sanctioning a decree of the Court of Teinds.

For, according to the argument maintained for the Presbytery, no such preliminary consent could have been required in the case of the Church, which, without notice to any one heritor in the parish, and contrary to the will of the whole of them, possessed the inherent power even of creating the portion sought to be disjoined into an independent parish of itself, or, with the consent of the heritors and minister of the adjoining parish, to have united it *quoad sacra* with such parish. No doubt there are some instances to be found in the records of Presbyteries, in which, when all parties were agreed, and of course there was no contradictor to challenge the proceeding, a sanction has been given by the Church courts to a voluntary arrangement of those concerned to an annexation of this description. But cases of this kind, where the Presbyteries in fact acted as a kind of arbitrators, can have no effect in these discussions.

But, *Secondly*, The powers of the Teind Court extend unquestionably and without dispute to the disjunction of a parish *quoad omnia*, and to the erection of the portion disjoined into a new and separate parish, both *quoad civilia* and *quoad spiritualia*, which this statute, like all others, regarded as one and indivisible. Now, put the case, that the proceeding here adopted by the Presbytery of Irvine was recognised by this Court, and that an action for dividing the parish of Stewarton, and erecting a new parish, were hereafter competently brought in the Teind Court, and

decree obtained for setting apart that very portion of it, now in question, to be the parish to be newly erected, the result would be to nullify the proceedings either of the Presbytery or of the Teind Court. For if the decree of the latter was effectual, then the patron of the whole parish would be entitled to grant a presentation of the benefice and cure to a qualified individual, which would impose upon the Presbytery of Irvine the duty of taking that presentee upon trial, and, if found qualified, of admitting, collating, inducting, and ordaining him as the pastor of the new parish so erected. But then, by the act of the Presbytery, the whole *cura animarum* in that district having already been indissolubly conferred upon another clergyman, either the legal presentee must, in such a case, be left without any cure whatsoever, although vested in a right to it conferred under the direct authority of the Legislature, or the proceedings of the Presbytery in favour of the person previously inducted must, by the operation of the decree of the Court of Teinds, have been *eo ipso* utterly extinguished and rendered void and null. I cannot doubt which alternative must have been adopted by any *Court of Law* whatsoever called upon to adjudicate in such a case; and nothing, I apprehend, can more distinctly prove the entire and absolute want of legal power on the part of the Presbytery to prosecute the proceedings which are now complained of, thus liable to be at once extinguished without even the formality of reduction, by a process in another court, to which it was not even required to be a party.

Indeed, I cannot conceive anything less consistent with every idea of a Presbyterian Church as connected with the State, in which parity of condition is a fundamental principle, than the idea of enabling such bodies of men, as the Courts of the Church, by their own account not responsible to the State, to add to their body any number of members which they may think fit. Were there nothing else in the case, the State has an interest that the whole ministers of the Church which it has recognised, with which it is connected, and which it pays, should be properly provided for and decently maintained. Accordingly, it has declared, that, together with manses and glebes, L.150 per annum is the least proper provision for the parish clergymen of the Establishment, and has provided funds for raising the poorer stipends to that amount; and even in the case of those clergymen, whom under its authority it created only to be assistants in some of the Highland parishes, Parliament also deemed that L.120 per annum was the least provision they should receive. This too, it will be observed, was the statutory opinion of the amount of an adequate provision for men not placed in the *status* of ministers of the Established Church, for by the same statute the Legislature disabled these reverend gentlemen from being constituent members of any of the Church courts. But were the claims presently maintained by the Presbytery of Irvine to be sustained, and the Church courts thereby enabled to enlarge the number of the established clergy to any extent, the State would have no security against the degradation of the character and *status* of its established clergy by the introduction among them of an inferior and subordinate class of men inadequately provided, and, by their means and mode of living, bringing disrepute both upon the Church and the State itself. Indeed, I cannot here refrain from observing, that what has been done with respect to these assistant ministers, affords a striking and instructive example of the extraordinary extent to which the powers now asserted by the Church courts inevitably tend. The Imperial Legislature had itself declared, that it was not fitting that men so provided with livings not exceeding L.120 a-year should possess the *status* or be capable of exercising the rights and privileges of constituent members in the Courts of the Established Church.[1] This enactment every one would naturally have held to be conclusive as to the relation to that Church in which this body of men, created and endowed by the State, must necessarily remain until Parliament in its wisdom should think fit to make a change upon their condition. But no: by an act passed, it is said, in virtue of those powers, the competency of which is now asserted by the chargers, the General Assembly, itself the creature of Parliament, thought fit to set this solemn act of the Legislature at defiance; and in the face of the statute, by an act of usurpation, nearly, if not altogether, unprecedented, boldly to confer upon all and each of these clergymen those very rights and privileges which the law had rendered them incapable of possessing. The utter illegality and incompetency of this proceeding, it seems impossible to question. Nevertheless, let it not be forgotten, that it might, in the case of these remote parishes, have remained unchallenged, and even unnoticed, during a course of years; and

[1] 5 Geo. IV, c. 90.

hence, as it seems to me, when corporations, such as the Church, lay claim, as in this case, to extraordinary powers, having no express creation in the statutes of the realm, and only pretended to be sanctioned by the usage of the body itself, such claims should with great caution be recognised or entertained.

But I would observe that this is not all. If the Church has the power of disjoining a parish *quoad sacra* in the way contended for, that power must extend to the division of the whole parish, as well as to that of a part of it, and to that of cutting and carving as many *quoad sacra* parishes, out of the legal parishes of the country, as either bigotry or caprice may dictate. Thus wherever a minister differed in opinions from the majority of his Presbytery, the result might be that the whole cure of his parish might be withdrawn from his pastoral care. It is enough that if this claim were sanctioned such might be the result, at least to impose upon this Court the imperative duty of having it made clear, that so extraordinary a power has been reposed in this ecclesiastical corporation, subversive alike of the true objects of the Establishment and the rights both of patrons and of people, before we acknowledge or recognise it. My very clear opinion is, that the very contrary has been established.

Lord Murray.—I concur generally in the opinions expressed by Lord Medwyn and the Lord Justice-Clerk, that this is a case depending entirely on the statutes which established and fixed the constitution of the Church of Scotland, and that the Presbytery of Stewarton has no jurisdiction, privilege, or authority to create or constitute a new landward parish within that of Stewarton.

I. The statutes which confer power and jurisdiction on Presbyteries and Synodal and General Assemblies, have received and deserve most minute consideration. The most important are the statute 1567, cap. 12; 1579, cap. 7; 1592, cap. 8; and the acts passed in 1690. Thomson, Ed. vol. iii. 24, 137, 541, vol. ix. 133.

Of these statutes, by far the most important is that of 1567, cap. 12. That statute is to be considered both as declaratory and enacting, It both *declares* and *grants* jurisdiction to the Church, and if it had done so only in general terms, the question would have remained, what was the extent of the jurisdiction so declared and so granted? But the statute joins the declaration and grant with these remarkable words, "which consists and stands" in "preaching the true word of Jesus Christ —correction of manners, and administration of holy sacraments." There is then a declaration that there is no other kirk or ecclesiastical jurisdiction acknowledged in the realm. The conclusion of this statute is not less important than the declaratory and enacting words—for it grants a commission to certain persons, of great influence in the State and Church at the time, "to seirche furth mair speciallie, and to consider quhat other speciall pointis or clausis sould appertene to the jurisdictioun, privilege, and authoritie of the said kirk." The Parliament of Scotland, therefore, not only described in what the jurisdiction, which they declared and granted to the Church, consisted, but they appointed a committee to consider what other special points or clauses should belong to the jurisdiction or authority of the Church.

The statute 1579 was passed twelve years afterwards, under the title of the jurisdiction of the Kirk. In the same terms as the act 1567, after declaring and granting jurisdiction to the Church, using the same emphatic words, it specifies that it "consists and stands in preaching the true word," repeating the former declaration and grant;—and it again appoints a commission to consider what other special points should appertain to the jurisdiction of the Church.

It appears, therefore, to have been the determination of the Legislature not to grant jurisdiction to the Church in vague or general terms. Jurisdiction only in certain matters, clearly described, was declared and granted. Something further, it was thought, might be necessary to make the judicatures of the Church more perfect; but what further points ought to be granted was to be examined by a committee, who were to examine whether they should appertain to the jurisdiction, privileges, or authority of the Church. Nothing was done further with regard to the jurisdiction of the Church, until the important statute 1592, cap. 8. It ratified the former statutes in favour of the Church, and especially the act passed in 1579, completed the system of Church jurisdiction, by confirming General and Synodal Assemblies, and established Presbyteries. It declared that the provincial Presbyteries generally held the whole power of the particular elderships of which they are collected; but although the powers of Presbyteries are minutely described, there are no terms used which are more applicable to the present question than those in the statutes 1567 and 1579, already referred to. These statutes were restored in their full force in 1690, when the

Confession of Faith was established. They form the ecclesiastical constitution of the country—but I am unable to find any thing in them comprehending a power to constitute parishes *quoad sacra*, or for any other purpose. The Legislature might have granted such a power to the Church, but the Parliament of Scotland never did so, or at any time acknowledged that the Church had any such power. On the contrary, it was a function which that Scotch Legislature exercised either directly or by commission.

II. If the Presbyteries or other Church Judicatories had ever distinctly asserted that they had a power to constitute landward parishes *quoad sacra*, or to subdivide them for that purpose, and there had been regular and continued proceedings of that nature,—it might go far, in a question of this kind, to extend the terms of the Acts of Parliament, which declare and grant jurisdiction to the Church. But no case has been referred to, in which that was distinctly asserted and claimed, before the year 1821, in the case of Heriot's Hospital. The Church may not be considered as fully established in all its possessions until after 1592, when its discipline and Church courts were made complete. Between 1600 and 1821 there must have been a great many cases in which, if this privilege or jurisdiction had been believed to belong to the Church, Presbyteries would have been called upon to exercise it. No instance of the actual existence of a landward parish, *quoad sacra*, has been stated; and it is unnecessary, in considering this question, to enter upon the somewhat anomalous arrangements which were made in royal burghs. It also appears to me that the Court cannot take into view, cases where parishes were ultimately constituted by Parliament or Parliamentary commission. What passed in the intermediate time before the Parliamentary constitution was obtained, can only prove that there was an intermediate arrangement acquiesced in, but which was not of itself sufficiently valid. From 1821 down to the present time, different opinions have existed on the subject, on the part of persons whose opinions are entitled to great respect; and a great many such parishes have been created by the sanction of Presbyteries, without its being determined whether it was legal to do so or not. While that was an undetermined question, the statute 4 and 5 Will. IV., cap. 41, was framed so as to include such parishes, supposing that they might be legal; but it did not declare them to be legal, and a clause was inserted in that statute, providing that it should noway affect the powers of the Commissioners of Teinds under the act 1707.

The views which some persons entertained on this subject since 1821, when the project of erecting landward parishes *quoad sacra* was first promulgated, appear to have arisen from an opinion which some lawyers held, that the Church courts had a universal jurisdiction in every thing that could be said to be ecclesiastical or spiritual, and that, therefore, whatever they thought fit to do, if it could be considered as ecclesiastical or spiritual, was within the bounds of the jurisdiction of the Church. I entirely subscribe to the opinion, that there is no ecclesiastical or spiritual jurisdiction other than that which is given to the Church. But the ecclesiastical and spiritual jurisdiction so given and so entrusted to the Church, was to be exercised within certain defined bounds, and the Church has no power to devise new sources of jurisdiction, and to exercise new functions beyond the limits defined by the legislature.

I have arrived at the opinion I have expressed, guided by what I conceive to be the clear and unequivocal enactments of the Scotch Parliament relative to the constitution of the Church. I felt greater difficulty in the question, how far this Court is obliged to exercise jurisdiction in the matter; but I have come to the conclusion, on nearly the same grounds as those stated by the Lord Justice-Clerk, that the heritors are entitled to the interference of the Court, to protect their rights against an exercise of authority by the Presbytery of Irvine which was illegal.

Lord Wood.—Concurring, as I do generally, in the opinions of Lord Medwyn and the Lord Justice-Clerk, which together with that of Lord Moncreiff, I have had an opportunity of considering, I have hesitated whether I should not confine myself to simply signifying my concurrence. In taking a different course, I do not propose to enter into the details of the case, and shall occupy but a short space in the observations I am to make.

I. And *first*, with regard to the question of Jurisdiction.

When it is admitted, as it has been by the respondents in the most unqualified terms, that the jurisdiction claimed by the Church has no foundation to rest upon except the statute law of the land, it is difficult to see any principle for contending that

the Supreme Court of Law of the country has not jurdisdiction to interpret and enforce the statutes, to which, in that view, the Church must appeal. It is the proper function of the Supreme Court to interpret the statutes of the land; and when any body in the State claims rights and privileges as derived from the State by statute, it seems to follow as a consequence, that if questions shall arise as to the nature and extent of these rights and privileges, (which are manifestly questions on the statutes,) it must be within the jurisdiction of the Supreme Court of Law, as the constitutional expounder of the statutes, to deal with and adjudicate upon them. It cannot be maintained that the body receiving statutory rights and privileges—whatever may be their nature—is itself to be the uncontrolled judge of their extent; for then the power of usurpation would be complete, and the most limited grant might be indefinitely enlarged, and used as the warrant of acts altogether unauthorized. If a grant of independent jurisdiction, in certain classes of cases, gave a power to determine what cases are comprehended within these classes, there is no case which might not be drawn within the jurisdiction.

Nor is it any answer to say, that if the grant is abused—if its true limits are exceeded, and groundless pretensions asserted, the abuse or excess may be restrained and corrected by the Legislature, because that is not the course appointed by the Constitution for the reformation and control of such abuse or excess. The function of doing so is delegated by the State to the Supreme Court of Law, which by the Constitution is the interpreter of statutes, and to which therefore must be entrusted the power, and the duty, of determining the extent of any rights and privileges conferred by statute, and confining their exercise within the bounds assigned to them.

If, indeed, a special case of exemption, from the general jurisdiction which resides in the Courts of Law to interpret statutes, and declare the extent of the powers derived from them, can in any particular instance be made out, then it may be, that the jurisdiction which the Courts of Law would otherwise have, will be excluded. But I can find no ground for holding that such exemption exists, as respects the statutory rights and privileges conferred upon the Church, whether of jurisdiction or otherwise. I see, indeed, that within the Church's own province, as standing upon statute, it has an exclusive and independent jurisdiction, and when the Church confines itself to that province, as it may be ascertained, and in the exercise of its jurisdiction conforms to the provisions of the statutes, there may be no jurisdiction in the Supreme Court of Law to correct or control its proceedings or decisions, however erroneous and unjust, or however injurious in their results to the individuals affected by them. But that is a very different thing from a question as to the extent or limit of the independent jurisdiction which has been conferred. The one is only the preservation of the integrity of the grant as defined: The other is the fixing its extent—the determining the matters on which the jurisdiction bestowed is to be exercised, and the mode in which it can be competently exercised—and in determining which, the Supreme Court of Law cannot be said to encroach upon the independent jurisdiction of the Church courts, inasmuch as that jurisdiction cannot have place except within the boundaries assigned by statute for its operation, and subject to the prescribed limitations, and the Supreme Court only interposes to fix these points, and not to interfere with them when ascertained.

I therefore think that as the Church, as an establishment, is the creature of statute, it is for the Supreme Court of law to interpret the statutes on which its rights and privileges rest, to the effect of determining the extent (if disputed) of these rights and privileges; and if it shall be the opinion of the Court that the right asserted by the Church is not within its charter, then I apprehend the Court has a power of control, by which the Church may be restrained or prohibited from exercising the right, and this even although the act complained of could be shown to be purely ecclesiastical. I am not now saying that there is any thing purely ecclesiastical which is not within the independent and exclusive jurisdiction of the Church. All I mean is, that the question of whether it is so or not, is a question on the statutes—it is a civil, not an ecclesiastical question—and it is one which the Supreme Court has jurisdiction to entertain and decide. Assume, for instance, that the erection of a parish *quoad sacra*, and the investing the clergyman with all the rights and privileges of a parish clergyman, were a purely ecclesiastical act not touching civil rights, I humbly conceive that it would be within the jurisdiction of the Court, to say whether the Church possessed the power to make such erection. It might, in that view, be quite clear that the Church had the power; but that is not the point—the point being, whether, irrespective of the ease or difficulty of the question to be determined, there is jurisdiction

in the Supreme Court of Law to deal with it or not. Now, I think there would be jurisdiction, and that it would be for this Court to decide, as a question of power on the statutes, whether the act of the Church, although ecclesiastical, were within the rights conferred on it by statute, and that, if the Court held that it was not, but was an usurpation of a power which the statutes did not support, that then the Court would be entitled to stop, and put an end to, the proceedings of the Church as unwarranted and illegal:—For I am aware of no authority for maintaining that the jurisdiction of the Supreme Court as the interpreter of statutes is excluded, and that it has no power of confining the different bodies of the State, whether in their judicial capacities or otherwise, within the limits of the grants in their favour, wherever it shall appear that the Court has itself no jurisdiction in the matter in which the power and jurisdiction of the separate body is asserted and denied. It may be that the Court of Session has no ecclesiastical jurisdiction; but I cannot assent to the proposition that therefore it has no jurisdiction to determine whether, in any matter ecclesiastical in which the Church asserts its power to act and judge, the Church really possesses such power or not. I think that that is a question which legitimately falls within the jurisdiction of the Court:—And, independently, but *à fortiori*, I think that the Court has jurisdiction to interpret the statutes to the effect of determining whether the act of the Church be an ecclesiastical act, and, as such, within its proper province, or truly a civil act, and therefore beyond its powers—or whether, although in one sense ecclesiastical, it does not injuriously affect civil rights, and be not a civil wrong committed, by the Church exceeding its statutory powers. And all this being the case, I further think, that if the Court shall decide against the power of the Church, then the Court has power to grant a remedy by at least restraining the proceedings of the Church courts, whatever may be the further redress it may be able to give, which of course must depend on the special nature of the case. And, finally, I think that, in every view, the Court has jurisdiction—in the *first* place, to entertain the present application, which is founded on the allegation, that what the Church asserts a right to do, will operate a fundamental change in the constitution of the body to which the statutory grant of jurisdiction has been given; and on the further allegation that thereby most important civil interests will be materially affected—and in the *second* place—if, on any of the grounds alluded to, it shall appear that the Church has exceeded its powers—to afford redress to the extent which is craved. The whole rights, powers, and privileges of the Church as an establishment, stand upon grant from the State, the terms of which are to be found in the statutes recognizing the Church as in connexion with the State, and it seems to me that the Supreme Court of Law must have the power alike of compelling the Church to do whatever the statutes put it upon the Church to perform, (as has been expressly ruled in the Auchterarder case,) and of preventing it from doing whatever shall appear to be beyond the Church's authority and commission; and this, even although the act were purely ecclesiastical. If the Supreme Court of Law, as the interpreter of the statutes, has jurisdiction to declare what the Church is bound to do, and enjoin performance, it must equally have jurisdiction to declare what the Church has no power to do, and is therefore bound not to do, and to enforce the restriction. Both are questions on the statutes, in virtue of which the Church exists as an establishment, and in regard to the one equally as the other, the Church must be subject to the jurisdiction of the Supreme Court. Both fall under the same principle, and in neither case is there any conflict of jurisdiction between the Church courts and the Supreme Court of Law. I abstain from going more fully into the grounds upon which I hold that there is no proper conflict of jurisdiction, because they are most distinctly stated in the opinion of the Lord Justice-Clerk.

II. Upon the question of the power of the Church to erect the separate *quoad sacra* parish of Stewarton, in the manner and to the effect proposed—

1. I am of opinion that the Church of Scotland, as the Established Church, is in its constitution—as finally settled down and recognized by the State—a parochial church; and that its clerical members (with the exception of the Professors of Theology in the Universities) consist of ministers who are endowed by the State, who enter the Church by presentation from a patron to a benefice, and who are the ministers of the parishes forming the territorial division into which the country is distributed; and that it is such persons only, who, by its constitution, are entitled to the rights and privileges of parish ministers, and who alone, more especially, have a right as clerical members to a seat, and to vote in the Church courts, to which the powers and jurisdiction given to the Church have been confided, and by which its

government is carried on. The elders again, who are entitled to a seat, and to vote, are the elders of the kirk-sessions in which these ministers preside.

2. If I am right in regard to the constitution of the Church as respects all or any of the above particulars, I apprehend that it follows that the Presbytery of Irvine had no power to proceed in the erection of a *quoad sacra* parish in the manner proposed; and that the Church generally has no power to erect parishes *quoad sacra*—and simply for this reason, that it involves a change of the constitution of the Church, which, be the act ecclesiastical or not, and whether it touches civil rights or not, no court of the Church has power to make, under the authority of any jurisdiction to which it can lay claim. When the statutes give powers and jurisdiction, they give them to the Church as consisting of a certain description of clerical members by whom, or by whom in conjunction with the lay members, the powers and jurisdiction were to be used and exercised. Now, however extensive, exclusive, and independent, may be the Church's powers and jurisdiction in matters ecclesiastical, I have no idea that they can reach the length of enabling the Church to alter its own constitution, by introducing into it not merely an unlimited number of additional members, but by introducing as members, and especially as members of the very courts which are to exercise the powers and jurisdiction conferred, persons not qualified in the manner required by its constitution; for that would be to put these powers and that jurisdiction into different hands from those entrusted with them by the statutes, and thus to bestow a public office upon persons not recognized by the statutes as entitled to hold it. It would be the Church—on which, as by law constituted, the powers and jurisdiction were conferred—changing, under colour of their exercise, the body to which alone the grant was given, and thereby in fact altering, fundamentally, the constitution of that very establishment, for the government and preservation of which all the powers and privileges were bestowed which the Church enjoys.

Accordingly, if the power now claimed exists, it is impossible to foresee to what extent the deliberations of the Church courts may, by the exercise of it, come to be influenced by individuals, not having the qualifications which, by the constitution of the Church, those, who as clerical members were to have a voice in its Courts, require to possess. Any proceeding which can be productive of such an effect, whether the act be ecclesiastical or not, surely never can be vindicated as a legitimate use of the powers and jurisdiction of the Church; and if not within its powers and jurisdiction, but an excess of both, as little, it is thought, can it be maintained that it is beyond the control of the Supreme Court of Law. I am at a loss to discover any principle upon which it can be found either, that the question of—whether persons who have been introduced into a body, having by statute independent powers and jurisdiction, and who have taken upon them to exercise the powers and functions assigned to that body for the public good, are persons capable of holding the office conferred upon them—is not a question upon the statutes for the decision of the Supreme Court—or, if the decision shall be against their title, that it is not within the power of the Supreme Court to give redress by controlling the body which, by introducing these persons as members, has committed an excess of power.

3. In the present parochial divisions of the country, and the existing relations between them and the Church, when combined with the Church's powers and privileges, and corresponding obligations and duties, as by law established, there are involved important civil interests, as well of the State as of individuals, comprehending both patrons and parishioners. By the erection of part of a parish into a separate parish *quoad sacra*, these interests must be materially affected, although the proceedings of the Church courts may partake of an ecclesiastical character, and have ecclesiastical purposes in view. Some of these interests would be seriously affected, even if the disjunction and separate erection were limited to pastoral superintendence in the clergyman of the new parish, and the kirk-session to be assigned to it; assuming that, in that matter, the erecting of the new parish *quoad sacra* is to be attended with its proper and necessary consequences, in any intelligible view of such a proceeding. But interests still more extensive, and purely civil, must be affected, when it is considered that the minister of the new parish, and the elders, are to possess and enjoy all the rights and privileges of ordained ministers and elders of the Church of Scotland, one of which is to entitle them to sit and vote as members of the Church courts, from the lowest to the highest. This being the case, raises the highest presumption against the supposition that power would be given to the Church to erect new parishes *quoad sacra*. Accordingly, I have been unable to find in the statutes any thing on which the Church's claim to the power of doing so can be rested.

The power and authority of the Church, as standing on the statutes, seem to me to be set forth in terms which exclude all pretensions of the kind. I think that agreeably to the statutes, instead of the Church having, through the medium of its ecclesiastical privileges and jurisdiction, the power of partitioning parishes, and cutting off from an original parish a district to be erected into a separate parish *quoad sacra*; and investing its unendowed and elected minister with all the rights and privileges of an endowed minister of an existing parish, inducted on the presentation of a patron—both the State and individuals (including patrons and parishioners) have an undoubted claim upon the Church, as an established Church, to do nothing which shall alter the subsisting connexion between its ministers and the parochial districts over which they are placed, or encroach upon the relative privileges and duties, whether of ministers or parishioners, arising out of it; or which shall change the character of the Church Courts to which, as parts of the religious establishment of the country, the administration and adjudication of certain highly important civil interests have been entrusted. I think that this is as much a consideration or condition on which the rights, powers, and privileges of the Church were bestowed, as the duty of taking on trial the presentees of lawful patrons, and admitting them if found duly qualified, or any other positive duty which the Church is bound to perform; and it appears to me to be impossible to hold, that any power given to the Church, or any grant of jurisdiction in matters ecclesiastical, although it be independent and exclusive within its own limits, could ever be intended to be used for a purpose, the accomplishment of which must be attended with the results which will admittedly follow the erection of *quoad sacra* parishes, or that if the power be not given, still the Church is in the peculiar position, that to control any excess of power or jurisdiction is not within the jurisdiction of the Courts of Law.

The attempt of the respondents in the proceedings in the present instance (which, be it observed, does not appear to be warranted by the Acts of Assembly under which these proceedings are taken) to save them from this ground of objection, by declaring "that no civil right of these parties" (that is, the parties applying for interdict,) "or of any others whatever, shall be in any degree affected by the foresaid allocation; and that the effect of this allocation is limited exclusively to matters of spiritual discipline and government"—is, in my opinion, quite hopeless. The allocation of the new parish is to stand—the minister and the elders of the separate kirk-session which is to be established, are still to be members of the Church courts. What then? Are they to be members only with power to discharge part of the duties of members—members with a partial qualification, and only a partial capacity for the office, and for the discharge of the duties attached to it, but powerless to perform some of its most important functions, including among others, the trial and admission of presentees! This novel and imperfect *status*, as members of the Church courts may harmonize with the novel and imperfect erection of the parish, as the minister and elders of which they are to enter these courts; but, with submission, it is totally inconsistent with any conclusion which can be formed from the language of the statutes in regard to the character of the constituent members of the Church courts, as by law established, whether as respects their qualifications, and powers, and privileges, on the one hand, or the duties to be performed by them, and which they are bound to discharge, on the other.

4. I conceive that the groundlessness of the Church's claim to the power now asserted by her, is confirmed by the practice of the Church, and by the legislative enactments which the Church not only concurred in, but promoted.

If not all, almost all the cases referred to as proving the former exercise by the Church of the power in question, have received explanations which deprive them of any weight as authorities. But at any rate, looking to the history of the Church, and the state of the country, it would not be by a few instances of the erection of a district of a parish, into a parish *quoad sacra*, that the Church's power to do so could be held to be established—the more especially, when, for a very long period back, no trace can be found of the exercise of such a power, even in the equivocal manner exhibited in the instances relied on. I cannot indeed but think that the few cases to which the respondents, after the most diligent research, have been able to appeal, in order to support the power claimed, by the evidence of practice, and the fact that the latest of them dates more than two centuries ago, affords (even when they are taken apart from the explanations of which they are susceptible) strong proof that the claim is unfounded.

And this conclusion is still further and most powerfully confirmed, by the statutory

provisions made for the division of parishes, and the erection of new ones, by the powers conferred on different commissions, and latterly upon the Court of Teinds. These provisions produce in my mind the strongest impression, that it could not be the understanding either of the State or the Church, that the latter in its different Presbyteries possessed a power of altering the territorial divisions of the country, as regarded the parochial relation, by erecting new parishes;—and of creating a new Church court within the original parish, consisting of the minister and elders of the new *quoad sacra* parish, and introducing into the other Church courts clerical members, differing in character, as the ministers of *quoad sacra* parishes do, from the ministers of existing parishes, and also the elders of their kirk-sessions. I cannot consider that the conclusion to be drawn from these enactments is satisfactorily obviated by the observation, that they had in view the disjunction of parishes, and the erection of new ones *quoad omnia*, and not *quoad sacra* only, and that the interposition of the Legislature was necessary to accomplish the former, by which the provision of the clergyman was to be made a burden on the teinds, but not required for the latter, which the Church was entrusted with the power of doing at its own discretion. It is apprehended that there is no ground for holding that such partial erection of new parishes, to special effects, was ever contemplated as an arrangement to be made within the Church, or any erection of a new parish understood to be possible, except one which would be accompanied with that provision for the clergyman which has been assigned to the ministers of the Establishment, as members of a church endowed by the State, and which would place the clergymen of the new parishes upon the same footing, in other respects, as those of the original parishes. The endowment of the minister is assumed by the Legislature to be a necessary part of the erection of a new and separate parish. The parish was to be a new parish *quoad omnia*, not *quoad sacra tantum*. Accordingly, although the Court of Teinds, (in virtue of the powers conferred upon it,) annexes a part of one parish to another parish *quoad sacra*; it never *erects* only *quoad sacra*. When it erects it erects *quoad omnia*. In the *quoad sacra* disjunction and annexation, there is no erection of a new parish to any effect. It is only the separation of a part of one existing parish, in order that it may be annexed *quoad sacra* to another existing parish. The ministers of the two parishes continue to draw their endowments as before, and to serve their respective cures, subject to the partial alteration of their boundaries. To make even this limited change, special power was granted by an act of the Legislature. It was ultimately placed in the Court of Teinds;—and there also was placed the larger power of erecting new parishes; but that is a power, not of making new parishes *quoad sacra*, but only of making new parishes *quoad omnia*. As I read the statutes, they were intended to afford the means—which otherwise did not to any extent exist—of making those arrangements as to the parochial divisions of the country, which circumstances might require. They proceed upon the footing, not that new parishes could by any, then existing power, be competently erected to certain effects, although not to all, but that they could not be erected to any effect, except on special application to the Legislature. They seem to me to assume that the want to be supplied was total, not partial; and while it was fully remedied, this was done, not by giving a power of erecting new parishes *quoad sacra*, but only of erecting them *quoad omnia*—that is, it was done in the only way which was consistent with the constitution of the Church, as by Law established.

I may further remark, that it occurs to me that it would be no easy matter, in various cases which might arise, to reconcile this alleged power in the Church, of disjunction and partial erection of new parishes, with the power, whether of disjunction and annexation merely, or of entire erection of new parishes given to the Court of Teinds. In some instances there might be a harmonious exercise of both:—In others it might be very much the reverse;—and I see no reason for supposing that any power was recognized by the State which could in any degree interfere with the full and unrestricted operation of that which was specially conferred on a distinct commission, to act in the matter as it should find cause.

The conduct of the Church in reference to chapels of ease, when first instituted, and down till 1834, and the statute in regard to the additional churches in the Highlands and Islands also, as it strikes me, lead to the same result.

In the last case, the Legislature, when—(for the particular reasons which induced the passing of the statute)—provision was made to enable certain districts to be set apart, within which additional churches were to be built, and the labours of the appointed ministers to be confined, and for whom an endowment of L.120 a-year was

to be paid by the Exchequer—specially declared that a district, so set apart, is not disjoined from the parish or parishes to which it belongs, or erected into a separate parish, that the minister and elders form no separate kirk-session, and that they have no seat in the Church courts. Can it be imagined that, while these were the provisions of the Legislature in the instance referred to, the Church all the while had the power of erecting *quoad sacra* parishes, and conferring upon the ministers of them all the rights and privileges competent to other ordained ministers of the Church of Scotland? In maintaining, that it had and has that power, it is not unimportant to remark what the Church, in the exercise of it, has done, in reference to the districts and their ministers, set apart and appointed in virtue of the above act. The church has, in fact, repealed the provisions of the statute, and, in direct opposition to its enactments, given a character to these districts, and conferred powers upon their ministers, which were expressly withheld by the statute. This shows, in a striking manner, what is the nature of the rights, powers, and privileges which the Church lays claim to, as belonging to it, in virtue of the general and exclusive ecclesiastical jurisdiction which it alleges it possesses.

5. But further, the uncertainty of the arrangements attending the erection of parishes *quoad sacra*, and particularly the insecurity of the provision for the minister, is a feature in the proceeding which ought not to be overlooked. As an Established Church, not only is provision made for the permanent support of its places of worship, but its ministers are endowed officers. It is a part of the constitution of the Church that the clerical members, serving cures, shall have a competent provision secured to them. The minimum was fixed at L.150, and funds were supplied by the State to bring up all livings to that sum. By the act already referred to, the ministers of the additional churches in the Highlands and Islands are provided with a lower endowment, viz. L.120 per annum; but these ministers are not placed in the same position as their brethren, as regards the rights and powers of parish clergymen. Now, it is not an interest, in the clergy merely, that the ministers of the Church, as an Establishment, should have competent and certain provisions, and that these provisions should be supplied in a particular way. It is also the interest of the State, and of the inhabitants of the country generally, and it is thought that any power of erecting *quoad sacra* parishes, to be exercised in the manner in which it has been exercised by the Church in its late proceedings, is altogether inconsistent with that feature in the character and constitution of the Church, as an Established Church, which has just been adverted to.

If the provision for the minister of the new parish, or for the support of the Church, shall fail, what is to become of the *quoad sacra* erection? Is it to be undone, and the inhabitants of the *quoad sacra* parish to be again thrown back into the old parish, and the two districts to be once more united *quoad sacra*, as well as *quoad civilia*, and all the arrangements which were made for the discharge of parochial duty and the supply of religious instruction overturned? If the charge of the old, but *quoad sacra* curtailed parish, has become vacant in the interim, and a new minister been appointed, is he, for such reasons, to be subject to having the territory of his pastoral ministrations thus suddenly enlarged, just as his predecessor was subject to having a part of his original territory and flock taken from him? Is the living to which the patron has the right to present, and to which the minister is in consequence inducted, to be subject to changes so material, and of duration so uncertain? And where is this to end?

If, when the original parish stands abridged of its former dimensions by the erection of a part of it into a new *quoad sacra* parish, the church of the former falls into that state of decay or disrepair which requires it to be rebuilt, how is the size of the new church to be determined? Is it to be made to hold two-thirds of the examinable persons in the whole extent of the original parish, although a fourth or a third of them may be resident in the *quoad sacra* parish, and for whom therefore the provision of church room would seem to be of all things the most incongruous with the existing *quoad sacra* state of matters? or are the latter to be excluded from the calculation? And if so, then what is to follow, if from either of the above causes the *quoad sacra* parish and its inhabitants shall be again united with the old parish? Must the deficient supply of Church accommodation continue, till the Church can again, in terms of law, be appointed to be rebuilt, or will it be competent to order it to be supplied forthwith? Is the case of a new church which is built in a parish, part of which has been erected into a separate parish *quoad sacra*, to be dealt with as one where at the time of building, provision can competently be made for additional accom-

modation, if the original parish shall be again increased to its former length and breadth?

I have now adverted only to the question of the extent of Church accommodation apart from its unavoidable accompaniment—the expense of supplying it. But there again will be found further difficulties, arising out of the anomalous position in which a parish comes to be placed by the erection of a part of it into a parish *quoad sacra*, and the uncertainty of its duration. And I would, with great deference, ask whether, upon a review of all the statutes in regard to the Church, any ground can be found for concluding, that it was contemplated, that by the exercise of a recognized power in the arrangement of parishes, as in connexion with religion, such cases as have been suggested (and many more, and I doubt not more important ones will occur to others) could arise under the constitution of the Church as established by law.

6. Finally, and reverting to what I have stated at the outset, as appearing to be essential points in the constitution of the Church of Scotland, as recognized by the State, and which certainly hitherto, and down to the late proceedings of the General Assembly, have operated in forming the constituent clerical members of the Church, and of those Courts to which its government and its powers and jurisdiction have been confided;—it is impossible not to be struck by the contrast which must be presented, if the Church is to proceed in the course on which it has entered. It humbly appears to me, that the effect must be to change most materially the whole character of a large portion of the clerical members of the Church, and in a great measure to place the powers and jurisdiction of the Church in the hands of individuals to whom—from their position and circumstances—it is impossible to suppose that the Legislature, in adopting the Church as an Establishment connected with the State, and forming one of its institutions, could intend to entrust them. It would, I apprehend, require very clear enactment to warrant an opposite opinion; but I find nothing of the kind. On the contrary, after considering, with the care which the subject demands, all that has been urged in favour of the Church's claim, I humbly think that it has no foundation either in statute or practice.

I shall only add, that,—while the result at which I have arrived is, that the letters ought to be suspended, and the interdict formerly granted declared perpetual—I am sensible that all that is necessary to be stated, or which indeed can be stated in support of that conclusion, is already contained in the opinions of Lord Medwyn and the Lord Justice-Clerk.

Lord Cuninghame.—I have considered the important questions now brought under our review, with all the attention in my power, and have come to the conclusion, that the proceedings of the Church courts, under suspension, were altogether incompetent and illegal. Being unable to add any thing to the ample detail, given in Lord Medwyn's opinion, of the statutes and precedents applicable to the case, I have only to state generally, my concurrence in his Lordship's views, while I beg to refer particularly to the Opinion of the Lord Justice-Clerk, as containing those propositions, in point of law, which I conceive to be fairly deducible from the more full exposition of the authorities given by Lord Medwyn. It is perhaps unnecessary to say more; but in a case of the great importance of the present, it may be proper to state briefly the grounds which have chiefly weighed with me, in forming the opinion now expressed.

I. The jurisdiction of this Court, to entertain the questions now brought under our cognizance, appears to me to be unquestionable. On this point, the relevancy and accuracy of the complainer's statement must be assumed. It must be taken for granted, that the erection of the new parish *quoad sacra*, by authority of the Church courts alone, and in the face of the strongest opposition of the patrons and heritors, was not authorized by the common law or statutes of the kingdom, and that it was a new and unheard of usurpation of power by the Church courts, as alleged by the complainers. Should that be made out, on the merits of the present question, it is apprehended that the Supreme Civil Court are entitled and bound to entertain the cause, as it turns on points which can only be discussed before them, and on allegations of wrong, for which they only can afford protection and redress. It is a proper civil and not a spiritual cause.

In this view, the pleas of the parties on the jurisdiction and merits in the present case, obviously depend upon, and are inseparably connected with, each other. The cause resolves into an enquiry, Whether the disjunction of a part of an ancient parishe and its erection into a new and additional parish, although limited to *quoad sacra*,

effects only, be within the legitimate powers of the Established Church as declared and defined by the statute? If it be so, this Court is bound to give effect to the measure; but, if it be not, the parties opposing the division, have a civil right and title to an interdict from this Court, to stop the Church courts from carrying into effect an illegal excess of power.

II. On the question as thus stated, it humbly appears to me, that the proceedings on the part of the Presbytery now objected to, are not only unsanctioned by the statutes establishing the Presbyterian form of Church government in Scotland,—but that they are excluded by all the acts of the Legislature which bear on the case.

It is impossible to examine the Statute-Book of the Scottish Legislature, at the era of the Reformation, without being struck, with the very limited jurisdiction indeed, that was conceded to the Kirk by the State. It is manifest that the sagacious statesmen of that day, were jealously alive to the evils of the ecclesiastical despotism claimed by the priesthood, under the system of ecclesiastical polity then abolished, and that they were resolved to restrain it, in future, within the narrowest limits consistent with the maintenance of a due discipline over the conduct of the clergy themselves, and their congregations. Hence the first act passed relative to the jurisdiction of the Kirk, the act 1567, cap. 12, which is not printed in the small edition of the Statutes, but will be found in Mr Thomson's folio edition, (vol. iii. p. 24,) enacts, "The Kingis grace, with avise of my Lord Regent, and the Estates of this present Parliament, hes declarit and grantit jurisdictioun to the said Kirk, quhilk consistis and standis in preeching of the trew Word of Jesus Christ,—correction of maneris,—and Administratioun of Haly Sacramentis; and declairs, that there is na other face of kirk, nor other face of religioun, than is presentlie by the favor of God establisheit within this realme; but that thair be no other jurisdiction ecclesiasticall acknowledgeit within this realme, other than that quhilk is and sal be within the same Kirk, or quhilk flows thairfrae concerning the premises." And it concludes with a Commission to certain Lords and Ministers, "to seirche furth mair speciallie, and to consider quhat other speciall points or clauses suld appertain to the jurisdictioun, privilege and authority of the said Kirk, and to declair thair mindis thairanentis, to my Lord Regent and the Estatis of this realm, at the nixt Parliament."

This statute appears to be very clear in its import. It gave the Kirk exclusive power to preach the true word,—to correct manners,—and to administer the holy ordinances,—and that of course enabled them to control and punish all undue conduct in the giving or receiving of these spiritual services;—but by no legitimate construction can it be held, to have conferred any power on the Kirk to nominate and choose the ministers who were to officiate, or to annex or disjoin the parishes in which rights of patronage already existed. That, in fact, would have been directly at variance with a previous act passed by the same Parliament; and on the same day (cap. 7.,) anent the "admission of ministers," whereby it was provided, that the examination and admission of ministers be only in the power of the Kirk, but that "the presentation of laic patronage be always reserved to the just and auncient patrones."

The act of 1567 was renewed in 1579, (cap. 69 of small edition,) and requires no remark;—but the act 1594, cap. 132, (small edition,) intituled, "The Causes and Maner of deprivation of Ministers," deserves to be particularly noticed, as it points out very clearly the occasions on which it was meant that the spiritual jurisdiction of the Kirk should be exercised. It proceeds on the narrative, that his Majesty and the Three Estates, "willing that the Word of God sall be preached, and sacrementes administrat in puritie and sinceritie, and that the rentes, quharon the ministers oucht to be sustained, sall not be possessed be unworthie persones, neglecting to do the deuties, for whilkes they accepted their benifices, being utherwaies polluted with the fraill and enorme crimes and vices after specified;—It is therefoir statute and ordained be his Hienes, with advice of the saidis Three Estates: That all persones, ministers or readers, or utheris provided to benefices, sen his Hienes Coronation, (not having vote in his Hienes Parliament,) suspected culpable of Heresie,—Papistrie,—false and erroneous doctrine,—common Blasphemie,—fornication,—common Drunkennes,—Non-residence,—Plurality of benefices having cure, quhairunto they are provided, sen the said coronation, Simonie and dilapidation of the rentes of benefices, contrare the last act of Parliament, being lawfully and ordourly called, tryed, and adjudged culpable, on the vices and causes above written, or onie of them, be the ordinar Bishope of the diocese, or otheris the Kingis Majesties Commissioners to be constitute in ecclesiastical causes, sall be deprived alsweil fra their function in the ministrie; as from their benefices, quhilkes sall be thereby declared to be vacand," &c. &c.

Then followed the Act of 1592, chap. 116, generally referred to as the charter of the present established religion in Scotland. It ratified and approved "the Presbyries and particular Sessions appoynted be the said Kirk, with the haill jurisdiction and discipline of the same Kirk; aggried upon be his Majesty, in conference had be his Hienesse with certaine of the Ministers convened to that effect; of the quhilkes Articles the tenour follows." It is unnecessary to transcribe the Articles, which are minute and specific; but they all relate to the jurisdiction and powers of the higher and lower Church courts to check Heresy, Immorality, negligence, and other delinquencies in the performance of duty, as specified in the Act of 1584 before quoted. It was accordingly declared that that Act (of 1584,) whereby jurisdiction was given to Commissioners to take cognisance of ecclesiastical delinquencies, "sall nawayes be prejudiciall, nor derogate ony thing to the privilege that God has given to the Spiritual Office-Bearers in the Kirk, concerning Heads of Religion—Matters of Heresie—Excommunication—Collation or Deprivation of Ministers, or ony siklike essential censures speciallie grounded, and havand warrand of the word of God," But this statute (of 1592) gave no power to the Kirk to erect new parishes or to divide old ones, or to interfere in any way with the subsisting extent and rights of any parish or patron. On the contrary, while the last clause of the statute gave Presbyteries power "to put order to all matters and causes ecclesiastical within their bounds, according to the discipline of the Kirk," it specially provided "that the foresaid Presbyteries be bound and astricted to receive and admit quhatsomever qualified Minister, presented be his Majesty or laic patrons."

It is upon these statutes that the jurisdiction of the Kirk stands at the present day. The ecclesiastical or spiritual causes, over which the Reformed Clergy got an exclusive jurisdiction, were not the ecclesiastical suits which belonged to the Catholic or Episcopal Hierarchy, but simply those powers necessary for the pure dispensation of the Gospel and its ordinances, and for preserving the morals of the pastors and their congregations, as these were established by law in existing parishes. No power was given to the Kirk, or intended to be given to them, to enlarge or alter, or in any respect to new-model their own constitution.

III. It is a fact as clearly traced, as any point in the ancient history and practice of the law can be, that the Kirk, at the date of the Reformation, neither assumed nor ever claimed any right, of their own authority, to make a permanent alteration of the organization and boundaries of parishes. Sir John Connell, in treating of the practice prior to 1592, distinctly states, that "in 1563" (*i. e.* the third year after the abolition of Popery) "an Act of Assembly was passed, which supposes that at that period the Church neither had, or claimed, any power of modelling parishes: for this Act authorizes an application to be made to the Queen and the Privy Council to unite such churches as were too near each other. A few years afterwards, viz. in 1571, an Act of Assembly was passed, which gave "licence" to Bishops, Superintendents, and Commissioners, to change the situation of parish kirks, manses, and glebes; but a power of this description is evidently one of a very inferior nature to that of erecting or suppressing parishes."—Connell on Parishes, p. 2 and 3.

Subsequently, when Presbyteries were recognized by the Act of 1592, the Records of the Assembly itself, afford conclusive evidence that the Kirk did not even at that time, when they were not slow to assert their power, claim any right, of themselves alone, to erect new churches in an existing parish. The Record bears, that in the General Assembly held at Montrose in March 1600, "the question being moved, If it be lawful, where congregations are so spatious, that a great part of the same may not commodiously resort to their own parish kirk, by reason of the great distance of the same, that a number of the said congregation build a new kirk, and entertain a pastor upon their own expenses. The Assembly, after long reasoning, thought it lawful, and declared they would assist the same as a godly work, and crave the same to be ratified in Parliament so oft as it shall occur." See Record, quoted in Book of the Kirk, 16th March 1600.

This is an authority of great importance. The subject discussed, related to a proposition far short of the disjunction of a parish and the erection of a new one; the question put, related simply to an additional Church proposed to be built, and a pastor to be appointed for the same, whose expenses thereof were to be defrayed by the Congregation, and the whole Kirk agreed that a new establishment of that description, required the consent of Parliament to give it validity.

On this head, it is only necessary further to refer to the detail given by Lord Medwyn, as to the actual proceedings which took place in the division and erection of

parishes between the Reformation and Rebellion in the seventeenth century. His Lordship demonstrates very clearly, that the authority, either of Parliament, or of the Commission, was in each case, asked and given to all the erections of parishes during that interval, before they were held to be legally completed.

IV. The Scottish Legislature not only gave no power to the Church courts to erect or disjoin parishes, but at a comparatively early period after the Reformation, they invested other functionaries with these powers. As stated by both parties in this cause, Commissions were issued by Parliament early in the seventeenth century, for the special purpose of uniting small parishes and dividing large ones, where that was found expedient on hearing all interested. The first of these Commissions was constituted by the act 1617, cap. 3, which contained only a power to unite small parishes, and not to divide larger parishes. But that omission was supplied by the next Commission appointed by the act 1621, cap. 5, which recites, that "there are some parishes so large, that many of the parishioners, from distance, 'or the interjecting of waters,' were unable to attend the parish church; and therefore, the Commissioners are authorized to erect new parishes, and to appoint the building of such new churches as shall be necessary, and to provide the new ministers 'with such proportion of stipends' as can be modified with the least prejudice.' To the erection of new parishes, and the building of new churches, the consent of Patrons, and all others interested, was declared to be requisite.

Similar powers were given to the Commissioners, in all the subsequent Commissions authorized by Parliament, from 1621 till the Union. One of the measures carried through, in contemplation of the Union, was the appointment of a permanent Commission for the plantation of Kirks and valuation of teinds (1707, cap. 9,) whereby the Lords of Session were empowered "to cognosce and determine in all affairs and causes whatsoever, which by the laws and acts of Parliament of this kingdom were formerly referred to, and did pertain and belong to the jurisdiction and cognizance of the Commissioners formerly appointed for that effect, as fully and freely in all respects as the said Lords do, or may do, IN OTHER CIVIL CAUSES."

By a subsequent clause of the same act, it was expressly provided that "the Transporting of Kirks, disjoyning of too large paroches, or erecting and building of new kirks, being always with the consent of the heretors of three parts of four at least of the valuation of the paroch, whereof the kirk is craved to be transported, or the paroch to be disjoyned, and new kirks to be erected and built, the minister in the meantime to serve the cure, in the present kirk of the paroch."

Now, looking to these statutes, the question arising here is,—Whether they do not effectually exclude any claim of the Kirk to interfere with the disjunction of parishes to any effect? Can it be contended that the Legislature meant to give this power to two judicial bodies at the same time? Nothing can be more improbable. The subdivision of old parishes, and the erection of new ones, are styled in the last statute as "civil causes;" which excludes the inference, that such proceedings were comprehended among the spiritual causes, to which the Kirk got exclusive jurisdiction by the older statutes on which they found.

The views suggested by the Statutes authorizing these Commissions, appear to me to be of overruling importance in the present discussion. The disjunction of old parishes and the erection of new parishes to any effect, must either be a civil or a spiritual proceeding; if it be of the former character, it will belong exclusively to the Civil court;—while, if it be a purely spiritual cause, it will belong solely to the Church courts. The jurisdiction of each is peculiar and exclusive, and ousts the other. The two Courts have no concurrent jurisdiction in such causes, by any of the statutes. In like manner, if the disjunction of an entire district from an ancient parish, and its erection into a new and separate parish, *quoad sacra*, be a proper spiritual cause, every partial annexation, *quoad sacra*, must have the same legal character. The greater power must, both in law and in reason and consistency, include the less; and, therefore, every local annexation, *quoad sacra*, be it greater or less, must be carried through by authority of the Church courts and of them alone; and all such annexations hitherto made by the Statutory Commissioners, as a Civil court, must be null and void.

That is manifestly a new and very questionable doctrine; and the consequences, to which it leads, deserve to be well considered. If these disjunctions, erections, and annexations *quoad sacra* (total or partial, as the case may be,) are held to belong to the Ecclesiastical courts, they may be made without the restraints of the act 1707—without the consent of three-fourths of the heritors—and even without

notice to them. By the statute, also, which treats all such proceedings as civil processes, the heritors, aggrieved by the sentence even of the Supreme Civil Court, have a right to bring the case under review of the highest tribunal of appeal, in the House of Lords. But that right is at once abolished by the Ecclesiastical courts, summarily and of their own authority, declaring such causes to be spiritual, and to fall within their own exclusive and final jurisdiction.

According to that rule, the Kirk would have the power of altering and new-modelling, at their own hand, the whole parochial jurisdictions of the kingdom, in Ecclesiastical affairs. They might unite parishes or diminish them—or multiply them by disjunctions, total or partial *quoad sacra* (*i. e.* as to the chief purpose of their original delineation,) as they thought fit, without regard to any of the provisions by which the rights of heritors, in such proceedings, are guarded and protected by special statute. It humbly appears to me, on the following considerations, that these pretensions are as novel in themselves, as they are contrary to the very object for which the Commissions were appointed by Parliament.

1. The Statutory Commissions, from time to time granted by Parliament, conferred the power of Disjunction, new Erection, and Annexation, solely on the Commissioners therein named, and on no other Functionaries, Civil or Ecclesiastical, in the State.

2. The powers of the Commissioners extended to every species of erection and annexation, total or partial—absolute or qualified, as the circumstances of the case required. Hence they have been in the practice, with the universal acquiescence of the country, at least since the Union, of decreeing a great many partial annexations, *quoad sacra*, of lands, which have been disjoined from one parish, and subjected to another *in spiritualibus*, solely under the authority of this Court, as the Statutory Commissioners for the Plantation of Kirks.

3. It is established by the Records, that in many instances, the Presbyteries, instead of claiming a power to judge in erections or annexations *quoad sacra*, have pursued such processes, as parties, before the Commissioners for Plantation of Kirks. Two such examples are given in Sir John Connell's Treatise on Parishes (p. 220-21,) in which decrees were pronounced by the Commission, disjoining certain lands from their old parishes and annexing them to new parishes *quoad sacra*, the processes to that effect, having been actually brought at the suit of Presbyteries. These were litigated cases opposed by the heritors, and it is probable that many other cases of a similar nature might be found on a search of the Records, which it was not thought of the least consequence, with reference to any question then mooted, to insert in any printed report. Enough has been shown to prove, that in the earlier practice after the Statutory Commission was acknowledged as the legitimate tribunal to which the Church was bound to apply, for disjunction and annexation even *quoad sacra*, in all cases where the consent of those interested was not given.

4. The preceding observation explains another statement in Sir John Connell's work, which at first sight may lead to error in considering the present question. The learned author states that "as an annexation of lands, *quoad sacra*, imports a change of parishes merely for religious purposes, our Church courts have sometimes exercised a power of this kind, without either the authority or the concurrence of the Teind Court."

Only one instance is given of such an annexation, though the author states, in a note, that he has been informed of various other disjunctions of this description by Church courts. It is very possible that such cases are to be found; but they must all have been proceedings of consent of all interested. When that is the case, and when the disjunction and annexation are followed by prescription, the proceeding is probably unchallengeable. It is even possible that the division of one parish into two, *quoad omnia*,—with consent of Patron—Heritors—Presbytery—and the whole community, when completed extrajudicially, and followed by possession, might be held unchallengeable *ex longo intervallo*. These examples are quite inapplicable to such a case as the present, where the disjunction and new erection have been strenuously opposed *ab initio*, both by patron, minister, and heritors.

It may be added, in reference to disjunctions and annexations of consent, and long acquiesced in, that the law of Scotland has always been cautious in interfering with the jurisdiction of special functionaries and corporations, when established and recognized from time immemorial, as demonstrated in the case of Dowie, and other authorities therein quoted (Fac. Coll., 30th May 1817,) in which it was found, that in respect of universal consuetude, the Magistrates of a burgh, when acting within

their own bounds, could exercise jurisdiction over parties, even *extra territorium*. It is obvious, that if such a proceeding had been challenged *de recenti*, when first exercised, it would have been instantly annulled.

5. On the same grounds, the admission and reception of the second ministers of burghs and other urban parishes is quite inapplicable to the present case. In each and all of these, the establishment of the second minister seems to have been made with the approbation and consent of patron and heritors, and ever after acquiesced in by them and their successors. Sir John Connell states expressly (p. 82)—"These ministers were established by the authority of the Church courts alone, in consequence of previous arrangements among the parties interested; and the legality of the establishments does not appear to have been called in question."

There is another consideration which distinguishes the case of second ministers in towns from the present case. As observed by Sir John Connell (p. 120)—"None of the Teind Commissions confer any express right to erect second charges; and the Commissioners are equally silent with regard to the power of modifying stipends to second ministers." When the Church courts, therefore, with consent of all interested, gave their sanction to the admission of second ministers, they did not trench on any special power conferred on the Commission.

It would rather appear, however, that the legality even of the admission of these ministers came to be doubted in the more mature practice of the Court after the Union, as Sir John adds (p. 87)—"About thirty years after the Union, however, a practice became prevalent, of applying to the Court of Teinds for the erection of new churches in towns; which applications were always followed by regular Decrees of Erection."

There is thus no usage, late or early, on which the Presbytery can found, to justify the proceedings now under suspension. But even if there had been a few isolated cases of this assumed power, when the State was struggling in barbarous and unsettled times, with political and ecclesiastical factions, taking advantage alternately of the weakness of the Monarchy, and of the rebellion of the people, these would form no precedents for the guidance of this Court, in the interpretation of the statutes, of clear import, in settled times. The records of the General Assembly, from the Reformation to the Rebellion, contain many examples of ecclesiastical usurpation, which no State, capable of upholding a regular Government, would have tolerated for one day. For example, though the Legislature positively enacted in 1592, that the Presbyteries should be "bound and astricted to receive and admit whatsomever qualified minister was presented by his Majesty or laic patrons,"—the General Assembly, in 1596, passed their noted act to counteract the statute, whereby they provided, "that none seek presentation to benefices, without the advice of the Presbyterie within the bounds where the benefice lyeth; and if any do the contrarie, that they be repelled as *rei ambitus*." In like manner, it is notorious that the Assembly of 1638 abolished, at their own hand, Episcopacy in Scotland, which had been established (no doubt contrary to the will of the nation) by an act of the Civil Legislature in 1612. Still further, a stronger example of the expedients resorted to by the Kirk, to obstruct, if not to resist, the statutory law of the land, is to be found in the well-known regulations made by them as to Calls in the preparatory steps for collating presentees. These were framed at an early period, and have been since kept up for the sole purpose of defeating the rights of Patrons; and so lately as in the first Auchterarder case, it was contended, that this was a law of the Church which qualified the rights of Patrons; but it was laid down by the highest authority in the House of Lords, that the call, in its original form, could never have been permitted to interfere with the statutory rights of Patrons, and that any new regulations to interfere with these rights, must be equally incompetent. (Lord Cottenham's Opinion, p. 56.) In short, the mere usage or proceedings of the Kirk, at variance with the common or statutory law of the land, can constitute no available authority, when it is challenged in a competent form by the parties aggrieved. But it has been shown that there is no usage to support the plea of the Kirk under the circumstances in which it is here urged. The present is admitted to be the first example, in which an attempt has been even made by any Church Court in Scotland, to divide a Landward parish, and to erect a portion of it, into a new and separate parish *quoad sacra*.

V. Upon the preceding grounds, and on every other legal view which I have been able to take of the present case, it humbly appears to me, that the proper question at issue, is a civil and not a spiritual cause. It involves civil interests of high importance, and has no connexion with the right Preaching of the Word—or the Morals of

Pastor or Congregation—or the due Administration of the Sacraments, but resolves into a claim by the Church, on their own views of religious expediency and necessity, to make an organic alteration on the Establishment in a specified district, incompatible with the statutory rights of the patrons and heritors objecting to it.

The plea of the Kirk appears to be founded on the assumption, that they are entitled to hold every suit as an " ecclesiastical " cause, that involves the right to dispense spiritual services and ordinances to particular congregations or districts. But this is a fallacy of the most palpable description, as some of the most familiar examples in practice may demonstrate. The privilege of dispensing the services of the established religion, in a particular district, is a valuable legal right, which is always tried and adjudicated by the Supreme Civil Court. For instance, when a question arises, as to the position of a particular district or estate, and it is claimed by contending incumbents of different parishes as lying within each, one of the main points in dispute is, Whether the inhabitants of the district, are entitled to have religious services and ordinances dispensed by the minister of the one parish or of the other? But it never was imagined, that such a cause was not a proper civil cause. The right of patronage itself also, is another example in which the jurisdiction of adjudicating as to spiritual offices, has invariably belonged to the Civil courts. It was so, long before the Reformation, even in the times when ecclesiastical supremacy was at its height.

In these, and in similar cases, however, it has been said that the right to stipend, and other temporalities of the benefice, though only incidental and subordinate to the spiritual office, constituted civil interests sufficient to support the jurisdiction of the temporal court; but it is argued, that no civil interest of any sort is involved in the present question. It is apprehended, however, that the proceedings of the Presbytery objected to, do affect many important civil rights, in which the suspenders have an interest amply sufficient to support their present plea.

In considering the argument raised on this branch of the case, I am quite aware of the peculiar and novel qualification by which the decree of the Presbytery in the present instance is attempted to be qualified with the declaration, " that no civil right of these parties or of any others whatever, shall be in any degree affected by the foresaid allocation; and they further declare, that the effect of this allocation is limited exclusively to matters of spiritual discipline and government; as also, that heritors and their tenants, in that part of the parish of Stewarton thus set apart as a territorial district to the New Church, having legal rights to sittings in the original church, may, in their option, continue members of the congregation thereof."

But these qualifications are of themselves novel, anomalous, and unauthorized; and were such as the Presbytery had no right to enact, and no means to enforce. With reference to parochial jurisdiction, the proprietors and possessors of lands may be attached to their respective parishes either ***quoad omnia*** or ***quoad sacra;*** but in either case, the astriction to the church of the parish, according to the law and practice of Scotland as hitherto understood, must be compulsory, not voluntary. Accordingly, Sir John Connell gives the form of a decree of annexation ***quoad sacra*** (page 219,) whereby the Commissioners for Plantation of Kirks disjoined certain lands from the parish of Falkirk, " and united and annexed the samen to the parochine of Denny; and ordained the inhabitants, of the respective bounds above mentioned, to repair to the kirks above specified, to which they were annexed, as said is, for hearing of the Word, receiving of the Sacraments and all other acts of public divine worship, and to subject themselves to the ministers thereof, as their proper pastors, in all time coming; and declared the above annexations to be *quoad sacra tantum.*"

The Presbytery of Irvine had no power to pronounce a decree to the preceding effect; and if they had not, it just shows the more clearly the utter incompetency and inability of any Church court, to make any valid disjunction or annexation of lands *quoad sacra*, according to the law and practice of Scotland. Their declaration, that " no civil right of these parties, or of any others whatever, shall be in any degree affected by the foresaid allocation,'—was a sort of protestation or reservation against the ordinary operation of the law, without precedent or authority—and in fact an attempt to effect an impossibility. If the erection now complained of were sanctioned, it would affect the legal rights of parties under the protection of the Civil court in the most essential points. The following may be noted *inter alia* as the most prominent:—

In the *first* place, even with all the unusual and anomalous reservations of the Presbytery in the erection of this parish, if it were sustained to any effect, it would necesarily exempt such heritors as chose to frequent the New Church from all burden of upholding the old. This of itself increases the ultimate burden upon, and the patri-

monial responsibility of, the heritors remaining attached to the original parish, who object to its disjunction.

In the *second* place, by the erection of a new parish, with a separate kirk-session, the Church courts divide the duties and diminish the emoluments of the session-clerk of the original parish—an office which the minister and heritors have an interest, in different views, to maintain entire, unless its privileges be taken away by competent authority. The session-clerk keeps records in which they have an interest; and the legality of his election, and the duration and conditions of its tenure, are matters of civil cognizance. (See Dict. *voce* Kirk-session, p. 8012.) These cannot be affected by any decree of a Spiritual court—which has no power to cite parties interested in its maintenance—and before which, they are not bound to plead.

But, in the *third* place, the erection of a different parish, and the admission of such additional ministers into the Church courts, on their own authority alone, as they choose to appoint—is a fundamental alteration of the constitution and organization of the National Church as established by statute, which may affect the whole civil rights of every heritor and party who belongs to the establishment, or has property subject to its maintenance.

By a variety of well-known statutes, special powers are devolved on Presbyteries (when legally constituted) not only in the collation and deprivation of ministers, but in the erection and repair of kirks and manses—trial of schoolmaster and the like—all of which involve patrimonial rights of greater or less importance. These duties are peculiar; they cannot be delegated to others—they can only be performed by legitimate office-bearers of the Church, invested with their office according to law—and even when their decrees are pronounced, they cannot be enforced by the Presbytery or other Church courts themselves; but they can only be carried into execution by executorial diligence, or decrees issued by the Supreme Civil Court. Obviously, then, it is a question peculiarly and exclusively fitted for the cognizance of the Civil Court, to determine, whether Ecclesiastical office-bearers, whose title is questioned, have or have not been competently assumed as members of these Church courts, and are, or are not entitled to the *status*, powers, and privileges, which they claim. According to an opposite argument, the General Assembly, in a moment of enthusiasm for the expansion of their order and the increase of their members, might add the Synod of Ulster—or the whole Presbyterian clergy within the diocese of Durham, to their body, as *quoad sacra* ministers—and maintain that their decrees in cases of collation—heresy—and of repairs of kirks and manses—schoolmaster's qualifications, and other statutory duties, must be blindly enforced by this Court. This is a question not merely of municipal, but of constitutional law, of no small importance to the country; but till the occurrence of the present case, I should not have thought that it required serious examination.

The opinions of learned and distinguished lawyers in former periods of our law, and in particular of Sir James Stewart and President Blair, have been quoted, as sanctioning the present claims of the Church. But as these were given, without the advantage of the elaborate argument and research, which have been employed in the present and in similar late discussions, relative to the foundation and limits of ecclesiastical jurisdiction—and as, at best, they were directed only to the establishment of second ministers, in parishes or towns, (to which the powers of the Commission for Plantation of Kirks do not extend,) they are quite insufficient to affect any of the views on which my judgment in the present case is founded. On the other hand, the opinion of Sir Henry Moncreiff, recorded, at a later period, in his protest of 1821, as that of a divine of the most sound judgment, and of the greatest experience, may be referred to, as outweighing all others in point of authority, on the very question now under the consideration of the Court.

On the grounds thus shortly explained, it appears to me, that the disjunction of a part of the parish of Stewarton, and the erection thereof into a new parish by the Presbytery of Irvine, was a proceeding altogether contrary to law, which this Court had jurisdiction to stop, and was bound to prevent. It was a violation of the statutory rights of the complainers, affecting both their civil and religious interests; and if it was *ultra vires* of the Church, redress could only be obtained by the interposition of this Court in the form in which it was applied for. It follows that the reasons of suspension ought to be sustained, and the interdict made perpetual.

Lord Moncreiff.—I approach the duty of delivering an Opinion in this Cause with much anxiety, and under deep feelings of the vast importance which it has now

assumed. I could have supposed a discussion to have taken place upon the simple facts which have given rise to it, which might not have involved any such momentous questions as those which are now presented to the Court. But the course of argument found necessary to the case of the suspenders, and the views adopted in some opinions already circulated, have rendered it, in my apprehension, by far the most important cause which I have yet been called upon to consider or to judge of in my time.

I had learned, in my earliest studies of the law of this country, and had believed it to be no subject of doubt or controversy, that the Presbyterian Church of Scotland, as originally constituted in its early history, and as finally established unalterably by the statutes of the Revolution, and the Union of the kingdoms, possessed, by its Courts of General Assemblies, Synods, Presbyteries, and Kirk-Sessions, formed and modelled within it, powers and jurisdiction, both judicial and legislative, in all matters spiritual or ecclesiastical, absolutely independent and exclusive, except as limited by express enactments of the Legislature not here in question, and which no Civil Court, itself created by the State for other ends, could touch or control. I believed this to have been so settled as at last to have become a fundamental, sacred, and unalterable principle in the constitution of the State; by a series of statutes, more precise, more stringent, and in the end more broad and unambiguous, than the laws which have created and defined any other jurisdiction within the kingdom. I do not mean, and am not of opinion, that this power and jurisdiction of the Church courts, in their exercise and application to particular matters, are so dependent on the existence and terms of special statutes, that nothing can be done in virtue of them which is not therein by express words provided for. It does not appear to me, that any such concession was made in the argument in this case; and I shall have occasion to deal largely with that proposition; which I humbly think to be fundamentally erroneous, and to lie at the foundation of all the views of this case which differ from mine. I speak at present only of the general principle, that there is by the constitution of these realms such an exclusive and independent jurisdiction, both judicial and legislative, and in all matters ecclesiastical, vested in the Courts of the Presbyterian Church; and, though I am well aware that its claims to this independent position, and the solemn sanction which it received in the final settlement of the free government of this country—deemed by our forefathers as essential to its existence and usefulness according to the principles of its institution, and ever dear to the affections of the great body of the people of Scotland—were at various times vehemently opposed by certain orders of the community; and may still be very distasteful to some, who may form an erroneous estimate of its true character; I must be allowed to say, that, until the discussions of the present day arose, I never heard it denied, as a matter of fact, that such was the Law of the Constitution.

I now find, however, that this, which I believed to be the fundamental principle of judgment, will not be granted, but is both practically rejected and directly denied; and that this cause is not to be resolved without the discussion of the most momentous constitutional principles. I shall not refuse it; however I may feel it to be painful and oppressive.

The case, which forces the Court into this irksome enquiry might seem to be in itself very simple. About the middle of the last century, certain ministers of the Establishment, and considerable portions of the population, while holding firmly all the doctrines of the Confession of Faith ratified at the Revolution, and the other standards of the Church, did, from other causes secede from her communion; and erect churches for themselves as voluntary or independent congregations, which have subsisted in some similar form and greatly encreased in numbers and extent ever since. We learn from the papers before us, that of late years it has happened, that the ministers and people of some of these congregations have evinced a desire of returning into the bosom of the Church, with which they are still perfectly agreed in doctrine, provided they may be received with all the ecclesiastical privileges and capacities of the ordained ministers and people of the Established Church, and of course under all the same obligations, in so far as these admitted of ecclesiastical adjustment, without requiring any civil burdens to be imposed on any one except by his own act, or any civil rights of others to be in any way touched. And the General Assembly, with much caution and deliberation, and after consulting all the Presbyteries of the Church by an overture transmitted to them during twelve months, and receiving their unanimous approval thereof, passed the Act which they thought well calculated for the purpose; and of their power to enact which, no doubt was suggested or entertained. It is stated that there never was a division in the Assembly on the subject. The measure was begun,

carried on, and finished with the concurrence of all the Church authorities, clerical and lay, so far as their advice could be collected. The Presbytery of Irvine, intending, as they were bound to do, to give obedience to that act of their ecclesiastical superiors, adopted the proceedings which form the subject of this suspension and interdict.

The object which the Church had in view in these measures, must, I should have thought, have recommended itself to the favourable opinion, not only of all men who love the Church of Scotland and desire to see its prosperity, but of all good men who love their country, and have the interests of pure religion, and the more sure spread of it among the people, sincerely at heart, and who cannot fail to rejoice in seeing unity and concord restored, where before there was discord and schism. I find it difficult to imagine any legitimate interest, which should induce any man to complain of such an act; and more especially difficult to see it in persons, who, being themselves dissenters from the Established Church, cannot be touched by a measure which is confined to ecclesiastical or spiritual ends, affecting only the members of the Church —or in others, who, being all heritors of the parish, and thereby with all their household, tenants and dependents, expressly excepted from its operation. To me it has appeared to be a measure, in the clearest sense, *innocuæ utilitatis*, as all the Church thought it to be—calculated to do much good, without the possibility of injury to any one. I have the misfortune to find, that other opinions are now held; and that there are also doubts entertained whether there may not be legal interests involved (whether substantial or not,) which may be sufficient to entitle and require this Court to interfere, to prevent what in itself appeared altogether a measure recommended by Christian charity and true patriotism. I shall give careful attention to these opinions and doubts. I am of opinion, that there are no such even legal interests. But I shall hereafter fully consider the point. In the meantime, the character of the measure is, on the face of it, such as I have described it to be.

This, certainly, will not settle either the question concerning the Church's power to pass the act, or that regarding the jurisdiction of this Court to interdict the proceeding. But yet I cannot help thinking, that in entering on the question concerning the power and jurisdiction of the Church courts, assuming for the present that the thing itself is purely ecclesiastical, it is far from being immaterial, that the measure is so simply in furtherance of the best ends of an established Church, that it is hardly conceivable that it should not be in the power of the General Assembly and the Presbyteries of the Church to accomplish it, if they have indeed any ecclesiastical power or jurisdiction at all.

It is now maintained, as I understand the case:—1. That the Church courts have no power to assign, to the minister of such a church and congregation, a district of a parish already existing, or, as it is expressed, to erect such a church and district into a parish *quoad sacra tantum;* and 2. That they have no power to admit the minister of such a church, or an elder from a kirk-session given to him, to sit in the Presbytery or any other Church court.

In considering these questions, a distinction of some importance must be attended to. If the matter itself is, at bottom, ecclesiastical, and if the Church courts have exclusive jurisdiction in it as ecclesiastical, it is not for this Court to enquire, whether it has or has not been done in the best form according to ecclesiastical principles, nor even whether it was expedient to do it at all. That, upon the hypothesis, would be entirely matter for consideration by the Ecclesiastical Court itself, and never could belong to the Court of Session. And yet it appears to me, that the obvious distinction has been lost sight of in a great deal of the reasoning on the subject, and that it will require serious attention. But the first question, and that which I regard as of paramount importance, relates to the powers and jurisdiction of the Church courts in all matters spiritual or ecclesiastical.

It will be necessary for me to make some enquiry into the origin and history of this Presbyterian Church, as the Reformed Protestant Church of Scotland, in order to arrive at a right conclusion concerning the just interpretation and real effect of the statutes, by which it has been adopted and ratified, with exclusive powers ecclesiastical. But before I enter on this, I desire in a short space to bring prominently under notice the terms of the leading statutes, in the clauses whereby the general jurisdiction of the Church is acknowledged, declared, and ratified.

I read in the statute 1567, c. 12,[1] the very first from which it can be said that the

[1] Thomson's Acts, vol. ii. p. 24.

Reformed Church derived any thing from the State, proceeding on a certain narrative of no small importance, that the King, with the advice of Parliament, "has declared and granted jurisdiction to the said kirk; quhilk consists and stands in preaching of the true word of Jesus Christ, correction of manners, and administration of holy sacraments; and declares that there is nae other face of kirk, nor other face of religion than is presently by the favour of God established within this realm; and that there be nae other jurisdiction ecclesiasticall, acknowledged within this realm, other than that quhilk is and sall be within the same Kirk, or that quhilk flows therefrae concerning the premises." I shall hereafter enquire into the true import and effect of this statute, which is plainly declaratory, and is so held by Sir George M'Kenzie. I will only now observe, that to my mind it does, in very distinct terms, declare the present existence of a general jurisdiction ecclesiastical in the Kirk; and, by plain implication, a jurisdiction, whereby it may be exercised by those whom the Kirk may authorize, by the institution of office-bearers and courts; by rules laid down for their guidance from time to time.

That act was repeated *in terminis* though without the preamble, by 1579, c. 7.[1] But it may be right to observe, that the title or rubric prefixed to it in the small edition of the acts is not in the original, the title there being simply "Anent the jurisdiction of the Kirk."

I next find, in Spottiswood's Report of the Conference between the Commissioners of the General Assembly and the Commissioners of the King on the various articles of the Second Book of Discipline, the following article relative to the powers of General Assemblies, with the result of the Conference concerning it:—"They have power also to abrogate all statutes and ordinances concerning ecclesiastical matters that are found noisome and unprofitable, and agree not with the time, or are abused by the people." This article is marked on the margin, "Agreed; that as they make acts in spiritual things, so they may alter the same as the necessity of the times requires;" and as I apprehend it to be clear, that the Book of Discipline, in all at least which had been so agreed upon, was fully ratified by the act 1592, I hold the article, just recited as agreed upon, to have the full force of statute law.

I read again in the act 1592, c. 8,[2] whereby the whole system of the Church courts in General Assemblies, Presbyteries, Kirk-sessions, and provincial Assemblies and Synods, was ratified and approved of, subject to the qualifications therein expressed, that the Legislature thereby "decerns and declares the said Assemblies, Presbyteries, and Sessions, jurisdiction and discipline thereof foresaid, to be in all times coming maist just, good, and godly in the self," notwithstanding whatever statutes might be to the contrary, and that all "acts, laws, and statutes made, at any time before the day and date hereof, against the liberty of the true Kirk, jurisdiction and discipline thereof, as the samen is used and exercised in this realm," are repealed; and after repealing certain special statutes, and declaring that they "sall naeways be prejudicial, nor derogate any thing to the privilege that God has given the spiritual office-bearers in the Kirk, concerning heads of religion, matters of heresy, excommunication, collation or deprivation of ministers, or ony sic essential censures, special grounded or having warrant of the word of God;" it ordains presentations to benefices to be directed to the Presbyteries, "with full power to them to give collations thereupon:" and then I read these words added, "and to put order to all matters and causes ecclesiasticall within their bounds, according to the discipline of the Kirk." I shall afterwards consider the special import of that statute, in the view which I mean to take of the whole history. But the words last quoted, are broad, general, and admitting of only one manifest construction. If, however, any exposition were required, of the understood meaning and effect of that statute 1592 and the other acts, I find it in the emphatic terms of the act 1662, c. 1, whereby the Presbyterian Church was overset, the order of Bishops restored, and the King's supremacy declared, and by which the act 1592 specially, and all the other acts establishing or recognising that Church, were repealed, this clear description of those statutes:—"Rescind, cass, and annul all acts of Parliament by which the sole and only power and jurisdiction within this Church doth stand in the Church, and in the general, provincial, and presbyterial Assemblies, and kirk-sessions, and all acts of Parliament or Council which may be interpreted to have given any church power, jurisdiction, or government to the office-bearers of the Church, their respective meetings, other than that which acknowledgeth a depend-

[1] Thomson's Acts, vol. ii. p. 137. [2] Ibid. p. 541; (c. 116 in small edit.)

ence upon, and a subordination to the sovereign power of the King as supreme," &c. I am incapable of imagining a doubt as to the meaning and effect which the framers of that act of Parliament attached to the act 1592. They plainly held, that it had recognised and sanctioned the sole and only power and jurisdiction, in spiritual or ecclesiastical matters, as standing in the General Assembly, and the other Courts of the Presbyterian Establishment. It was the point of difference, and the precise ground for repealing it.

The acts of 1690, at the Revolution, repealed the act 1662, and all other acts prejudicial to the Presbyterian establishment; and among them, be it observed, the act 1612, c. 1. Jas. VI. Parliamt. 21, whereby certain powers were vested in the Lords of Session, in the case of the bishops, then restored, refusing to collate a presentee; which act is in express words totally repealed. And it was further thought necessary, by a special act, c. 1, to repeal in express terms the act 1669, c. 1, declaring that that " act asserting his Majesty's supremacy over all persons, and in all causes ecclesiastical, is inconsistent with the establishment of the Church government now desired, and ought to be abrogate ;" and it is accordingly annulled in all its heads &c.

I next read in the act 1690, c. 5, " for ratifying the Confession of Faith, and, settling Presbyterian Church Government," that the Legislature thereby, proceeding upon the claim of right, " do establish, ratify, and confirm, the Presbyterian Church government and discipline, that is to say, the government of the church by Kirk-sessions, Presbyteries, Provincial Synods, and General Assemblys, ratified and established by the act 1592, c. 14, entitled, Ratification of the liberty of the true Kirk, &c.; and thereafter received by the general consent of this nation, to be the only government of Christ's Church within this kingdom, reviving, renewing, and confirming the foresaid act of Parliament in the whole heads thereof," except that concerning patronage. The act further declares, " that the Church government be established in the hands of, and exercised by, those Presbyterian ministers who were outed since the first day of January 1661," &c.; " and such ministers and elders only as they have admitted or received, or shall hereafter admit or receive," &c. Then it appoints the meeting of the first Assembly thus:—" Allows the general meeting, and the representatives of the foresaid Presbyterian ministers and elders, in whose hands the exercise of Church government is established, either by themselves, or by such ministers and elders as shall be appointed and authorized visitors by them, according to the custom and practice of Presbyterian government throughout the whole kingdom, and several parts thereof, to try and purge out all insufficient, negligent, scandalous, and erroneous ministers, by due course of ecclesiastical process and censures; and likewise for redressing all other church disorders."

Then I find that, in the act 1705, c. 4, concerning the treaty for a union with England, it is thus enacted, " Providing also that the said commissioners shall not treat of or concerning any alteration of the worship, discipline, and government, of the Church of this kingdom as now by law established." This was followed by the act of 1706, c. 6, commonly called the Act of Security, which ratifies the act 1690, c. 5, and the Westminster Confession of Faith, and then provides and declares, " That the foresaid true Protestant religion, contained in the above-mentioned Confession of Faith, with the form and purity of worship presently in use within this Church, and its Presbyterian church government and discipline, that is to say, the government of the Church by Kirk-sessions, Presbyteries, Provincial Synods, and General Assemblies, all established by the foresaid acts of Parliament, pursuant to the Claim of Rights, shall remain and continue unalterable; and that the said Presbyterian government shall be the only government of the Church within the kingdom of Scotland." And it is further enacted, that this act, " with the establishment therein contained, shall be held and observed in all time coming as a fundamental and essential condition of any treaty of union to be concluded betwixt the two kingdoms, without any alteration thereof, or derogation thereto in any sort, for ever ;" and, further, that this act, with a similar declaration, shall be inserted in any act for agreeing to the union, in words equally express.

Accordingly, that act of security is expressly inserted *ad longum* in the act of Union, 5th Anne, c. 8, and is thereby ratified and confirmed; and it is further provided, that an act for securing the Church of England, and that act of the Parliament of Scotland for "securing the Protestant religion and Presbyterian Church government, with the establishment in the said act contained, be, and shall for ever be, held and

adjudged to be observed as fundamental and essential conditions of the said Union, and shall in all time coming be taken to be, and are hereby declared to be, essential and fundamental parts of the said articles and union."

I know not how these acts may be read by others, or how any one perusing them attentively, in their connexion, can think that they do not contain any recognition of a general and defined legislative power in the Courts of the Presbyterian Church, for the government of the Church, and putting to order all matters ecclesiastical within it. In my apprehension, such a power is necessarily comprehended in all the anxious provisions in the statutes of King William, placing the entire government of the Church, absolutely and exclusively, in these courts, and still more stringently comprehended in the Act of Security, and the Act of Union proceeding on it. But I confess I am also of opinion, that the power is in plain words declared and provided, in the broadest terms, both in the act 1592, and in the act 1690.

If this part of the case could have been resolved, on such a short view of the leading statutes as I have here given, the question in this cause would probably have been reduced to this :—1. Whether the thing here complained of is or is not a matter ecclesiastical; and 2. Whether this Court has any jurisdiction to control the judgment and proceedings of the Church courts concerning it. But I have, with feelings of great pain and regret, been made sensible, that it is not to be so resolved; and, having the opinions which I entertain on the subject, I feel that an imperative duty is laid upon me, to enter into a more detailed and careful enquiry concerning the beginnings of the Reformation in Scotland, and the progress of it through a century and a half, which terminated in the Revolution settlement in 1690.

As I understand the matter, the precise point of difference of opinion in the practical result seems to stand thus. One opinion begins with the assumption, that the Presbyterian Church of Scotland was altogether a Creation of the State, having no previous *status* or existence till it was so created by acts of Parliament; and then infers, that the Courts of this Church can exercise no powers or jurisdiction in regard to any matters even ecclesiastical, unless such power and jurisdiction had been specifically conferred by express definition in the statutes. I should think this last proposition unsatisfactory and essentially unsound, even if the first, which is the basis of it, could be granted. For it is evident, that jurisdiction may be constituted in particular courts, and may be constituted in broad general terms, sufficient to cover innumerable things as they arise in the course of time, and which it would have been impossible to embody specifically in any statute; and, that the practical exercise of such jurisdiction, during a long course of years, in virtue of the general constitution given to the court, in very many and various things and transactions of which there is no specific mention or trace in any act of Parliament, will establish the general power as derived from the undisputed meaning of the statute, and leave no other question as to any special matter arising, but whether it is truly of the nature and character of the things over which the jurisdiction is in such general terms created. The Court of Session is undoubtedly the mere creature of statute; yet its powers, assuredly, are not limited in such a manner as to cover nothing except such special matters as are specifically laid down in statutes. Its jurisdiction is constituted in general terms over all causes of a civil or patrimonial nature arising within the limits of Scotland. And I should think it a very clear proposition, even if the jurisdiction of the Church courts did truly stand on the same basis, that an exclusive jurisdiction constituted in the Church courts, in general terms, for the government of the Church, and in all matters or causes ecclesiastical, must be equally effectual, to vest jurisdiction in all things which do belong to the government of the Church, or do bear the character of matter ecclesiastical. I shall have occasion to return to this view. But I cannot agree, that the jurisdiction of the courts of the Established Church of Scotland can be justly or correctly dealt with, even on this footing. I take the liberty of denying the first proposition. According to all the lights which I possess or can obtain, I think that it is incorrect in history, and unwarrantably deduced in law. I cannot grant, that the Presbyterian Church, as the Reformed Protestant Church of Scotland, was nothing but a new creation by the State; or that it had no existence, no *status*, no principles, no courts, no rights or power, but such a condition in these points as was specially constituted by acts of Parliament. On the contrary, it appears to me to be very clear as matter of fact, that it was a Church existing, with all these qualities, in relation to the members of it, before any act of the Parliament of Scotland had conferred any power or jurisdiction upon it.

This is a point of vital importance in the argument. For if the fact be as I have stated it, the inference from all that was afterwards done, will be very different from that which is assumed in the opinion which holds the contrary. It will in fact be the very reverse; and exclude that inference, even if it were otherwise warrantably drawn from the assumption.

There is great difficulty in finding materials for showing the precise state of the Reformed Church previous to the year 1560. But, not to go back to previous occurrences, I believe there is no doubt that the Reformation in Scotland had begun at least as early as the year 1540, though the papal church still occupied all the benefices, and still had power sufficient to enable it to perpetrate atrocious deeds of cruelty; of which the deaths of George Wishart and various other persons are fearful proofs. But from that time forward there was a struggle carried on, for effecting a complete reformation, according to the Protestant doctrines, as far as they were yet understood in Scotland. In 1542, the influence of the persons of rank who had embraced those doctrines succeeded in obtaining an act of Parliament, for allowing the Holy Scriptures to be read throughout Scotland in the vulgar tongue; and there was a body of men associated together who described themselves as "The congregation of Christ Jesus within Scotland," who were unremitting in their endeavours, on the one hand, to spread the knowledge of the true faith among the people, and on the other hand, to obtain the protection of the civil government against the violence of the Roman Catholic hierarchy. The Regent Arran at first professed himself favourable to their views, but in the end pronounced a recantation, and turned all his power against them. Afterwards, when the Queen-mother became Regent, she also at first held out hopes of support to the Reformers of the Congregation, but soon changed her language and conduct, and, by means of French troops introduced into the country, persecuted them with the most rancorous hostility.

In this period there were but very few ministers or preachers of the Reformed doctrines; and the few that were in the country, and dared to preach the truth at the risk of their lives, were of necessity obliged to move from place to place over the country; as openings for instructing the people presented themselves, and the brethren of the Congregation might desire. In this state of the Reformation, it was, in the nature of the thing, impossible, that the ministers who were thus associated with the noblemen and others, and were thus actually employed in the ministry, could in any proper sense of the term be ministers of parishes according to the civil division of the country. They might attach themselves more to one place, where they could obtain access to a church, and the people desired their services, than to other places. But, excepting in the very few instances where they might have been converted to Protestant views, after being in possession as incumbents under the papal church, it would be a perfect abuse of language to speak of them as parochial ministers. Benefices they had none; and they really could bear no other true character, but that of voluntary preachers of the holy evangel, according to the opportunities given.

In 1546 John Knox, who, though he had at an early age taken orders as a priest from the Roman Catholic Church, had never entered upon any ministry, but who had many years before embraced the Protestant faith, being then in the Castle of St Andrew's while under siege, was called upon by Henry Balneaves and John Rough, a preacher then officiating in that place, to take upon him the office of the ministry; and though he hesitated at first, yet being at length called upon by the people to do so, he did at last consent to undertake the office. He preached the doctrines of the Reformation with great power, in the important truths belonging to it; and it appears that so early as 1547 he had there taught the important tenet so unalterably insisted on by the Presbyterian Church in all periods, "that no mortal man could be the head of the Church."[1] He was indeed at that time confined in his labours to St Andrew's not because he was, or professed to be, the ordained minister of that parish, but because he was besieged in the castle, to which he had voluntarily resorted in order to encourage the defenders of it; and, scorning to desert it as others did, was ultimately taken prisoner, and doomed to a ruthless slavery of nineteen months in the French galleys. When, after many years, he returned for a short time to Scotland in 1555, he preached in various places throughout the country, and in particular at Castle Campbell, which never was a parish; and when he finally returned in 1559, he joined himself to the forces of the Congregation, who were at open war with the Re-

[1] M'Crie's Life, 4th edit. vol. i. p. 103.

gent, accompanied them from Cupar Moor to Perth, and afterwards came to Edinburgh, where he preached freely in St Giles's and the Abbey Church; and though the inhabitants elected him to be their minister, it was found nesessary for the safety of his life that he should leave the city for a time; and then he employed himself in preaching and administering the sacraments all over the country,—at Kelso—Jedburgh—Dumfries—Ayr—Stirling—Perth—Brechin—Montrose—Dundee—and again in St Andrew's.

It would be unsuitable, in this place, to go more minutely into the history. But it is to me perfectly apparent, that, during all this period, and down to the death of the Queen Regent, no such thing could exist, as that the ministry of the Gospel among the Reformers was confined by the artificial divisions of the parishes, and that there is no possibility of doubting, that all they did was done by the sole authority of the Church itself, that is, of the ministers and others associated in the Congregation, who then constituted the only visible Church of the Reformation within Scotland. Accordingly, I find, in certain resolutions of the Congregation in July 1559, which were afterwards embodied in a royal proclamation, this article:—"That the preachers and ministers shall not be troubled in the ministration, where they are already established, neither yet stopped to preach wheresoever they shall happen to travel within this realme."[1] The reason of the importance which I attach to this unquestionable fact, which is abundantly attested by the terms of the statutes afterwards passed, will very soon be made evident.

But I beg leave here to make this general observation, that it seems a very strange thing, in a question concerning the power of the Church to appoint and regulate the pastoral duties of her ministers, in regard to the places and districts of their ministry, to found on her own acts in adopting or sanctioning ecclesiastically the local districts of the country, by the name of parishes. It does not even appear that all the places which may have been so denominated were really separate parishes in the civil division, or to civil purposes; and I do believe that many districts were so dealt with, which cannot be shown to have been of the latter description, and which, at any rate, soon ceased to bear the character. But the more important fact, of which there can be no doubt, is, that it was the Church alone, by its own power, which, in the first instance at least, gave to all or any of the districts the ecclesiastical character and denomination of parishes in the Reformed Church. If she adopted the ancient divisions, it was still her own sole ecclesiastical act. If she varied them, in the exercise of her discretion, it was not more her own act than in the other case.

The death of the Queen Regent, and the support which the Protestant cause obtained from Elizabeth, by this time Queen of England, brought about a great change in the public acts of the State in Scotland. A convention of the Estates of the kingdom was held in August 1560. To that convention the Protestant Church, still consisting of the ministers and the noblemen and others associated in the Congregation, gave in a Confession of Faith, prepared by Knox, with the assistance of others. Now mark the form in which this was treated. The record of Parliament bears on the 17th August 1560:—"The Confession of Faith professed and believed be the Protestants within the realm of Scotland, published by them in Parliament, and be the estates thereof ratified and approved as hailsome and sound doctrine, grounded upon the infallible truth of God's word."[2] After a quotation from the gospel of Matthew, the record proceeds:—"The estates of Scotland, with the inhabitants of the samen professing Christ Jesus his holy evangel, to their natural countrymen, and to all other realms and nations professing the samen in Christ Jesus with them, wish grace, mercy, and peace," &c. After a preamble, the Confession of Faith is recited at length, and simply ratified by the estates.

What, then, is the character of this important proceeding? It manifestly is simply a recognition and adoption of the doctrines of divine truth, presented as the Confession of Faith already "professed and believed be the Protestants within the realm of Scotland, published by them in Parliament;" and what is done is done with the concurrence of the inhabitants of Scotland "professing Christ Jesus his holy evangel." It plainly acknowledges a Church as already constituted, holding the doctrines delivered in the Confession. It creates and erects nothing, and it confers no powers of any kind.

On the 24th August following, the Estates passed another act of great importance.[3]

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[1] Knox's Hist. p. 154-156. [2] Thomson's Acts, vol. ii. p. 526, &c. [3] Ibid. vol. ii. p. 534.

It bears, that the Estates, "understanding that the jurisdiction and authority of the Bishop of Rome, called the Paap, usit within this realm in times bypast, has been very hurtful and prejudicial to our Sovereign's authority, and common weal of this realm, therefore has statute and ordainit that the Bishop of Rome haif nae jurisdiction nor authority within this realm in times coming." And it prohibits all the subjects of the realm from acknowledging such jurisdiction, under the most severe penalties.

Here the acts of this convention of 1560 stopped. They had approved of and ratified the Confession of Faith presented to them by the Church of the Congregation; and they had cleared the country of the Popedom. But they had done no more, except recognising the body of the Protestant Church as existing in the land. They had substituted no power or authority ecclesiastical in the place of the Pope. They had neither created nor authorised any assemblies, synods, presbyteries, or kirk-sessions. Nevertheless, it is manifest that the whole proceeding went on the assumption that there was a government of that Church of the holy evangel, and that there was a power existing to provide for and administer that government. No inquiry was made as to whether the Confession of Faith came from ministers actually settled in parishes according to the ancient division. It was taken simply as the Confession of those who had embraced the doctrines expressed in it.

That this view of the solemn transaction thus effected is no fanciful conception, but a serious and deep reality, will be seen at once by contrasting it with the terms of the statute of 26 Henry VIII. cap. 1, by which the authority of the Pope was thrown off in England, which proceeds on the express ground that "The King's Majesty justly and rightfully is and ought to be the supreme head of the Church in England, and so is recognized by the clergy of this realm in their convocations"—and, on this ground, enacts that the King shall be "taken, accepted, and reputed the only supreme head on earth of the Church of England," &c., with all the powers and privileges ecclesiastical therein specified in broad terms. The Convention of Estates in Scotland made no such attempt; but, for the present at least, left the Church whose confession was thus recognized, to stand on its own basis, and to work to its sacred objects by its own strength.

It will be particularly observed, that as the ministers and members of this Church had yet derived no power whatever from the State, so neither had they received any endowments, or even any pledge for the granting of such endowments. It has been said, that the Presbyterian Church of Scotland took nothing from the ancient Papal Church, and that they were not a reformed but an entirely new Church. I cannot admit the proposition. The act 1690, c. 5, says the contrary; bearing that prelacy was a grievance "and contrary to the inclinations of the generality of the people ever since the Reformation, they having reformed from Popery by Presbyters." The words are taken from the Claim of Right, and very clearly import that the Presbyterian Church was simply the church of the realm, reformed from Popery. It is the more singular that a different view should be taken of this, in a case where the whole object of the argument is to show, that the Presbyterian Church was tied down, without any statute to that effect, to the parochial divisions of the old Church, and when it is not only allowed, but insisted on, that they afterwards claimed their manses and glebes and even the whole patrimony of that ancient Church. How came it that there were parishes at all ecclesiastically, if what were assumed as parishes (seeing that it must have been done by the Church itself) were not the parishes of the Popish Church? If they were not, the whole argument fails. If they were, the proposition is unsound; but still what took place was by the authority of the Church itself. Nevertheless, as I have no anxiety about the inferences connected with this assumption, I think it of no importance whatever in the question. But it is a matter of importance, that at the passing of the act of the Estates in 1560, no provision had been made by the State for the maintenance or endowment of the ministers of the reformed Church.

Now, it was in this state of the Church, the Popedom abolished and the Confession of Faith adopted and ratified—but nothing more done—that the first General Assembly of the Church met on the 20th December 1560. By what authority? Manifestly by the sole authority of the Church itself. There was no previous act of the State to authorise it. Yet it was held openly—never complained of as illegal—but, on the contrary, expressly recognised as a lawful institution both in itself and in its positive acts, in the very first Parliament which, after seven years, took further cognizance of the subject. I shall presently advert te some of the acts done, which reach in the

most direct manner the very thing which is here in controversy. But first of all, let it be observed, that the meeting of this Assembly by the sole authority of the Church was not as an isolated fact, occurring once or accidentally, without any serious import. Fifteen General Assemblies were successively convened and held, before there was the least notice either of such an institution, or of any system for the government of the Church, in any act of Parliament. In those various Assemblies, the most important acts, both of judgment and of legislation, were exercised by the body so assembled; and, though all was done openly and in public, there was no complaint, and no surmise, that these Assemblies were usurping powers which did not belong to them.

But the essential point is, that these facts are utterly inconsistent with the idea, that the Reformed Church of Scotland which, in the course of these seven years, was gradually assuming the form and qualities of a regular system, and was held and treated equally by the Government and the nation as the Established Church of the realm, had been brought into existence, or had been created in its form and capacities, by any acts of the civil Legislature. It had grown up upon the foundations of the original Congregation of the Protestant Reformers. It professed to be founded on the word of God, and to acknowledge no spiritual head but the Divine Author of our religion; and it worked to its objects, by the powers which, rightly or wrongly, it believed to be derived from that source.

True it is, that the Church earnestly desired, and strove assiduously to accomplish the object, to obtain the direct sanction of the supreme power of the State to a complete system for the government of the Church to be proposed by herself; and true it is, that she did at last accomplish it. But I must profess my utter inability to see how this could alter her position as a Church, not created, but adopted and recognised by the State on such terms as were finally settled. There were manifest reasons why the Church should desire such recognition, without in the least departing from her principles, as to the necessity of absolute independence in her courts concerning all matters spiritual or ecclesiastical. She desired to have endowments for her ministers, provision for their comfortable residence, and the aid of the civil power for execution of her decrees, and securing obedience to her judgments; and, more generally, she desired, and the people of the land desired, to see the whole system of policy, so anxiously longed and laboured for, secured by the power of the State against all trouble or molestation. As no one doubts, therefore, that the Presbyterian Church did become the Established Church of the State, according to the terms of the various statutes, it seems to me to be of no weight in regard to the true nature of this union, in its original character and its continuing qualities, that the Church did from time to time solicit the aid, the protection, the ratifying sanction of the civil power. In looking for the correct principle of judgment, concerning the extent and application of the powers of the Church courts in matters ecclesiastical—more especially in competition with any other court of a different order—we must still come back to this, that the Church, as an establishment, was not created by any act of the State, but was adopted and recognized as a church already existing with all its inherent qualities, though subject to the terms or provisions which might be expressly enacted concerning it. It will soon be seen, that this distinction lies at the very bottom of the present question, in the view now taken of it.

But the facts bearing to this point are much stronger than I yet stated them. We must now look back to some things which were actually done in the fifteen Assemblies which met before the year 1567.[1]

In the first Assembly, there were only six ministers, who appeared, not so properly as the ministers of the particular places mentioned, as in the character of commissioners along with others for those places.[2] At the same time, laymen appeared as commissioners for other kirks and towns; and, in several instances, for kirks, not of parishes, but of large districts; as Hugh Wallace and two other persons "for the Kirks of Kyle," George Hoome "for the Kirks of East Lothian." The Lairds of Tillyvaird, &c. "for the Kirks of the Mearns," the Laird of Garlies "for the Kirks of Nithsdale," &c.

From the first act of this Assembly, it appears how very few qualified ministers there were at that time. The record professes to give a list of the Ministers; and separately, of the mere readers who were thought qualified, and said to be given up

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[1] Book of the Kirk, Bannat. Club Ed. p. 3. [2] Ibid. p. 4.

by the Ministers and Commissioners present, every one within their own bounds. All that are given up are "in Kyle (generally for the whole district) for reading," seven persons—not one Minister, and but one person said to be "apt to teach." In St Andrew's (apparently as a general description,) for ministering and teaching," twenty-one persons. Then a number of other persons are named, who are thought to be apt and able to minister, the first of whom is Erskine of Dun. And the Record further bears, that "Mr John Ramsay was presented by Sir John Borthwick as Minister for the Kirks of Aberdour and Tyrie," two parishes now in the Presbytery of Deer, and which appear at all times to have been perfectly distinct. It is hardly necessary to observe, although there will be occasion to say more of the fact presently, that in this state of the Church there could be no call or opportunity for dividing parochial districts, or making special arrangements for the performance of ecclesiastical duty in parts only of existing parishes. The difficulty was all the other way—to find qualified ministers for preaching the word and administering the sacraments throughout the extent of Scotland. But the things done leave no doubt, that the Church took upon itself the power and the duty of making all appointments in that matter.

The very first act of this Assembly is not a little remarkable[1]—"The Ministers and Commissioners forsaids being assemblit, finds that the ministrie of the word and sacraments of God, and assemblie of the peiple of the whole parochin of Restalrig, be within the Kirk of Leith; and that the Kirk of Restalrig, as a monument of Idolatrie, be raisit and utterlie castin downe and destroyed."[2] Though there may be doubt whether this resolution took full effect for a considerable time after, it shows very clearly, that the General Assembly made no hesitation as to their power to make the order ecclesiastically. They also made an important declaration on the subject of the degrees of consanguinity or affinity within which marriage might be lawful religiously; but, perfectly aware that this could only effectually be done by civil authority, they desire the Lords and Estates to interpone their authority thereto, "and make laws thereanent." And this was afterwards done by 1567. c. 15.

Knox states in his History,[3] that, "the Parliament dissolved, consultation was had how the Kirk might be established in a Godly and holy policy, quhilk by the Papists was altogether defaced. Commission and charge was given to Master John Wynram (and four others, including Knox himself,) to draw, in a volume, the policy and discipline of the Kirk, as well as they had done the doctrine; quhilk they did, and presented it to the nobility, who did peruse it many days." The first Book of Discipline was accordingly prepared, and was presented to the Nobility: It met with considerable opposition, but was, after a little time, approved of by certain persons of high rank, including the Regent Arran, and subscribed by them on the 27th January 1560, according to the reckoning of the year at that period. That book laid down a general scheme for the government of the Church. Among other things, it introduced an office of superintendents: it instituted the office of elders, and provided for their appointment; and it supposed also the existence of provincial assemblies.

Now, in this first General Assembly,[4] "the Kirk appointed the election of the minister, elders, and deacons to be in the public kirk," &c., thus at once establishing the court of the kirk-session. It appointed punishment for scandal: and, in other points which the Church itself could not reach, it appointed supplication to be made to the Lords of the Secret Council.[5] In the end, it continued the Assembly till the "15th January 1561, and has thought expedient that, the said day, ane commissioner at the least be sent frae every kirk, for requiring sic things of the Parliament as shall be thought for the weil of the whole Kirk;" and then it ordains every Commissioner, as well of the towns as of the parish kirks to landward, to bring a roll of the teinds, lands," &c. The object here clearly was, to obtain secular provision by a title to the patrimony of the old Church, which could not, of course, be obtained without the aid of Parliament.

The second Assembly accordingly, in May 1561,[6] passed certain resolutions and a supplication evidently of this description. But one article of the resolutions is "for maintaining and special provision to be made for Superintendents," &c. The Book of the Kirk bears a particular proceeding in December 1561, which need not be particularly adverted to. But then in June 1562[7] there is the record of the proceedings

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[1] Book of the Kirk, p. 5. [2] Ibid. [3] Knox's History, p. 256.
[4] Book of the Kirk, p. 5. [5] Ibid. p. 7. [6] Ibid. p. 8. [7] Ibid. p. 13.

of the Convention of the Kirk then held, in which very important matters were under consideration. There were present five superintendents—whereby it appears, that the office was by this time in operation; sixteen ministers, and various other commissioners. It is clear from the proceedings—1. That the office of superintendents had taken effect; 2. That the offices of elders and deacons were in force; 3. That the Assembly made many orders in the government of the Church, and for regulating the ministrations therein; 4. That they made various appointments of individuals to officiate in different places; and, 5. That they made an earnest supplication to the Queen, both for effectual reformation in various points which could not be otherwise effected, and for obtaining provisions for the ministers of the Church.

What was the nature of the office of superintendents? I will not go into any particular discussion on this point. The character of the office is particularly explained in the First Book of Discipline, so far as that received effect. But, as I understand the subject, any one who supposes that it had any resemblance to the office of a bishop will be in error. Knox, the chief author of the book, had taught long before "that there were no true bishops but such as preached personally without a substitute;[1] and I conceive that the office of superintendent was introduced simply as a temporary arrangement, from the necessity of the times and the scarcity of ministers, in order that a certain number of able persons might have the especial duty of preaching to the people in extensive districts allotted to them according as circumstances might require it. They acted solely by the authority of commissions from the Assembly. Their duty was very laborious, in so much that some of them desired to be relieved from it. They did not act by themselves alone, but with the advice of the ministers and elders of the province, the inferior judicature of the Presbytery not being yet instituted, and being impracticable from the scarcity of ministers; and they were liable to trial and censure by the General Assembly. That this was the general character of the office is brought out remarkably by a proceeding in the Assembly 1562, where a complaint having been made by the people of the kirk of Calder, that they were defrauded of the preaching of the word by their minister being elected superintendent, and praying that he might be restored, or another minister provided to them. It was answered, "the profit of many kirks was to be preferred to the profit of one particular, and that the kirk of Calder should either be occupyed be himself, or be some other qualified person in his absence, which could not be otherwise helped in this rarity of the ministry, and that they should have complained when the public edict was set forth, twenty days before his admission."[2] And, in another important point, there is a proceeding in another Assembly in December 1562, which further explains the nature of the office. "The Kirk presentlie assemblit gives power to every superintendent within their awin bounds, in their Assemblies Synodall, with consent of the maist pairt of the elders and ministers of kirks, to translate ministers fra ane kirk to another."[3]

That the superintendents were liable to trial and censure by the General Assembly, is practically exemplified in the proceedings of the Assembly 1563, where no less than four of them were brought under trial before the Assembly.[4]

Now, these officers were created solely by the authority of the General Assembly, and they sat as members of the Assembly in that character. Some of them may have been ministers, in particular parishes, before they were made superintendents; but were they parish ministers, or did they officiate in that limited character, when they were discharging the duty of superintendents? Clearly not. They were ministers of districts by special appointment, not limited to one parish, but extending much further. Again, when superintendents could not be found, the General Assembly granted commissions to particular ministers to travel to distant parts of the country, and there to preach and administer the sacraments, in such places as they should find opportunity and a willing people. Finally, it is an ascertained fact, to prove which there is no need to multiply quotations, that one minister frequently received the charge of two or three kirks or congregations, in different parishes. But to show the clearness with which the power of the Church was asserted, the following entry may be quoted:—"The haill Kirk appoints and decerns Mr John Sharp and Robert Wilson to ministèr in sik kirks as sall be thought gude be the Kirk."[5]

Now, not to stop at present to draw all the conclusions which these facts warrant,

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[1] M'Crie's Life of Knox, p. 103. [2] Book of the Kirk, p. 18.
[3] Ibid. p. 29. [4] Ibid. p. 39. [5] Ibid. p. 18.

I may just indicate this obvious inference, that if the Church had, in its earliest institution, power, or at any rate exercised such power, to provide for the spiritual necessities of the people, arising from the deficiency of qualified ministers, by appointing district ministers in these various ways, it is not easy to see how they can, without any special statute to that effect, have lost the power of providing for the very same necessity, though arising from a different cause, by appointing smaller district ministers to the overgrown population of extensive parishes.

As the General Assembly settled the order of superintendants of their own authority, so they also settled the order of elders, as the passage last but one above quoted, and various others which might be given, clearly show. And the same fact and others show the establishment of the provincial or synodical Assemblies.

A passage in the proceedings in the Assembly 1568 has been supposed to favour the idea, that the Assembly did not hold that they had power to unite parishes without the authority of the Queen and Council.[1] The passage is important, as again showing the scarcity of ministers. But it will not show the point deduced from it, for two obvious reasons:—1. That the General Assembly had unquestionably made no scruple to appoint, of their own authority, ministers to take the spiritual charge of two or three parishes. But, 2. The sentence immediately before that founded on shows, what the real nature of the application proposed to be made to the Secret Council was. The Church was naturally desirous of obtaining the command of the manses which still existed in the parishes, or having manses otherwise provided to the officiating ministers; and having this evidently in view, they suggest the expediency of uniting parishes which were small, desiring to obtain a complete union, not *quoad sacra* only, but *quoad civilia* also.

If I were to insert here quotations from all the proceedings of the General Assembly, in this period between 1560 and 1567, which bear materially on the point I am considering, I should swell this Opinion to much too great an extent. But there are still a few particulars of such importance that I cannot omit the notice of them. In 1562 there is this passage—"It was ordained that Mr Craig should be joined with Mr Knox in the ministry of Edinburgh."[2] Here is an appointment, thus early, of a second minister of the same parish which was at the time occupied by Knox; and no other authority was interposed to it but that of the Church itself; at least I have found no trace of any other appointment.

Again, it was ordained "that Mr James Craig should assist the superintendant of Glasgow till Michaelmas next to come, and thereafter to teach in the parishes belonging to the Lord Erskine till the next Assembly."[3] Then comes this—"Mr George Hay, the Superintendant of Glasgow, Mr Robert Hamilton, minister of Mauchline and Ochiltree, were appointed to preach in the unplanted kirks of Carrick successively one after another monthly till the next Assembly. Mr James Pont was appointed to minister the word and sacraments in Melrose till next Assembly; Mr Robert Pont appointed to minister till the next Assembly in Dumblane."[4]

A more general commission is granted thus:—"Commission was given to Mr Johne Hepburn, minister of Brechine, to plant ministers, exhorters, readers, elders, deacons, and other members requisite and needful for a reformed Kirk, in Murray, Bamf, and the countries adjacent, and to place schoolmasters. The like commission was given to Mr Robert Pont, to plant kirks in Invernesse; and to Mr Donald Monro, to doe the like within the bounds of Rosse, and to assist the Bishop of Cathnes in preaching of the Gospell, and planting of kirks; and these commissions war to endure onlie for a yeare."[5] And again, "Commission given to the Superintendant of the west, to visite Nithisdaill, and plant kirks there for a yeere. To Mr Thomas Drummond, minister at Creich, and Johne Duncansone, minister of Stirling, *conjunctim et divisim*, for a yere, to plant kirks in Monteith."[6]

There is here no limitation as to the places where churches might be so planted; far less any prohibition against planting more than one in extensive districts bearing the name of parishes, (perhaps 30 or 40 miles long, as in Inverness-shire,) if accommodation could be had and ministers found. The commission is broad and general, and the commissioners were answerable for the execution of it only to the General Assembly itself. See also p. 32, where other commissions were granted for planting kirks, and it was ordained that in default of superintendents, "commission be given

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[1] Book of the Kirk, p. 33. [2] Ibid. p. 17. [3] Ibid. p. 17. [4] Ibid. p. 18.
[5] Ibid. p, 34. [6] Ibid. p. 35.

to some qualified men, for the year next to come, to plant kirks in the said bounds," viz. Teviotdale, Nithsdale, Annandale, and Selkirk.

I will not multiply these quotations further, though there are numerous other passages of equally important application. Among other things, we find the Assembly laying down minutely the order of appeal from the kirk-sessions to the superintendent and Synod, and from them to the General Assembly.[1] But in short, during all this period of seven years, the General Assemblies of the Church had exercised the most extensive ecclesiastical powers, and had exerted themselves with great assiduity to give order and system to the Reformed Church in Scotland.

True it is, that, during all this time, the Assemblies had been labouring and travelling to obtain for this, the church of their own formation, the sanction and protection of the Parliament and the ruling powers of the State, the settlement of regular provisions for the clergy, and powers for execution of the most important nature. And therefore I am not in the slightest degree moved, by all the quotations which can be made of proceedings for attaining these ends, or even for obtaining from Parliament a general recognition, by the powers of the State, of this Church, as the Established Church of Scotland. It was a great and important object. It is clear, however, that those who conducted the affairs of the Church saw very well, that there were some vital points, which must be taken as entirely settled in the constitution of the Church, and without which it could not be established at all. Among these, the first and principal was, the independent jurisdiction of the General Assemblies in all matters and causes ecclesiastical. This was a point radical and fundamental in the constitution. It had so stood, and had been so exercised in fifteen General Assemblies, while as yet no act of Parliament had been interposed on the subject.

True it is, also, that the Presbyterian system had not yet been made perfect; the Court of the Presbytery not having been yet instituted, as it soon after was, when the office of superintendents was laid aside. But still it had gone a great way towards precise organization; and it stood openly out, before the country, as a great ecclesiastical establishment, extending its practical labours over the whole limits of Scotland, and universally recognised by the great body of the people as The Church of the Reformation within it.

It was in this state of things that the Parliament of 1567 met. Its proceedings are of decisive importance. Did it, by any act, repudiate and condemn that Church of which fifteen General Assemblies had already been held? Did it repudiate and condemn any one of the proceedings of those Assemblies as illegal and unwarranted? Did it even hold, that they required its allowance and ratification to give them effect and authority? Did it erect or create any other church as the Established Church, according to its own views? Did it create or erect, as of new, this existing Church, by specific definition of its power, character, and system, in all the particular parts and powers on which it had before stood? There is nothing of the kind; but in all points the very reverse.

By the 4th act of that Parliament, the Confession of Faith previously ratified by the Convention is of new ratified. By the 5th, the mass is abolished, and severe penalties enacted against the observance of it.[2] The 6th act, 'Anent the True and Holy Kirk,' &c., proceeds thus:—'Item, Forsameikle as the ministeris of the blessit Evangell of Jesus Christ, quhome God, of his mercies, hes now rasit up amangis us, or heirefter sall raise, agreing with thame that now livis, in doctrine, and administratioun of the sacramentes, and the pepill of this realme that professis Christ as he is now offerit in his Evangell, and do communicat with the holy sacramentes (as in the reformit kirkis of this realme ar publicklie administrat) according to the Confession of Faith. Our Soverane Lord, with avise of my Lord Regent, and thre estatis of this present Parliament, hes declarit, and declaris, the foresaid Kirk to be the onlie trew and haly Kirk of Jesus Christ within this realme." And then it declares, that all who gainsay the word of the Evangell, as thus received and approved of, shall be no members of the said Kirk.

What is the effect of this act? It makes no new church. It takes the Church as it is, ministers and people, as professing Christ as he is now offered in his Evangell, and communicating in the sacraments as they are publicly administered "in the reformed kirks of this realme;" and it "declares the foresaid Kirk to be the only

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[1] Book of the Kirk, p. 32. 33.

[2] 1567, c. 4; Thomson's Acts, vol. iii. p. 14.

trew and haly kirk of Jesus Christ within this realme." Here there is no creation or erection of any thing; but there is an adoption and recognition of the existing Church, and a declaration that it is the only true Church of the realm,—plainly treated as a reformed Church, not a new one. But there is no definition of powers or qualities, otherwise than by reference to the Confession of Faith for the doctrines. It will be immediately seen, that, in other acts of the same year, the leading points of its constitution were assumed as already existing, without any words of creation, or even of declaratory enactment.

The next act, c. 7, is an act which has been much canvassed on a particular point, which I conceive to have no connexion with the present question.[1] But it is exceedingly important in its character and clauses; in the view which I am now taking of the progress of the Church. The title of it is, "Anent the admission of them that sall be presented to Benefices having cure of ministry." Observe that it relates distinctly to benefices; that is, patrimonial rights to be conferred on ministers. Therefore the interposition of the civil power was necessary. Its first provision is—"that the examination and admission of ministers, within this realm, be only in the power of the Kirk now openly and publicly professed within the samen"—thus again recognising the Church as previously existing. Then it reserves the rights of patrons, and provides that they shall present a qualified person within six months after it comes to their knowledge ("of the decease of him who bruiked the benefice of before) to the Superintendent of thae parts where the benefice lies, or others having commission of the Kirk to that effect, otherwise the Kirk to have power to dispone the samen (the benifice) to ane qualified person for that time." Then there is the well known provision, that if the superintendent refuses to receive a qualified presentee, the patron may appeal to the "Superintendent and ministers of that province where the benefice lies;" and if they refuse, "to the General Assembly of this haill realm, be whom the cause being decided, sall take end as they decern and declare."

I say nothing of the effect of this act, in regard to the agitated questions concerning the powers of the Church in dealing with the presentations of lawful patrons; or the construction of the act 1592 in connexion with it, in reference to that point. If some authorities, much relied on in the present case, could have been accepted on that point, the decision of it would have been different. But that is not the subject now in discussion; and I lay it entirely aside. Yet this statute 1567 has in it matter, admitting of no dispute, which does bear in the most direct manner on the present subject. 1. It puts the examination and admission of ministers solely in the Kirk, without any other definition of what the Kirk is, except by a reference to its previous existence. 2. It relates throughout to the benefice; and for that reason, it runs in the style, "It is statute and ordained." 3. It, in distinct terms, recognises the General Assembly as the supreme Court of the Church. It does not institute or create it; or appoint it to meet; or provide for its constitution; or its order of proceeding: It assumes it as it was, and appoints appeals to be taken to it, precisely according to the order before laid down by the Assembly itself in 1563. But, 4. It directly recognises in two essential points the Legislative powers of the General Assembly. For it takes at once the superintendents, as the authority to whom presentations should first be given, and the provincial assemblies "the ministers of that province" in which the superintendent only presided, as the first court of appeal against any judgment of his, refusing a presentee. Thus the act at once recognised and adopted the Church itself, in general terms; the Court of the General Assembly constituted by itself as supreme; the superintendents instituted by the Church by the Assembly's Legislative power, and the provincial synod; and all this without one word of special enactment for the constitution of any one of those authorities.

I beg leave now to make a general observation, in order to prevent misunderstanding. I have said, that the Church had a great deal to ask, and a great deal very necessary to be obtained, for the firm consolidation of it as the established Church of the kingdom. They desired endowments; they desired aid for execution, in some things laudable and necessary, but in some also of great severity, more suitable to that age than to the present, though neither the Court nor the Parliament differed with them on the subject; and the demand and the grant only the more marked the true nature of the case and the relation between them. They desired, in general, counte-

[1] 1567, c. 7; Acts, vol. iii. p. 23.

nance, support, and protection in their important objects. Now, I do not in the least doubt, that the supreme power of the State might, upon general principles, in adopting such a Church, impose specific conditions and restrictions on the sanctions and benefits which it held out to it. But the point of discrimination which is important is, that, if the Church, previously constituted, was adopted and recognised in general terms, with the form and capacities which were before in full exercise, it must be by specific enactments that such restrictions must be made on any powers or jurisdiction naturally comprehended in the constitution of the Church. The opposite view which is taken, based on the supposition of an immediate creation or erection of a new establishment, that no power can exist in any particular matter, unless it is found specifically written down in some express statute, is incompatible with the true history and nature of the case, as well as with the universal understanding evinced by nearly two centuries of practical experience. I am not now speaking of the particular matter here in question, but of the general powers of the Church courts, as exercised in other things not defined in any statute in any more precise terms.

Having made this observation, let us now look at the act 1567, c. 12. I have already quoted the terms of it, in the connexion of the words. It is entitled, "Anent the jurisdiction of the Kirk;" and, in the preamble, bears to proceed on an article proposed to the Estates, "Anent the jurisdiction justly appertaining to the true Kirk and immaculate spouse of Jesus Christ; to be declared and expressed, as the article at mair length is conceivit." On this narrative, the Estates "has declared and granted jurisdiction to the said Kirk," &c. It is obvious to me, that this is declaratory, even if there were no more in it. It is granted indeed, because it is first declared; it is not declared because it is granted. And then, in another clause of this act, the term used is "declared" alone. Accordingly, Sir George Mackenzie (no great friend to the power of the Church) so understands it. For, observing that the act infers that ecclesiastics have no temporal jurisdiction, he adds, "but they are acknowledged to have had an ecclesiastical jurisdiction; for the act bears, "has declared," &c. And the operative words of the act establish, not only that such a jurisdiction is acknowledged, but that it is exclusive; "and declares," &c., "that there be nae other jurisdiction ecclesiastical acknowledged within this realm, other than that quhilk is and sall be within the same Kirk, or that which flows thairfrae, concerning the premisses." It is "concerning the premisses;" and, in the previous part of the act, it says that the jurisdiction consists "in preaching of the true word of Jesus Christ, correction of manners, and administration of the holy Sacraments." It seems to me to be a very strange construction of these words, to narrow down the Jurisdiction of the Church to the mere act of preaching, or the mere act of correcting manners by admonition, &c., in any particular case, or the mere act of administering the sacraments. These are not acts of jurisdiction at all, but the exercise of functions under the jurisdiction. They are the things declared in broad general terms, concerning which the jurisdiction is to be exercised. The words of the act, in the ruling part of it, are, "nae other jurisdiction ecclesiastical concerning the premisses." The things expressed are the subjects of the jurisdiction; not the jurisdiction itself. And it appears to me that, instead of rendering that jurisdiction narrow and confined, they are so broad as to comprehend every thing truly spiritual or ecclesiastical. Concerning "preaching of the true word." Does not this comprehend power to determine every thing respecting the doctrines preached—respecting the persons authorised to preach—respecting the order of preaching, or service—respecting the times of preaching—and respecting the places in which such preaching shall take place? I do not say at present that the words decide the present question. But I do say, that they are sufficiently broad to cover the case of jurisdiction, to regulate ecclesiastically the preaching of the word within a parish, in the way that is thought most conducive to the spiritual interests of the people, as long as no statute has said that the Church courts shall not exercise such jurisdiction. Again, "for correction of manners." The ecclesiastical jurisdiction is exclusive concerning that. It evidently refers to the discipline as previously declared and exercised by the Kirk; and this again had plain reference to the institution of the elders and kirk-session. The paramount jurisdiction of the General Assembly over all this is necessarily supposed; and it refers to the institution of a kirk-session, for correction of manners, as an ecclesiastical act plainly within the terms of the statute, according to the broad general meaning which alone it can bear. Lastly, it is concerning the administration of the sacraments. Does not this comprehend a jurisdiction concerning the persons by whom they are to be administered—

concerning the time, the form, the place, the conditions, the general order of such administration? It again includes, by plain implication, the office of the elders in their proper sphere.

In one word, looking back to what was done by the two previous acts of the same year, I apprehend that this act contains the most explicit declaration of the exclusive jurisdiction of the Church, as declared by themselves in the article referred to, in all matters and causes ecclesiastical; and that in terms so broad and general, that no criticism can explain away their plain and obvious meaning. And I have no idea that such an act of Parliament, the very first in the Statute Book on the subject of the Church's jurisdiction, can be thrown aside upon an assumption, without any authority, that it was truly meant merely to exclude the jurisdiction of the Pope. The act says nothing of the kind. The jurisdiction of the Pope had been effectually subverted seven years before. But who was it that thus declared the jurisdiction of the Church? The estates of Parliament. Why not declare, as in England, that the jurisdiction ecclesiastical, or some branches or parts of it, belonged to the Crown? Why not constitute another Court with such a jurisdiction? Why not declare the Supreme ecclesiastical jurisdiction to be in the Court of Session? But no. The Church is assumed—its assemblies, superintendents, provincial synods, and kirk-sessions are all acknowledged; and then it is broadly declared, that there is no other jurisdiction ecclesiastical than that which is and shall be in the said Kirk. I confess that I can see no escape from the conclusion, that, as the Church itself was adopted, its jurisdiction ecclesiastical, as previously exercised and existing, was declared sole and exclusive in the broadest and strongest terms.

The acts of Parliament, in like manner, had said nothing of the constitution of the General Assembly, or the persons who should compose it. But, in the very next year 1568, the General Assembly passed an act, laying down specifically certain rules for the composition of it. It is, "Anent the order hereafter to be usit in General Assemblies," &c.;[1] and it regulates, in a very precise manner, the persons who are to sit and have votes, and the election of commissioners by the provincial assemblies. It is unnecessary to quote the words. But I must draw attention to the following ordinance:—"Commissioners of Burghs sall be appointed by the Counsal and Kirk of their awin townes." I apprehend that the whole act is of very decisive importance in the present question. It seems to me completely to settle this ruling principle, that the constitution of the Church courts, and specially of the General Assembly, and the qualifications of its members, are things which it belongs exclusively to the Assembly itself to regulate. But I would here ask more particularly, By what title have Commissioners from the town-councils of the royal burghs sat in the General Assembly from the very beginning of the Presbyterian Church? And it is evident that they have had none but what is derived from the acts and constitutions of the Church itself, of which that now quoted is the first. They do not come either as ministers or elders of any particular parish. And yet they have been constantly received as members, by the single authority of the Assembly itself. I think this a very decisive fact, in regard to one point in the present controversy.

There is not any doubt, that in the period preceding the year 1567, very anxious exertions were made by almost every Assembly for obtaining possession of the revenues of the ancient Church, or at least of some sufficient provision for the working clergy out of these. It does not belong to this place to enter into a detail of the difficulties, the shiftings, and evasions, which the tenacity of the old beneficiaries, and the greed of the court and the courtiers, presented, to defeat all such applications. Those details are fully given in Sir John Connel's work.[2] Some acts of the Privy Council were indeed passed for appropriating the thirds of such benefices as were in the hands of the Crown, to the support of the Reformed clergy; and at last the act 1567, c. 10, was passed, by which the thirds of the whole benefices in the realm were appropriated as a fund for this purpose. It is nevertheless a matter of fact and history, that means were constantly found of evading this arrangement, both before and after the constitution of the Commission of Platt. The utmost produce of the fund, even when applied, was the merest trifle; and notwithstanding of what may be said to the contrary, I believe it to be a matter of certain fact, that many of the clergy received nothing; and were either obliged to abandon the churches, or to depend for their support on voluntary contributions. "In consequence," says Connel, "many

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[1] Book of the Kirk, p. 124.

[2] Vol. i. p. 90, &c.

churches were left without provision, and were abandoned by the ministers, or not filled up by the patrons in cases of vacancy. Those who had stipends regularly assigned, had great difficulty in enforcing payment in the courts of law."

But, as this appears to me to be more a matter of curiosity than at all material to the question, I shall not enter into it further. It is not immaterial, however, to observe what that arrangement was about the thirds of benefices. No minister obtained thereby any right to any part of the tithes or fruits of his own parish; or of any particular parish. The whole thirds were collected into one fund, in the hands of a collector for the Crown; and stipends were merely modified out of that fund to the officiating ministers. Was this an endowment to ministers according to the civil divisions of parishes? It was very remarkably otherwise. I apprehend that the whole arrangement implied, that the ministers of the Reformed Church were not necessarily to be ministers according to the parochial localities; and, accordingly, while provision was made for assigning small benefices to the Church, they were assigned simply to such persons as the General Assembly should appoint.[1]

It would be with great unwillingness that I should go now into the minute details of the controversy, which followed the year 1567, between the Church and the Crown. All that can be said, and all that can be extracted from any records or other books, only go to show, that there was a struggle of great importance carried on between that time and the year 1592. Knox died in 1572; and with regard to his last letter to the General Assembly, I have no idea that there is any thing in it, which can be justly interpreted as a surrender of any of the principles which he had held during his whole life. He had been struck with apoplexy in 1570; and, though he recovered the power of preaching, he was still in a state of debility.[2] There had been an agreement of a certain junto at Leith, the object of which was the restoration of the order of bishops. It does not appear that Knox ever approved of this. The passage in his letter is otherwise explained by his great biographer;[3] and James Melville has recorded, that in the Assembly held at St Andrews, in March preceding, "Thair, among other things, was mentioned the making of bishops, to the quhilk Mr Knox opponed himself directly and zealously."[4]

But the policy or full constitution of the Presbyterian Church had not yet been settled. The first Book of Discipline had gone a good way. But it was not entirely approved of, and never was fully received. In the meantime, Andrew Melvil had come to Scotland and become Principal of the College of Glasgow. He was among the persons appointed to confer with the Regent's commissioners upon the jurisdiction and policy of the Church in 1574;[5] and the second Book of Discipline certainly was prepared chiefly under his direction; although I believe it to be perfectly incorrect to say, that the views which he entertained of Church government had not been held or publicly maintained in Scotland before he came into it. That Book of Discipline was received by the Assembly, and recorded. It was afterwards presented to the King and Parliament; and without waiting for the positive sanction of Parliament, it was finally approved of by the General Assembly, and all the ministers of the Church were ordained to subscribe it. I do not propose to enter into any analysis of that work, though there are some particular passages in it to which it may be necessary to advert.

In the meantime, the interests of the Church fluctuated from time to time, according to the state of the political parties in the government. For a time, civil war raged in the country; and after the death of the Regent Murray, in 1569, the Church came to be in great jeopardy. After James VI. assumed the government in his own person, though at first he showed some inclination to favour the views of the Church, he soon became intensely set on two objects. One was the restoration of the order of bishops in the full sense of that term; and the other was the establishment of the supremacy of the King as the head of the Church, and in all causes ecclesiastical. On the other side, the Church was equally determined against the surrender of their principles in either point. But the last, especially, was directly inconsistent with the fundamental principle on which the Reformed Church of Scotland had stood, and could alone stand. Andrew Melvil, at least, was not the man to consent to the surrender of either principle. I will not accept of Archbishop Spottiswood's character of Melvil. I think that it is more fairly and truly drawn by a very different historian of his

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[1] Connel, i. 4; Keith, p. 561. [2] M'Crie's Life, ii. 181. [3] Ibid. p. 202, &c. [4] Diary, p. 24, Ban. Club Ed. [5] Book of the Kirk, p. 325.

life. But that he was a man of great intrepidity and unflinching determination, in every thing which he held to be fundamental in the constitution of the Church, must be granted by every one; although it may also be granted, that he sometimes carried his principles to extremes in the practical application of them. But surely it is the most improbable thing that can be conceived, that Melvil and the other leaders of the Church should ever have consented to surrender the point, which formed the very foundation stone of their whole system, the independent jurisdiction of the Church courts. Particular things might be departed from, or the refusal of them acquiesced in. But the essential doctrine originally delivered by Knox, that there is no head of the Church but the Divine head of it, and that the Church itself, by its courts, must be supreme in matters ecclesiastical, never could be given up, if the Presbyterian Church was to stand at all. And yet the theory which denies that independent jurisdiction, or would make it subject to the control of the Court of Session, must proceed on the assumption, that such a surrender actually took place.

While the General Assembly had been employed in adopting very strong measures for putting an end altogether to the order of bishops, an act of Parliament was passed in 1578, entitled, "The ratification of the liberty of the true Kirk of God and religion;"[1] and it ratifies and approves "all and whatsomever acts of Parliament, statutes, and constitutions, passed and made of before, agreeable to God's word for maintenance of the liberty of the true Kirk of God and religion, now presently professed within this realm, and purity thereof, and decerns," &c. Here is no condemnation of the manifold and unequivocal proceedings of the Assemblies; but a complete ratification of the liberty of the Kirk, and of all the acts which are described as having been passed, not for the creation of that Kirk or its liberties, but for the maintenance thereof. It was to the same Parliament who passed this act, that the Second Book of Discipline was presented.[2] The Parliament then found that they could not come to a resolution upon the whole of it; but they appointed commissioners to examine it, and to "confer thereupon, and upon all other things concerning or that may be profitable to the furthsetting of the said policy, to the quietness of the haill Kirk, and common weal of the realm," and to report.

It is obvious, that the Parliament were desirous that the Book of Policy should be confirmed, though there might be some things in it tending, perhaps, to touch civil rights, which required more consideration; and there were various points submitted, on which some arrangement was really necessary. There is no question that the Church was exceedingly desirous of obtaining a ratification of it, for very obvious reasons. But it does not at all follow, as some have inferred, that they had any intention to submit the essential articles of the constitution to the will of the King or of Parliament. There is no ground for saying, that they had any such intention; and if proof of this were wanted, it is found in the subsequent ratification of the Book by the General Assembly itself, by an act, which also required all ministers to subscribe it.

The conference took place; and, according to Spottiswood's account of it, many of the most important articles were agreed to; others were referred for further consideration; and others were partially agreed to and partly referred.[3] To me it appears, that every thing that is necessary to the present cause was agreed to; or if any thing material was referred, or not taken into consideration, it was subsequently established by the act 1592. The general system, by which the ecclesiastical jurisdiction was vested in the General Assembly, and the elderships or provincial Assemblies, and the congregational sessions, seems to have been agreed to, only under a reservation for further conference as to what related to the order of bishops. And, in regard to the jurisdiction of these Assemblies, I shall here quote three articles, which clearly relate to it:—"9. The final end of all Assemblies is—first, to keep the religion and doctrine in purity without error and corruption; next, to keep comeliness and good order in the Church." This is marked "Agreed."

"10. For this order's cause they may make rules and constitutions pertaining to the good behaviour of all the members of the Church in their vocation." Marked thus—"Agreed, joining in the end of the articles these words, *or spiritual things only.*"

"11. They have power also to abrogate and abolish all statutes and ordinances concerning ecclesiastical matters, that are found noisome and unprofitable, and agree not

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[1] 1578, c. 3; Thomson's Acts, vol. iii. p. 95. [2] 1578, c. 19; p. 105.
[3] Spottiswood, p. 289 to 302.

with the time, or are abused by the people." Marked thus—" Agreed that, as they make acts in spiritual things, so they may alter the same as the necessity of the time requires."

These articles speak for themselves. There is another which requires notice, and stands peculiarly. " 32. It (the Assembly) should take care, that churches should be planted in places where they are not planted; and prescribe a rule for the proceeding of the other two sort of Assemblies in all things." This is marked—" The last part of the article referred to the heads of Bishops." I think it must be implied in these terms, though it is not expressly said, that the first part of the article was agreed to. Still I admit that the terms may be so far ambiguous, that they may cover two cases —one the planting of churches ecclesiastically only, or *quoad sacra*, by the act of the Assembly itself,—the other the taking measures for having churches planted, both ecclesiastically and to all civil effects.

Under the special heads craved to be reformed, article 3d has been thought to be of importance, because, on a narrative of the difficulty of finding ministers for all the parishes of the realm, it proposes that small parishes to landward should be united " by the advice of such as the Prince or Church may appoint." There may be doubt of the construction of this. I should say that, if there is to be a full union *quoad civilia*, some civil authority is to be interposed; but, if it is to be done ecclesiastically only, the Church may do it itself; for it is, by the advice of persons to be appointed either by the Prince or by the Church; and it is certain, as already seen, that the Church had before been in the open practice of granting commissions for the purpose. But even if the word *or* could be read *and*, I should say that it was just a general article contemplating a union *quoad omnia*. Yet there is a clause at the end of the article expressed in more general terms, which bears more directly on the present question. " As also where the congregation is too large, the same would be divided." When the General Assembly set this down in their Book of Policy, they seem to have contemplated the very thing which is here in question. The whole article is marked " Agreed." And it is evidently more in favour of the independent power of the Church in such matters, than against it.

The King afterwards, in 1581, intimated to the Assembly, that sundry matters had been agreed upon in general terms, though not yet put in form to be presented to the Estates.[1] The probability is, that there were further conferences, after what is reported by Spottiswood. But, however that may be, we have no report of any thing more, though it seems to be implied in the nature and terms of the act 1592.

In the Assembly 1581 some preparations were made for the institution of the Court of the Presbytery. It is true, that in consequence of certain conferences with the ministers and others of the Church, the King had sent a commission with a certain roll of parishes and presbyteries.[2] But the Assembly ordained these " to be considered by their brethren underwritten, who best knew the bounds of the country."[3] And upon a report by that committee, the proceeding is recorded thus:— " A great part of the said rowis beand reproduceit with thair judgment, quhilk they presentlie could not resolve upon in sick shortness of tyme, quhill they be farther resolvit with advyce of the countreyes, the haill Assemblie thocht meitt, that ane beginning be had of the Presbyteries instanlie, in the places following, to be examplatour to the rest that may be established heirafter." In this way the beginning of the presbyteries took place. In the list which was thus hastily agreed upon, there are various places which I believe never were parishes, and others which soon ceased to be so. The Castle of Edinburgh is a remarkable example. The Bass is another. I may also remark, that in the Presbytery of Stirling, there is this entry— " St Ninian's kirk to be divided." The Assembly further named commissioners to see these elderships or presbyteries constituted and ordained, each eldership at its first meeting to choose a moderator, to continue till the next meeting of the Synodal Assembly.

The order of presbyteries thus set down was completely changed in 1586. " It is thought universally meet, that thro' the haill countries there be orderly set down presbyteries in the places underwritten, quhilk are judgit most proper and convenient therefor, to the number following, viz."[4] and a list of 51 presbyteries is given. There were but 13 in the list of 1581. After this there is, the same year, a list of what are actual presbyteries, but really meaning kirks, by the counties, which is said to have

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[1] Book of the Kirk, p. 478. [2] Ibid. p. 475. [3] Ibid. p. 482. [4] Ibid. p. 648.

been "presented by my Lord Clerk-Register, and set down by his "Lordship's travels at the request of the Kirk."[1] This is a large list, altogether different from the former. In the first list in 1581, there were only 266 places mentioned. In the second there are about 960. The Castle of Edinburgh is still there. So is the Bass. There cannot be any doubt, that this great increase in the number of kirks or parishes under the General Assembly, was produced by numerous kirks which were planted under the various commissions issued by the Assembly for that purpose. The order of presbyteries has, accordingly, been changed and varied at various times since, by the acts of the General Assembly alone.

I shall not stop to advert particularly to the three acts of 1584. They struck at the root of the Presbyterian Church; and if they had stood, would have put an end to it as the Established Church of the State. Why would they have had this effect? Plainly because they struck at the fundamental principles on which it stood. Whether the Church could have subsisted as a Voluntary Church, as it had done at first, under the violence evidently intended to be directed against it, is a question which need not be considered. Very clear it is, that the Church did not submit to those acts, or for a moment acquiesce in them. The acts 1584, c. 129 and 132, were intended, and plainly had the effect, to subvert the jurisdiction of the Church courts in matters ecclesiastical, and set up the King with his Council, as supreme judges in all matters and causes ecclesiastical. This was the precise point of struggle, and which King James, in his disingenuous way, had been strenuously aiming at. But it could not so stand, if there were to be a Presbyterian Church at all.

The struggle accordingly continued about that and the order of the bishops, till the year 1592, when it was brought to an end for the time, by the statute of that year, 1592, c. 116.[2] It has been said, that advantage was taken of some difficulties King James was in, at the time, to obtain this statute. I believe that it just came to this, that he could not resist the voice of the nation, demanding that the Presbyterian Church should be fully established. However this may be, as this statute, not alone, but with the statutes of 1690 and 1706 superadded to it, ultimately became an essential part of the law of the Constitution, its enactments and provisions must be of ruling weight. But it must be construed with reference to the previous history of the Church, and specially to the manner in which the Church courts, and particularly the General Assembly, had been constituted and regulated, and the long use and practice of its proceedings from 1560 downwards.

It begins with ratifying the liberties of the Kirk presently established within this realm, as declared in the act 1569, c. 1;[3] which again specially ratifies all acts for the maintenance of the true Kirk, and particularly the act 1567, c. 6, already sufficiently quoted and considered. Then it ratifies the act 1581, c. 1, which act specifically ratified all the acts of 1567, to which I have already fully adverted. Then comes this clause:—"Ratifies and approves the General Assemblies appointed by the said Kirk, and declares that it shall be lawful to the Kirk and ministers, every year at the least, and oftener, *pro re nata*, as occasion and necessity may require, to hold and keep General Assemblies, providing that the King's Majesty, or his Commissioners, with them to be appointed by his Highness, be present at ilk Assembly, before the dissolving thereof, nominate and appoint time and place, when and where the next General Assembly will be holden; and in case neither his Majesty nor his saids Commissioners be present, for the time, in that town where the said General Assembly was holden, then and in that case it shall be leisum to the said General Assembly, by themselves, to nominate and appoint time and place where the next General Assembly of the Kirk shall be keepit and holden, as they have been in use to do thir times past."[4]

It then ratifies and approves of "the provincial synods and the presbyteries, and particular sessions, apointed by the said Kirk, (using the same word as in the case of the Assembly,) with the haill jurisdiction and discipline of the same Kirk agreed upon by his Majesty in conference with certain of the ministry, convened to that effect, of the quhilk articles the tenor follows." It will be observed, that the particulars which follow, relate solely to the Provincial Assemblies, Presbyteries, and Sessions. With regard to the General Assembly, the act assumes its character and powers to stand precisely according to the previous use, as appears clearly from sub-

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[1] Book of the Kirk, p. 668, &c.
[2] C. 8, Thomson's Acts, vol. iii. p. 541.
[3] C. 6, Thomson's Acts.
[4] Ibid. iii. 210.

sequent clauses. It speaks of the duty of the presbytery "to cause the ordinances made by the Assemblies, provincials, nationals, and generals, to be kept and put in execution—to make constitutions quhilk concerns το πρεπον in the Kirk for decent order in the particular kirk where they govern, providing that they alter nae rules made be the Provincial or General Assemblies." Here there is the clearest assumption of the power of the General Assembly to make laws for the whole Church. But the act goes on to put this out of all doubt. After declaring the jurisdiction of the kirk-session in their own congregation in matters ecclesiastical, it goes on—"And decerns and declares the saids Assemblies, Presbyteries, and Sessions, jurisdiction and discipline thereof aforesaid, to be in all times coming maist just, good, and godlie in the self, notwithstanding whatsoever statutes, &c., made to the contrary." It then repeals in general terms all "laws and statutes, made at ony time before the day and date hereof, against the liberty of the true Kirk, jurisdiction, and discipline thereof, as the samen is used and exerciset within this realm." It goes on to repeal a great number of acts—specially the two acts of 1584, already alluded to, declaring in regard to the first particularly, that it shall not "derogate to the privilege that God has given to the spiritual office-bearers of the Kirk concerning heads of religion," &c. &c. And having repealed the act by which presentations were to be given in to the bishops, and general powers ecclesiastical were vested in them, it ordains all presentations to benefices "to be direct to the particular presbyteries in all time coming, with full power to them to give collation thereupon, and to put order to all matters and causes ecclesiastical within their bounds, according to the discipline of the Kirk."

The last clause of the act is that on which the case of Auchterarder mainly turned, declaring the Presbytery to be bound and astricted to receive and admit whatever qualified person should be presented by a lawful patron.

Looking at the whole of this statute, apart from any question arising on the last clause, and taking it in connexion with the whole history of the Church from its first formation before 1560 downwards, in the view which I have endeavoured to take of it, it is quite impossible for me to think, that there can be any just doubt as to its true construction; as having established in the Church courts thus recognized, and specially in the General Assembly, a general and independent jurisdiction in all matters and causes ecclesiastical, as the same had been before used and exercised. But the point of most importance is, that such a statute, in the recognition and ratification of the jurisdiction of such Ecclesiastical Courts, is not to be construed on the principle of the State having thereby created the Church, or created the Courts in whom the jurisdiction resided; on the contrary, to deal with it justly, it must be looked at with reference to the real fact, that the Parliament was thereby recognizing or adopting a Church which already existed in the land, and recognizing the jurisdiction of Courts which, as constituting the true Kirk so acknowledged, had previously been in the constant exercise of such jurisdiction. And when it is seen, that there is not in this act any grant, or even definition, of any specific powers as vested in the General Assembly, or of its powers at all, except by the broadest general terms, while in its whole scope it assumes that that Assembly is the supreme judicial court in causes ecclesiastical, and that it is the maker of laws for the government of the Church, it seems to me that to say that the General Assembly has no power ecclesiastical, except what is specifically laid down as to the particular matter in some statute, is just the same thing as to say, that this act 1592, called the Charter of the Presbyterian Church, made no establishment of that Church at all which could have worked for a single year.

I shall now speak very shortly of what followed. There are special facts very important in the particular question now before the Court to which I must still return. In the meantime, let it be observed, that the General Assemblies did go on to exercise all ecclesiastical jurisdiction both judicially and legislatively. They regulated the order and constitution of the Presbyteries: They regulated the order and constitution of the Assemblies: They took cognizance of everything whereby the spiritual interests of the people might be effected: They passed laws, forming an immense record, which took full effect whenever the Church stood, without any man doubting (I mean generally) that it was within their power and competency to enact and enforce such statutes.

But the people of Scotland had yet to learn, that their struggles for this establishment were not over, and that in the end they would have to purchase its rights and liberties with their blood. James VI. never lost sight of his two favourite objects,

closely linked with one another—the restoration of the order and jurisdiction of Bishops, and the King's Supremacy in Ecclesiastical affairs. The arts and devices by which he sought to accomplish these ends, and for a time succeeded, are very remarkable. It was all done under the most distinct acknowledgment of the legislative powers of the General Assembly. No attempt was made by Parliament at once to repeal the act 1592, declare the Presbyterian Church at an end, and revive the acts of 1584. The scheme was proceeded in, in the most insidious manner. The Parliament in 1597 first restored ministers, provided to Prelacies, to a right to sit and vote in Parliament; but as to their spiritual office, remitted to the King to advise with the General Assembly. In 1606 Parliament restored to them their patrimonial emoluments; and in 1600 their ancient temporal jurisdiction in cases of divorce, testaments, &c.: but as to their spiritual office, all was devolved on the General Assembly. After various partial proceedings, a General Assembly was, by corrupt and illegal devices, (fully detailed in the acts of the Assembly 1638,) brought together in 1610, which passed an act whereby the bishops were appointed Moderators of the Synod, and invested with Episcopal jurisdiction and authority. Then, indeed, the Parliament interposed effectually by the act 1612, c. 1, which, proceeding on a full recital of the articles of that act of Assembly, "ratifies, approves, and confirms" them, "annulling and rescinding the 116th act of His Majesty's Parliament, held in anno 1562, and all and whatsoever other acts, or any of them, or any part of the same, are contrar or derogatory to any of the articles above written." This indirectly revived the acts of 1584, and extinguished the acts of 1597. It thus laid the Presbyterian Church of Scotland completely prostrate. But it is certainly a most remarkable feature in this disgraceful transaction, that it had been found impossible to accomplish the object, except by the fullest recognition, in the first instance, of the legislative powers of the General Assembly, and its absolute jurisdiction in all spiritual affairs.

Considering, however, the deep hold which the principles of the Presbyterian Church had taken in the affections of the people of Scotland, it was impossible that this could stand or come to good. A little time showed the danger of thus trifling with the feelings of a whole nation. In 1638 Episcopacy was abolished, and the Presbyterian Church restored. The Westminster Confession of Faith, in preparing which some of the ablest men of the Scotch Presbyterian Church had assisted, was adopted by the General Assembly, and many other important acts were passed. This was all done by the Church itself, in the first instance, though it was confirmed by the Estates of Parliament. And I presume no one will doubt that the Church did in the acts of that Assembly 1638, assert in the most explicit and decided terms the independence of the Church and its courts in matters ecclesiastical, and repudiate and rescind all the doctrines delivered, and ordinances made, to the contrary.

The civil war in England and Scotland followed soon after, the events of which are too well known to require particular notice. Then came the Restoration; when the order of bishops was once more restored. But in the acts effecting this change, the statute which rescinded the previous acts, and in express words the act 1592, c. 116, most distinctly describes these acts, as acts whereby "the sole and only power and jurisdiction within this Church doth stand in the Church, and in the General Provincial and Presbyterial Assemblies and Kirk-Sessions," in the terms which I have before fully quoted. I can conceive nothing more decisive as to the true meaning, and the universally understood effect, of the statutes by which the Presbyterian Church had before been established, and in particular, of the only construction of the act 1592 in this point; and I own I do not understand, how any one should think it admissible to construe it otherwise, in the face of this statutory declaration by the very Parliament which repealed it.

It is a little remarkable, that it came to be thought that this Parliament, in their zeal for the establishment of the authority of the bishops, had not sufficiently guarded the enactments, so as to secure the other main point constantly aimed at—the King's supremacy—in so much that it was found necessary to pass another act in 1669, to declare in peremptory terms that principle of the King's supremacy.

But the acts of the Revolution swept all this away. Need I ask, whether, in the interval, the Presbyterian Church, or the Presbyterian people, had submitted to this violent extinction of their Reformed Church, with its liberties and independent rights? The events of that dismal period sufficiently attest the determination with which they clung to their principles, and sacrificed all for the defence of them. The

system of tyranny and violent persecution which was directed against them, proves how hopeless it was known to be that they would ever be surrendered. In the end, the civil liberties of the country came to be in a great measure identified with the liberties of the Presbyterian Church, or mainly dependent on the devoted spirit with which the latter were contended for by the great body of the nation. I will not now repeat the statement already made of the terms of the Acts of 1690, the Act of Security 1706, and the Act for the Union of the Kingdoms. But I do apprehend that they are most imperative and momentous statutes; rendering the things done by them fundamental and unalterable in the Constitution. The very point of struggle throughout the seventeenth century had been, whether the Church of Scotland should stand as independent, and whether its Courts should be supreme, in all matters ecclesiastical. If the Revolution Settlement did not accomplish this, it was not the Revolution for Scotland which all the people of that kingdom believed it to be at the time, and have ever since believed it to be. I will not go back to the terms of the statutes. The essential thing is, that the only government of the Church, and the sole power in all matters ecclesiastical, are declared to be in the General Assembly and other Church courts, and that any supremacy in the Crown is abrogated as inconsistent with that settlement. Nor is there, in any of the statutes the slightest hint. that any other court, constituted by the Crown for civil purposes, shall have any right or power to interfere, to control the acts or judgments of the exclusive ecclesiastical jurisdiction thus established with so much anxiety and emphatic force. To my mind, it is a most perilous state of things, if such fundamental laws are to be now either denied in their plain meaning, or frittered away by minute criticism.

I shall only further observe, in regard to the general power of making laws in the government of the Church, that the act of Assembly 1695, c. 11, commonly called the Barrier Act, which provides that "no new acts touching the government of the Church, be made, until they be first transmitted to the several Presbyteries of this National Church;" and which has since been so often and earnestly enforced, would, indeed, have been a very idle ceremony, if there was no power of making new acts in the government of the Church at all. But the whole history of the Church, both before and since that time, affords yearly proofs of the universally acknowledged power of such legislation.

Having thus, I hope, at least explained my own views concerning the legal *status* of the Church courts in such questions, I turn back to the particular point now before us. Being of opinion that it is not the law of this country that the Church courts have no power in any matter, however clearly ecclesiastical, unless it be specifically mentioned in some statute; and that at the least, if it be ecclesiastical, the Court of Session has certainly no jurisdiction in it, I must think that the first proper question here is, whether the thing complained of is ecclesiastical or not? This might be resolved at once, by considering the nature of the proceedings themselves, without reference to what may or may not have been done in former periods. For I am of opinion that, if the thing is in itself properly an ecclesiastical act, it must be within the exclusive competency of the General Assembly, with the concurrence of the Presbyteries, whether the precise same thing, or any thing equivalent to it, had ever been done before or not? It might be matter for argument in the General Assembly, as the proper authority, as a reason why the ecclesiastical measure should not be taken, that the same thing had not been done before. But if the exclusive jurisdiction in all matters ecclesiastical is clear, and if the act itself be ecclesiastical, the mere novelty of its occurrence could give no jurisdiction to another court, which confessedly has no ecclesiastical jurisdiction at all, to review it.

It will be very necessary for me, before I close this opinion, to draw most particular attention to the true principles of judgment concerning any claim to jurisdiction in the civil court to take cognizance of such a matter. I conceive it to be a most essential point, that neither in law nor reason is there any ground for identifying the Court of Session, or any other civil court, with the supreme power of the State. The Court of Session is not the State. At present I only indicate the distinction as essential to be borne in mind.

But I am aware, that it is important first to show that the thing is ecclesiastical. And although I think that this may be satisfactorily established by a simple analysis of the proceeding itself, it is surely of importance if it can be shown, that acts either exactly the same, or precisely similar in their nature, have been done throughout the whole history of the Church, by the sole authority of the Assembly and the other

Church courts. Such facts must be of material aid in considering the nature of the proceeding particularly complained of.

It is expressly admitted by the suspenders, that where additional accommodation is required for the people "provision may be made by the Church for their spiritual interests,"[1] and that they have long been in the habit of ordaining ministers for chapels of ease, assisted by a portion of the regular session, who baptize, and marry, and administer the sacraments. It is not, then, to any permanent arrangement, made for the preaching of the word and administering of the sacraments to a portion only of the people of the parish, while yet there is an Established Church and minister of that parish, that the suspenders object. Yet, in so far as these objects are concerned, what is here complained of is but another mode of doing the same thing. The grounds of objection seem to be three :—1. That the ministers, thus ordained to the preaching of the word and administering of the sacraments, are admitted to sit in the Church courts ; 2. That they are allowed to have a kirk-session for discipline, and to return an elder to the Presbytery and Synod ; and, 3. That a district of the parish is assigned to these ministers, in which they are to attend to the spiritual interests of the people, and exercise ordinary discipline. These things are different in themselves, though there is sometimes an attempt made to connect them together. But, if it should appear that there has been a long and constant practice of the Church, regulating the constitution of its own courts, of changing the component parts of them at will, and also of admitting persons to sit in them who were neither ministers officiating in any parish church, nor elders in any kirk-session of what is called a legal parish, without any one, up to the present time, alleging that any objection could be made to the proceeding, a considerable way will be made in the question, whether that objection, which depends on these facts, can possibly be well founded. And if again it shall appear, that the Church has, in many instances, sanctioned the preaching of the word, &c., in a particular district assigned to the minister ordained, forming a part of some other parish, or in a parish not locally that to which he was previously attached, giving him a kirk-session with jurisdiction over such district, it will not be easy to think that there can be any solidity in the second and third objections.

Now the first striking fact is, that from the beginning, and to the end, the General Assembly has regulated the order and constitution of all the Church courts. I have shown this already to a great extent. But there are still other facts which bear more directly upon it, as the question now stands. And first of all, the Church has determined and varied, from time to time, the whole order of the Presbyteries. This was done before 1592, and it has been done to a great extent since. The act 1592 gives jurisdiction to the Assemblies and to the Presbyteries "appointed by the said Kirk." It is, in my judgment, out of all question to limit these words to the form of Assemblies or Presbyteries, or the number or order of the latter, as they had existed before that date. The Assembly was a body to be constituted annually ; and, I apprehend, that the act plainly meant the Assemblies and the Presbyteries equally, either already existing, or which should be appointed by the Kirk. It was ever so understood, and there can be no doubt of it. Now what is the fact? In 1592 there were in all fifty-three Presbyteries, two of which had been added by the Church posterior to 1586. Before the year 1638 the number of the Presbyteries had heen increased to sixty-four. And the acts of that year bear,[2] that it seems needful that those erected since 1586 be ratified by the Assembly, "and that other Presbyteries shall be erected where they shall be found needful, and especially now in the Synod of Lismore," &c.[3] The practice continued ; and a list is given, in the Case for the respondents, of new presbyteries erected after the Revolution, whereby it appears, that twenty-nine presbyteries have been added and erected since 1592, making the whole number at present eighty-two. In like manner, synods have been erected, suppressed, and modified: and in many instances particular parishes, and districts, have been transferred from one presbytery or one synod, to another. No doubt was ever entertained of the legality of these proceedings ; and the Civil court, in the matters properly belonging to it, has constantly recognised the presbyteries so constituted.

It is said that all this is of no consequence, because it is matter of internal regulation. But I humbly apprehend that it is of very great consequence. When the Assembly determine, that certain parishes, or rather the ministers of certain churches,

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[1] Case, p. 28. [2] Acts of Assembly, 1638, vol. i. pp. 31, 39. [3] Case for Respondents, pp. 26, 27.

shall compose a Presbytery, which was not a Presbytery before, do they not determine who shall be members of that Presbytery? Do they not determine, who shall be returnable as members to the Assembly, and who shall vote in the return? They evidently vary and change the constitution of both bodies. They do the same when they change the Synods, to a certain extent. And when they transfer the minister of a parish from one Presbytery to another, do they not change the constitution of both Presbyteries, and do they not admit a man to sit in the second, and an elder also from his kirk-session, who had no right to sit there before, and who was not, before, the minister of any parish within its bounds? It is true that this is matter of internal regulation. But that is the very answer to this part of the suspenders' case. It is not only an act of the very same kind, but it is the very same act, so far as regards the constitution of a particular Presbytery, with the act of admitting the ministers ordained to churches, *quoad sacra*, to sit in the Presbytery; and not a word of argument can be employed concerning the effect of such an admission, and such an alteration of the members of the Presbytery, in the one case, which will not apply to the same thing in the other.

But, in my humble judgment, this goes a great deal further. The people of the Established Church have as clear an interest to be under the spiritual care of a particular Presbytery or Synod, as they have to be under that of a particular minister or kirk-session. Any change, therefore, in the arrangement of the Presbyteries alters their ecclesiastical condition, and may affect, either for good or evil, their rights of appeal, or trial, or spiritual superintendence. It is the same case in a different form with that which is here complained of. The answer is, that it is all ecclesiastical arrangement in the internal government of the Church. And, accordingly, no doubt has ever been raised, and the suspenders raise none, as to the legality of the numerous acts of this description.

It is an act of the very same kind, though it does not reach all the argument in this case, that the General Assembly, of its own authority, admitted commissioners from burghs to sit in the Assembly; and an act not very different, when they regulate the qualifications of all commissioners, the numbers who are to be returned, the forms of their commissions, the formula to be subscribed, &c. &c.; and it is certainly very remarkable, that, when the Legislature, in 1693, thought that a change as to the proportion of representatives sent by the Presbyteries to the Assembly would be expedient, they enacted nothing, but only recommended to the General Assembly to appoint the commissioners to be sent in different proportions, "as they might judge convenient."

It is, perhaps, a still more remarkable fact, that when, by the statute 1695, c. 27, the Legislature allowed the Episcopal beneficiaries, who should qualify in a certain manner, to remain in possession of their benefices, it was under the express qualification, that they should exercise no power of Church government, unless they should be first assumed by the competent Church judicatory, but that they might apply to be so assumed; providing, "that, as the said ministers, who shall qualify themselves as said is, are left free to apply, or not, to the foresaid Church judicatories, so the said Church judicatories are hereby also declared free to assume, or not assume, the foresaid ministers, though qualified, as they shall see cause." Now, here is a plain case of ministers holding the benefices of parishes, conforming to the Presbyterian worship, and allowed to remain in the pastoral duties of the parishes; and yet it is left to the free judgment of the Church to admit, or not to admit, them to any participation in the government of the Church, or to sit or vote in the Church courts. It is impossible to imagine a stronger acknowledgment of the principle, that it belonged exclusively to the Church itself to determine the constitution of its own courts.

I think it must have appeared, from the details already given, that, in the early constitution of the Church, the members of it could not possibly be limited to persons occupying, statedly, districts civilly ascertained as bounded parishes. What the Church looked to, was congregations mainly, but of course, in general, in localities where churches were to be found. But it may be further observed, that, in so far as ordained ministers of the Popish Church became converts to the Reformed creed, they might very well be of the order of the priesthood without having any stated ministry in any parish. The collegiate churches, composed of many clergy, and having many benefices through the country, would probably furnish many examples of this. John Knox himself was an ordained priest, and had become a member of the Congregation, before he had taken upon him the ministry at all; and even when he

did so, it was but to a congregation in the Castle of St Andrew's, without any thing like a definition of a proper parochial charge.

It is important to remark further, that, when it is said there was no Church but a Church of parishes, and that none were admitted to the Assembly but ministers of such parishes, it is an assumption, in the first place, without evidence; and in the second place, against evidence. The Church itself using the name of parishes, will not prove it to the purpose of the present argument. But in reality, when one looks at the list of places (for they are not called parishes) which, in 1586, were said to compose the Presbyterial divisions ecclesiastically, it is apparent that, as to a very great number of them—even the names of which are unknown in the present lists of the Church—there is no evidence that they ever did constitute proper parishes in the sense required. The very basis of the theory, therefore, is not sustained. But, on the other hand, it is clear that a great many others had been planted by the authority of the Church alone.

But, that persons sat in the Church courts, who were neither ministers nor elders of parochial districts, and that they have done so down to the present moment, is an incontestable fact. In the beginning, numerous noblemen and landed proprietors sat along with ministers, simply as commissioners from the shires or extensive districts. And even after the Presbyterial order first received proper form, and the component parts of some Presbyteries were set down, we find the castle of Edinburgh, and the Bass, mentioned as denoting places giving title to clerical members, though they never were parishes in any sense. Again, it is undisputed, that, from the beginning, professors of theology, that is, the teachers or doctors whose office is described in the Second Book of Discipline, and pointedly distinguished from that of pastors, were constantly received as members of the Assembly; and indeed commissioners from the universities are always enumerated in the description of its composition.[1] Thus, in 1574, Alexander Arbuthnot is there simply as "Principal of the College of Aberdeen;" and Andrew Melvil sat solely as Principal of the College of Glasgow, in spite of an objection by King James himself. And there is another remarkable example—Mr Robert Pont, one of the "senators of our Sovereign Lord's College of Justice, and minister of God's word." Pont was unquestionably an eminent minister of the Church; but at this time he appears to have had no parochial charge; at any rate, he is not so designed. The theological professors have continued to sit in all the Church courts down to the present moment; and I have never heard any explanation of this fact, which can be at all reconciled with the idea that the constitution of these courts is necessarily limited to the ministers and elders of parochial churches or parishes, in the civil meaning of the term, or that the Church has no power to admit any one into its courts, who is not of that description.

But the last example of the contrary, above alluded to, leads me to take notice of what happened to that Mr Robert Pont in 1583. It is surprising to me, that it should not be seen that it is a palpable example of the General Assembly assuming the power of laying the pastoral duty, in particular places, on their members, and relieving them of it in their own discretion. It is said, that Pont had been appointed minister of St Andrew's in 1581.[2] The fact is not distinct in the document referred to. But so far as I understand it, the session having elected Mr Pont, appointed a committee to travel with the Earl of March, the prior, "for an reasonable stipend." From this it appears, that, though the kirk of St Andrew's, which is the only thing spoken of, was probably the parish kirk, it was not a benefice; and it could only be by the orders of his ecclesiastical superiors, that Pont could be expected to go there at all. There is no record of this transaction in the Book of the Kirk. But in 1583 there is a record, that Pont came to the Assembly, and declared, "that with loss of his heritage and worldly commodity, he had proponit to sit down in St Andrews, and had served on his own charges ane whole year, and could not have any equal conditions of living; no, not the least provision that any had that passed before, and now altogether his heart is abstracted from them, praying the Church not to lay the charge upon him against his will." I should have thought it a matter of very trivial moment, in this question, that the people of St Andrews did not provide a stipend for Mr Pont by voluntary contribution. That they never thought of that, I do not know; but it is plain, that he was sent there by the Assembly. If he was not made thereby minister of a parish, observe the consequence. He was a member of the Assembly

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[1] Book of the Kirk, pp. 299-315. Papers produced by Dr Lee in Patronage Committee.

1582, and of that very Assembly in April 1583. But supposing that he was technically a minister of a parish, though labouring gratuitonsly in expectation of provision, what is the transaction in April 1583? To whom does he appeal, and what does he ask? He comes to the Assembly, tells the plain fact that he could not live, having no provision, and that his heart was altogether abstracted from them, (the people,) and prays "the Kirk not to lay the charge upon him against his will." Thus he submits himself to the will of the Kirk. I presume that he was relieved of the charge; though I do not see, whether then, or at what date, but probably it was done at once. Now, in the next Assembly, which was held in October 1583, Mr Robert Pont was again a member, and was elected moderator; and I see not that he was then a minister of any parochial charge at all. He may have been so; but it does not appear. Another person, Robert Wilkie, became minister of St Andrew's; and in 1589, Mr Robert Bruce was appointed as "ane minister and fellow-labourer with Mr Robert Wilkie." Thus a second minister was settled in St Andrew's, who sat in the Church courts; and a second church was afterwards erected.

A great many other examples were mentioned in the Hearing, of persons sitting in the Church courts, who were not ministers of any parish church in the sense now assumed. There were three places for which ministers sat—in Holyrood, Leith, Restalrig—where there were but two parishes; two in St Catherine's Hope and Glencorse, neither being parishes; two in Cambuskenneth and Kirk in Muir; two in Shotts and Bothwell; two in Cardross and Kilmahew; and I believe that many more might be added.

I beg leave now to direct attention to a few of the instances, on record, of the erection of parishes ecclesiastical by the Church, of the union or suppression of parishes, and of the appointment of second ministers. They are too numerous, and some of them too pointed, to permit us to avoid the effect of them.

I shall say nothing of the case of Greenock in 1592, except, that as the object of Mr Shaw was to obtain a disjunction and erection *quoad omnia*, the transaction required the charter and ratification; and yet he only applied for it with the express concurrence of the General Assembly and the Synod.[1]

But the case of Stranraer in 1600, is much more important; and far from thinking that there is any thing in it adverse to the plea of the respondents, it appears to me that it is a decisive case the other way. The whole fact concerning Stranraer itself is plain and simple. The Synod of Galloway had passed an act "for erecting and bigging of ane kirk at the burgh of Stranraer, within the Presbytery of Wigtown, and annexation thereto of the 20 pound land of the parish of Inche, lying toward the coast of Ireland, pertaining to the lairds of Garthland," &c. Various other lands are then described very particularly, as also to be so annexed, "as being most commodious for the inhabitants of the said lands to resort to the said kirk for the hearing of the Word; to which erection and annexation foresaids, the heritors and friendly tenants" had given their consent. This is what the Synod of Galloway had done; and the record of the Assembly 1600, (as abridged in the Book of the Kirk,) bears, that the Synod presented a supplication to the Assembly, setting forth the fact, and "desireand, therefore, that the General Assembly will ratify and approve the same, as at mair length is containit in the said supplication: The General Assembly ratifies and approves the erection and annexation foresaid, made by the Synodal of Galloway, in all points." This is the whole statement of what was done and finished in that case. It is the erection of a church, and the assignment of a district by annexation, by the authority of the Church courts alone. It is not stated by the suspenders as matter of fact, that any other erection, or any other ratification of it ever took place; and it is admitted that Stranraer, with that district, has been a parish church ever since. In such a state of the case, it is surely a very inadmissible mode of meeting or avoiding such a plain precedent, to say that, because Stranraer afterwards got a charter erecting it into a royal burgh, it is probable that there may have been an Act of Parliament ratifying the erection of the Church. The records of Parliament at that period, are perfectly entire, and all the acts of ratification are faithfully preserved. And why, then, is it to be taken as a probability, that, of all the acts of ratification, this—of the existence of which there is no trace any where—should have disappeared? The reason assigned is precisely a reason against any such probability: For if there had been such an act, it is in the highest degree improbable that it

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[1] Book of the Kirk, Peterkin, p. 478

should have been overlooked when the erection of the burgh took place. That there was no such act, I hold to be certain—1. Because there is none extant, and no record of its ever having existed; but, 2. Because it is a known fact, that the minister of Stranraer has no right in the teinds of the lands annexed—all these having been claimed by the ministers of the parishes from which the lands were taken, and allocated to them; and he now depends for his living on the Crown grants for small livings. If there had been any erection by act of Parliament in 1600, or soon after, this result would have been impossible. Be the effect of the case, therefore, otherwise what it may, I hold it to be distinctly a case in which the Synod and Assembly, for the accommodation of the town and district, erected a new church within an existing parish, and allotted a district to it; and it is unquestionable, that the minister has had a kirk-session, and sat in the Church courts, from 1600 to the present day. It had become the Presbytery seat before 1638, or was then assumed to be so.[1]

It happens that, after the whole fact thus recorded, of the settlement of the parish of Stranraer, there is an entry, quite separate, in the Book of the Kirk,[2] in the following terms:—"Because the general question was proponit to the haill Assembly, quhere congregations are so spacious, that a great pairt thereof may not commodiously resort to thair awin paroche kirk, be reason of their great distance of habitation therefrae, if it be lawful to ane number of the said congregatione to big ane new kirk and intertaine ane pastor, at the same time, upon their awn expences? The General Assembly, after long reasonyng, thinks it both lawfull and expedient, and declares they will assist the same as ane godlie wark, and will crave the samen to be ratified in Parliament, how so oft it shall occurre."

This proceeding, of which the account is very brief, though it occupied a long time, must either have had relation to the case of Stranraer, before under consideration, or not. From the nature of the record of the Book of the Kirk, especially after 1592, it may have had no connexion with it; the entries being very desultory and unconnected. But, if it did relate to it, and arise out of it, then the case of Stranraer must have been a case of the erection of a church to be maintained by the people "upon their own expenses"—which proves the application of the actual erection to the present case. If it did not relate to that case, the proceeding cannot possibly affect the importance of it as a precedent; because the thing was actually done first, and the subsequent resolution, whatever be its import, cannot be construed as undoing what had been done the instant before.

There may be doubt as to the full meaning of the sentences last above quoted. They are very succinct, and may be thought in some measure ambiguous. Do they refer only to such institutions as chapels of ease? If so, the inference from the last clause would prove too much—the power of the Church to institute them being admitted. But that is really not the meaning. It seems to me, that the true intendment is not dubious:—It is, that the thing set forth as done or proposed to be done, in the abstract, viz. the institution of a church for the accommodation of the people where the church is insufficient from distance or otherwise, and the appropriation of a district to that church, so far as ecclesiastical purposes go, is perfectly lawful and highly expedient, and has been accordingly sanctioned by the Assembly, and will always be approved of as a godly work; but that the Assembly will, not in that case specially, to which there is no allusion, but in any other case, so often as it may occur, assist the work, by applying to Parliament, whereby civil privileges as well as ecclesiastical may be secured. This I take to be the right construction of the passage. But I apprehend, that it cannot be received as either altering the plain fact, that Stranraer was created as a parish by the Church alone, or as warranting the inference that the Church ever disclaimed the power of constituting any district as a parish *quoad spiritualia*. It may be said now, that they have not the power. But, as to their having disclaimed it by that deliverance on a supposed abstract question, it seems to me to be a deduction from facts which do not warrant it, but which prove practically that they both maintained, and did, the reverse.

But, even though the case supposed, if it was Stranraer, could be taken otherwise, it would only prove, that, if there was to be an erection to all civil purposes, the interposition of Parliament was necessary. Yet no such thing did take place. I am, therefore, strongly of opinion, that it is a direct case in point for the respondents.

The case of North Leith appears to me to be another example of the exercise of

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[1] Acts of Assembly, 1638. [2] Book of the Kirk, Peterkin, p. 479.

the same power. It was a new parish erected out of a part of the parish of Holyrood-house; and the fact is thus stated in the Book of the Kirk under the date of 1602:[1]—"Anent the supplicatione in the northe paroche of Leith, makand mention, that quhen the Presbytrie of Edinburgh has erected the said northe paroche in ane parochin, quhilk is also approvine be the Synod of Lowthiane, desyrand, therefore, the ratificatione of the General Assemblie unto the same: The Assemblie ratifies and approves the erectione of the same in all poynts." It is probable that this had been done by the Presbytery a very considerable time before. For it is stated, in an act of Parliament subsequently obtained in 1606, that the inhabitants had built the church, and had had "ministers serving the cure thereat and ministering to them the sacraments thir 20 years bygane, with the mair like as they have presentlie a minister serving the Kirk thereof." Whatever may have been the date of the act of the Presbytery, the Assembly made no difficulty in at once confirming it. They made no condition about any ratification by Parliament being obtained, but at once sanctioned the establishment as an ecclesiastical arrangement for the good of the people; and so the matter stood for four years more. It is very true, that, in that case, an act of ratification by Parliament was ultimately obtained. But there were very substantial reasons for this. From certain discussions which took place some years ago concerning the stipend and the Church of North Leith it appears, that there were very serious civil interests involved in the final arrangement of that parish. The minister acquired a right to fish-tithes and various other emoluments; and the kirk-session and the corporations of Canongate acquired rights of property in the Church and the ground on which it stood, while the patronage was vested in the inhabitants. But though the act of ratification had thus become necessary, there is not a word in it, condemnatory of the proceedings of the Presbytery and the Assembly, but, on the contrary, a full recognition of the Church and parish, as already existing, and the minister as an ordained minister of the Church in it.

A proceeding, exactly of the same nature, took place in the same year, 1602, in the erection of the parish of Ferry Port-on-Craig, in which the inhabitants of that place, and a large district of the parish of Leuchars, applied to the Assembly, with consent of the Presbytery and Synod, to give power to the Presbytery to annex "sic villages as are most adjacent to the said parish kirk." The Assembly ratified the erection, and gave the power; and not a word was said, at that time, of any act of Parliament. It is true that such an act was afterwards obtained in 1606, for erecting the parish *quoad civilia*. But, in the meantime, it stood as a parish kirk to all ecclesiastical purposes.

Prestonpans is another example. It is said to have been anciently a vicarage of the monastery of Holyrood, and that the church had been burnt in 1544, from which time the people had frequented the church at Tranent, and become practically, though not formally, united to that parish. From that time there was no parish, and no minister of Prestonpans recognized, till after Mr John Davidson built a church and manse at his own expense, and endowed a school for it. But "Preston was, in 1595, recognized by the Ecclesiastical Legislature as, *quoad sacra*, an independent parish; and in 1606, an act of Parliament was obtained by Sir John Hamilton, formally separating it from Tranent, in order to obviate all dispute in regard to its temporal relations." This is the statement in the New Statistical Account. It shows, that, during fifty-one years, Preston had ceased altogether to be a parish church—that it never had been so since the Reformation—and that during eleven years it was recognized as a parish church, though erected only by the authority of the General Assembly. This is confirmed by the fact of real evidence, not denied, that, in that period, there was a regular kirk-session, the record of which is still extant. Calderwood designs Mr John Davidson, in 1596, as "then minister at Saltpreston," the name which the place at that time bore;[2] and that he was a member of the Assembly in 1597 is proved by his letter to the Assembly, dated at Saltpreston, 8th May 1597, which begins in these words:—"As infirmity of body hindereth my presence from this Assembly," &c.[3] Here, then, is the very case proved, of an erection of a church and parish by the Assembly, and the minister sitting in the Church courts, while not a word was said of the interposition of any other authority, and none was interposed for eleven years. That it may have been a vicarage in Popish times cannot alter this fact. If that had been sufficient for some purposes, it must have been good

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[1] Book of the Kirk, p. 528. [2] Cald. p. 312. Stat. Acct. [3] Ibid. p. 404.

for all; and why, then, pass an act in 1606 in regard to the civil or temporal interests?

Carmylie, which is a parish made up of lands disunited from various parishes, is evidently another example of the erection having been made by the Assembly in the first instance, ecclesiastically, and their act having been afterwards ratified and made effectual for civil interests by an act of ratification in 1609. The act itself proves this, though the record of the original ecclesiastical proceeding has not been found; but, in virtue of the statutory erection, the minister has right to teind stipend.[1]

The case of Denny appears to me to be as clear a case of the erection of a parish, by the authority of the Church courts alone, as it is easy to conceive. It originally formed part of the parish of Falkirk. It was not known as a parish in 1586; and it is not alleged that it ever was so since the Reformation in 1560. The act of Parliament, by which it was erected to patrimonial effects in 1641, bears expressly that it proceeded on the supplication of the General Assembly, and of "Mr Alexander Callender, minister of Denny, and the elders of the said kirk, making mention that the kirk of Denny *being some forty years since* or thereby dismembered from the *parsonage* of Falkirk," &c., the congregation had been, during that space, served by their own pastors "upon means within themselves." The act thus recognizes the dismemberment from Falkirk forty years before, and the existence of a church with a minister and a kirk-session; and there is evidence in the records of the Presbytery of Stirling, that Mr Thomas Ambrose was recognized as the minister of Denny in 1603, and was entered as a member in the books of the Presbytery from that time downwards; and that from 1627 till 1641, Alexander Callender, the minister who applied to Parliament in 1641, sat constantly as a member of the Presbytery. And it further appears from the only other existing record, (the Synod record, before that, being lost), that he was a member of the Synod in the two years preceding 1641. Here, then, is a palpable case of a parish erected ecclesiastically, with a district assigned by dismemberment from an existing parsonage, and with a kirk-session, the ministers of which had, during forty years, sat in the Church courts. And what is the answer? It appears that the Popish rector of Falkirk, before the Reformation, had had a vicar at Denny; and that at a later period, by some means not explained, a right of patronage of Denny had got into the titles of the Earl of Linlithgow in 1606. It will be observed, that this is posterior to the dismemberment from Falkirk, if it took place forty years before 1641; and as the patronage of Falkirk is in the same title, the fact shows nothing more, than that a right of patronage was claimed in the parish of Denny previously separated. It is to my mind clear, that this is no answer at all to the plain case, that Falkirk was one parish from the Reformation downwards, and that the lands constituting the parish of Denny were separated from it, and erected into a parish ecclesiastically, forty years before there was any act of Parliament, by an act of the Church, under which all ecclesiastical rights were fully exercised.

I apprehend that these examples, taken along with all the previous history, are abundantly sufficient to prove the practice of the Church posterior to the act 1592, in the erection of parishes *quoad sacra*, with all the privileges which are bestowed in the present case. But is this all? There are a great many other facts, which appear to, be exceedingly material, detailed in the papers, or to be found in the records. Thus the Church courts frequently suppressed parishes, or united two into one, ordaining both to be served by one minister. In the early period of the Church, this was of very frequent occurrence; and, though unwillingly, was sometimes carried to a great extent.[2] It was done remarkably in the case of the parishes of Essie and Neva, in the Presbytery of Meigle, in 1600; in that of Aberdour and Dalgety in the same year; and in the case of Tullibody and Alloa, notwithstanding a very strong complaint by the parishioners to the Assembly. The thing had been done by the Presbytery of Stirling. The parishioners complained to the Assembly, stating that Tullibody was an old parish. But the Assembly, after fully hearing parties, "ratifies and approves the union of the said two kirks, and ordains Alloa "to be the parish kirk hereafter."[3] It is manifest, that, if the civil divisions were to be attended to, the minister was minister not of a parish simply, but of a district under ecclesiastical authority only. In the same manner, there are instances of districts being exchanged, by a kind of

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[1] New Stat. Acct. Forfarshire, p. 372. [2] Book of the Kirk, p. 489. [3] Ibid. 485, 486. [4] Ibid. Pet. p. 488.

excambion, from one parish to another. Thus, in 1597 the Synod of Aberdeen annexed certain parts of the parish of Tarves to Methlik, and certain parts of Methlik to Tarves; and so clearly was it understood to be *quoad sacra* only, that it was declared to be without prejudice to the teinds of the parsonage and vicarage of the said lands to be paid to the old parsons and vicars as before; and this was ratified by the Assembly in 1600. In like manner, the Presbytery of Glasgow, in 1771, annexed a portion of the parish of Govan, *quoad sacra*, to the then newly constituted parish of Gorbals.

But there is another large class of such acts, which appear to me to bear directly to the point. I mean the appointment of second and third, and even more numerous ministers in the same parish. This was done in Edinburgh so early as the time of Knox. It was done in St Andrew's at an early period, as above referred to, and more formally in 1593. It was done in Stirling in 1607, and again in the institution of a third charge, of which Ebenezer Erskine was minister, by the Presbytery of Stirling alone, in 1731; which charge, after having been in abeyance for some time, was again revived, by the Presbytery solely, in 1817.[1] It was done in Kirkcaldy in 1612; in Dundee in 1636; in Haddington, by the Bishop and Presbytery, about 1635; in Cupar in 1640; in Inverness in 1704; in Falkirk in 1706;[2] on which occasion, the decided opinion of a very eminent lawyer, Sir James Stewart, then Lord Advocate, concerning the power of the Church courts, was obtained, and has been preserved.[3] The case of Edinburgh is very remarkable. In 1602 there were but three churches, and six ministers; two were added in 1625. Before the Revolution there were six churches and twelve ministers. Two were added in 1698, when a new parish was erected. In 1721, another church and two ministers were added; and in 1784, St Andrew's parish was erected with a single minister; and in 1800 a colleague minister was instituted. In all these proceedings there was no authority interposed but that of the Church courts, with the concurrence of the Town-Council; and in the last case, at least, the thing was not done without deliberation, having been carried through with the express, deliberate, and most decided written advice, of no less an authority in the land than President Blair, whose opinion concerning the ecclesiastical powers of the Church courts, I must consider as of the greatest possible weight.[4] It seems to be now weighed too lightly. The later charges instituted in Edinburgh were established under the authority of local acts of Parliament; the real nature of which was, that the Magistrates and Town Council, in obtaining acts for extending the royalty, were, at the instance of the Presbytery, laid under obligations for the erection of new churches to be formed into parishes.

In the same manner, in Glasgow, of ten parishes all were erected by the Church courts except two.

Now, it is undeniable, that, in all these very numerous instances, the ministers appointed to these charges became constituent members of kirk-sessions regularly appointed, and did sit, and vote, and act as members in all the Church courts. And what was it that was thus done in every single instance? In the first place, did not the Church courts, by these purely ecclesiastical acts, introduce persons into the Presbyteries, Synods, and Assemblies, who were not members before, and could not have been so but by the institution of those charges? This point seems to be lost sight of in the reasoning upon the effect of this practice. If there be civil interests involved in the constitution of these courts, so that the addition of members to the Presbytery, (whereby the constitution of all the other courts is or may be more or less altered,) consequentially affects those interests, did not the institution of second and third and other charges produce the very same effect in every instance? I know it is said, that they were instituted to parishes. But the question as to the assignment of a district, which, however, was directly involved in many of those appoinments, is a separate point. In the mean time, the objection founded on the change of the component members of the Presbytery must either be given up, or it must be said, in the face of all this practice, and the opinions of the highest lawyers of their day, that there was no power to institute those second charges at all. That would be just to say, that the law must be held differently now for this case, from what it was ever held to be before, down even to a very late period, and long after the establishment of the present Commission for the Plantation of Kirks and Valuation of Teinds. But I am not aware that it is so maintained by the suspenders, or has been yet so held.

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[1] Connel, p. 83. [2] Book of the Kirk, p. 516. [3] Respondents' Case, p. 57. [4] Ibid. p. 58.

But, in the second place, I apprehend that the practice, now referred to, goes directly to meet the principle of the second objection, that there is no power to establish a minister ecclesiastically with a *cura animarum*, in a parish which already has a minister in the full charge. In the city of Edinburgh and other towns there was a distinct allotment of separate districts in all the cases of new churches erected. Edinburgh is said to be all one parish. That just proves the case, that specific districts within the parish were allotted ecclesiastically to the ministers inducted into those parishes. But really, even as to the colleague ministers appointed, the case is the same in principle. For, if there be an interest to prevent any change on the parochial arrangements, so that a new minister may not be instituted to a particular church with a district, there must just be the same interest, or an interest of the same kind, to object to the introduction of any new minister, who is to divide the parochial charge as it stands, and to have spiritual jurisdiction over all the inhabitants of that district. There is a difference of arrangement, but there is no difference in principle. The object in both cases is the same, to increase the amount of pastoral ministrations, not in preaching merely, but in the whole spiritual relations.

I must, therefore, consider all these numerous classes of cases as consisting of the exercise of powers of the very same nature, and leading all to the same results in principle, as the act complained of in the present case. I believe, that the statement of such facts might be enlarged to a great extent. I have not adverted to very many things which have struck me in the study of the case. But there is surely enough for establishing the exercise of such powers in the constitution of new spiritual relations, in the various departments to which they have been applied.

The facts which have now been considered show, beyond all doubt, that, in the practice of the Presbyterian Church, from its first commencement to the present moment, the General Assembly, as the Supreme Court Ecclesiastical, subject to ecclesiastical rules, has constantly exercised powers, either the same with those now objected to, or clearly of the same nature. I say that, in a great many cases, they have distinctly erected parishes *quoad sacra*, the ministers of which have had specific districts assigned to them, and have been received without objection as members of all the Church courts. But I say, besides, that, out of all controversy, they have always done things which are precisely of the same nature and character;—by constituting in the first instance, and changing from time to time, the order and arrangement of the Presbyteries and Synods of the Church; by regulating all things concerning the number, proportions, and qualifications, of the members of the Assembly; by devolving the whole duty of one or more parishes on one minister, thus rendering him a minister, not of a parish, but of a district; by suppressing one parish, or uniting it to another; by annexing specific lands sometimes from various parishes, to the pastoral superintendence of the minister of a parish within which they were not locally situated; by introducing second ministers, with equal charge, into parishes already filled, and receiving them as members of the Church courts; and by frequently compounding and erecting a new parish, out of lands belonging to various parishes, according to the views entertained of the convenience of the people.

Now, this practice, even in the extent in which it is admitted to be indisputable, proves that such things are, and ever were understood to be, in their proper nature ecclesiastical, and, when limited to spiritual purposes, clearly within the powers of the Church courts. Even if doubt were thought to hang on the cases of direct erection of churches with districts, and the admission of the ministers to sit in the Presbytery and Assembly, though I think there is none, it could not affect my opinion; because the other facts, admitted because they are indisputable, prove the exercise of the ecclesiastical power in other ways which are precisely homogeneous in their character, and which involve in them all the same consequential results, which have been supposed to raise objections to the acts complained of in the present case. And it is with all these facts before us, that we are called upon to consider, whether the matters now complained of are or are not properly ecclesiastical acts? The question, as to the jurisdiction of this Court to inquire into it, is still separate. But, if the Church has exclusive power in matters ecclesiastical, the case is resolved. To me it is evident, that it cannot be held otherwise, on any correct reasoning.

But now, let us see what the thing complained of is, and consider whether it is or is not purely ecclesiastical? In itself, it is simply an arrangement for the better edification of a portion of the people within a parish, willing to receive such ministrations as members of the Established Church. So stated, it is plainly spiritual or

ecclesiastical; and to these purposes it is distinctly restrained by the express words of the institution. But it is said to involve some civil interests, which may render it incompetent for the Church courts to deal with it.

One answer to this difficulty is, that it no more involves such civil interests than the other things above enumerated do, which it is confessed the Church courts have full power to sanction. But I have no objection to meet it more directly in abstract reasoning. Two distinctions, however, are indispensible: The first, that we are not in a question whether the measure was right or expedient, or even whether it was competent on ecclesiastical rules: It may be wrong ecclesiastically, or injudicious in the circumstances, and still perfectly within the compass of the powers of the Church, and not challengeable in any other court: The second, that there may be civil consequences resulting from an act clearly ecclesiastical, which will not alter the nature of that act itself, or raise any competent ground for disputing the power to do it, or bringing it under the review of any civil tribunal.

I think it of the more importance that these distinctions should be attended to, because, on the one hand, in a great deal which has been said against the proceedings, the argument is directed merely against the expediency, the propriety, the judiciousness, the correctness in ecclesiastical law, of the things done, taking them truly to be ecclesiastical measures; and on the other, consequential effects arising from them, and which are and have been constantly produced by other ecclesiastical acts, are treated as if they constituted the acts themselves. I must observe also, that assumptions are made as to civil effects to be produced, for which I can find no warrant either in the Act for a Union with the Seceders, or in the other acts to which it may be supposed to bear relation.

We are surely bound to judge of the thing done as it is, and according to the known meaning of the terms employed. In the act out of which this cause arises, the main substance is, that the class of persons applying shall be received into communion with the Church of Scotland, and that when they are received, the steps necessary shall be taken for procuring a constitution for the newly admitted church; and then that every minister and elder admitted, shall subscribe the Confession of Faith and the Formula, "and shall enjoy all the rights and privileges of ordained ministers and elders of the Church of Scotland." The suspenders did not wait to see what the constitution to be given should be, but interposed with a suspension and interdict before that was settled. It may be assumed, however, that the constitution would be framed on the principle laid down in the acts as to the new churches and chapels of ease. According to the Chapel Act, the power given to the Presbyteries was distinctly "to allot and assign to each of the said chapels a territorial district, and to erect such districts into separate parishes *quoad sacra*, and to disjoin the the same *quoad sacra* from the parishes whereof they at present form parts." Every thing else in it must be construed with reference to this limited character of the erection. In the act as to new churches it is provided, that when the constitution shall have been settled, &c. the Presbytery shall pronounce a deliverance sanctioning it, "and erecting the church into a parish church, and the district into a parish "ecclesiastical, agreeably to the Act of Assembly 1834." There is a qualification of this, which I conceive to be of very great importance. But, in the meantime, it is only as a church and parish ecclesiastical that the Assembly authorises any such erection. In the present case, according to the minutes of the Presbytery, "the Presbytery appoint the minister and kirk-session of the New Church of Stewarton to take care of the souls and to exercise spiritual jurisdiction and discipline over the persons inhabiting the district comprehended within the following boundaries, viz." &c. And with reference to the grounds of the interdict, it is declared and provided, "that no civil right of these parties, or of any others whatever, shall be in any degree affected by the foresaid allocation; and they further declare, that the effect of this allocation is limited exclusively to matters of spiritual discipline and government." I apprehend that these provisions must be fairly taken, according to their terms and plain meaning; and that it is altogether inadmissible, to assume that civil effects are produced, which in any other question would be excluded by the very terms of the appointment.

The specific qualification in the act of 1837, in substance repeated in the minute of the Presbytery in this case, is this—Declared and provided, "that heritors and their tenants in that part of the parish of Stewarton thus set apart as a territorial district to the New Church, having legal right to sittings in the original church, may, in their option, continue members of the congregation thereof." I apprehend, that this is a

very broad exception; more so than has been supposed. If the church has been properly divided, it comprehends all heritors and all their families and servants, and all tenants, and all their families and servants. I apprehend that, in point of law, all these persons have a right to sittings in the church, in so far as it may be capable of receiving them; and, consequently, that it is in their own option whether the erecting this church shall at all affect them or not. These classes will, in general, comprehend the whole inhabitants of the parish, unless there be a few paupers, who ought, in every church, to be provided for by a few open seats. But I hold, besides, more generally, that every inhabitant of the parish is entitled to accommodation, if he chooses to resort to the parish church, whenever it appears that there is room for him. In this way, as I read the qualification, it really gives an option to all the parishioners to adhere to the original church and minister, if they choose to do so. There is no doubt that practically they may do so; and I regard it as a merely imaginary doubt to suppose the contrary.

If this view be sound, where is the interest in any one to object to the arrangement? I do not ask, where is the civil interest; for there is evidently none. But there can be no interest, even spiritual; and without the necessity of any practical concession, it is impossible that any one can be subjected to pastoral discipline or government against his will. Even supposing, however, that this construction should be thought too broad, and that there might be some few persons to whom the opion in its terms, would not be available, what would it come to? If they had no right to sittings in the old church, how can they complain, merely because another church is provided, in which they may have sittings if they please? If the complaint is, that the district is put under one minister instead of another, it assumes the point *de quo quæritur*, the question whether the act is ecclesiastical or not. If it is ecclesiastical, which the very terms of that objection imply, any individual of the Church must, as a member of the Church, submit to it. A man may have an interest to prevent the translation of a minister from his own parish to another, and he may even object to it legally. But to whom must he state his objection? Plainly to the Ecclesiastical courts only, his own acknowledged ecclesiastical superiors. He may have an interest to object to the deposition of a minister. But such an interest will not change the nature of that act, as being purely ecclesiastical.

Of the same kind I apprehend to be, the supposed interest of the minister of the original parish, to object or not to consent to the change. He may indeed have a sort of interest; but it is purely ecclesiastical. In his spiritual relations he takes nothing by his presentation. He takes all by his ordination; and by his oath of ordination he is bound to submit to his ecclesiastical superiors in all spiritual matters and arrangements.

The objection, in short, which can apply only to the first exercise of the power, not to the permanent system, rests upon no grounds of right or principle. To say that there may be an individual interest in the arrangement of the parishes, does not alter the question as to the power of the Church courts to make the arrangement ecclesiastically. The interest may be to have the division *quoad sacra*, or not to have it; and so there may be an imaginary interest to have the whole parish shifted from one Presbytery to another, or that it shall not be so shifted. A man may have an interest, or rather, properly speaking, a wish to have the sacraments administered by A. B., rather than by another; but if A. B. be removed or deposed, such an interest will not alter the power of the Church courts to do the thing, if by the just construction of the statutes they have that power.

Certain difficulties have been suggested in regard to the effect of the arrangement upon civil duties imposed by statute—or as to the proclamation of banns for marriage, the management of the poor-laws, &c.; and it is said, that there is no sufficient definition given to exclude such cases from the operation of the acts. The obvious answer is, that, as it is only a parish *quoad sacra*, and a parish or district minister ecclesiastical, that are constituted, whatever is directly civil cannot be affected by the erection. Though the religious ceremony of marriage has in it much of an important spiritual character, marriage is also, and specially in the view of the municipal law of Scotland, a civil contract; and the proclamation of banns, as a prerequisite to the regular constitution of it, is appointed by civil statutes, and the omission of it exposes the parties, the celebrator, and the witnesses, to severe penalties. The main purpose of it is to furnish a security against marriages within the prohibited degrees, contrary to the civil statute, 1567, c. 15, and a safeguard against the crime of bigamy. I have, therefore, no doubt that it belongs to the original

parish church; and I believe the matter has been generally so understood. The administration of the poor-laws is also clearly civil; and of course, all special duties imposed on the ministers or elders of the parish generally, by particular statutes, must be of this description. The annexation of lands, locally in one parish, to be *quoad sacra* part of another parish, by the powers of the Civil court of the Commission of Teinds, is a known case. That may possibly be attended with some civil effects. But it never was thought to create any objection to such an arrangement, that the decree did not define minutely the limits of the constitution *quoad sacra* in regard to every particular matter. The effect of such an erection by the Church courts alone may, in some points (such as the support of the Church,) be necessarily more limited, and more strictly confined to what is purely spiritual and ecclesiastical; and this is specially provided by the proposed constitution in the present case. But I apprehend that no difficulty can arise, of distinguishing what is purely ecclesiastical from what is, in any proper sense, civil; and that it will be time enough to consider any matter which may be thought doubtful, when a case upon it is brought before the court. No civil relations can be affected by the terms of the acts of Assembly, or any proposed erection in conformity to them; and therefore, after all, the argument, as applied to the measure, itself entirely fails. It may be perfectly legal and effectual in itself, and yet not effectual to produce any particular result, as being excluded by the very nature and terms of the institution.

I am well aware of the different objection, that civil questions may come before the presbytery in which such ministers and elders are allowed to sit and vote as members. If this objection were at all well founded, it would only warrant the conclusion, that such ministers and elders, though received as members of the presbytery in all its ecclesiastical functions, are not in a capacity to sit and vote in such civil questions; and that any such proceeding, in which they so acted, could only raise a special case. But though much has been said of this, I am unable to think that, with any due regard to the principle of the thing and the practice of the Church, there is any foundation at all for the difficulty. In reality, the very statement which assumes that such consequences must necessarily take place, implies in it a perfectly solid answer to the objection. The supposed effect that the ministers and elders of those churches, once received into the presbytery, must necessarily be members of it to all purposes, just proceeds on the known principle in the constitution of the Church, that the court of the presbytery is a court constituted or appointed by the powers of the Church itself. No civil statute has attempted to touch the constitution of the presbytery, or to define the members who shall legally compose it. The judicatory, recognised by the statutes as the presbytery, is the court appointed by the Church itself; and when special duties are laid upon that court, it must be taken as it is constituted by the Church. It seems to me, therefore, to be an entire begging of the question, or an argument in a circle, to say that the reception of such ministers into the Presbytery cannot be within the powers of the Church, because, consequentially the members so admitted may judge of civil matters committed in general terms to the Presbytery of the bounds. What the Presbytery is, depends on the constitution of it as fixed by the Church; and any interest which may be involved in such civil matters, is merely consequential upon the particular constitution so given to the Presbytery. If the erection of the parish *quoad sacra*, and the admission of the minister to the Presbytery, are ecclesiastical acts within the power of the Church, the casual consequences which may arise in the exercise of the general powers of the Presbytery cannot render it illegal.

But it must be further apparent, from the statement already given, that this consequential interest is precisely the same, which might be said to arise in numberless other cases as to which no doubt exists. Whenever a Presbytery is divided into two Presbyteries; whenever a Presbytery is suppressed or united to another; whenever a parish or several parishes are taken from one Presbytery and added to another; whenever a second charge has been instituted; whenever a colleague minister has been admitted; nay, whenever an ordained assistant and successor is appointed; in all these cases the constitution of the Presbytery is changed, and in all but the first, ministers and elders are introduced into the Presbytery who were not there before, and all by the power of the Church alone. And it never was yet heard, that, whenever a question arose about a manse or a glebe, or the trial of a schoolmaster, inquiry must be made into the component parts of the Presbytery, to see whether the constitution of it has always been the same, or has been at any time altered by the Church.

In short, all this argument appears to me gratuitous and inconclusive; and if it were better founded than it is, it would lead to no general inference, and would only raise a question on the special matters involved.

It has been thought to raise a great difficulty in the case of the respondents, that certain Parliamentary Commissions have from time to time been issued for the special purpose of the plantation of churches, that at last the Judges of the Court of Session were erected into a special Court for the plantation of kirks and valuation and sale of teinds; and that the Church courts have in many cases recognised and applied to that Court, as the proper Court for the erection of a new church and parish. I confess that I have never been able to see the force of this objection. The Commissioners of Teinds certainly have powers for planting new churches and erecting parishes; and unquestionably one reason for the institution of that Court was, that the General Assembly and other Church courts had it not in their power to effect a complete erection of a new parish with all the rights and privileges belonging to ordinary parish churches. The reason is, that the Church courts could not deal with any civil rights or patrimonial interests; but this Commission of Teinds was to deal with the tithes of the land and other patrimonial rights involved in such an institution, to temporal effects. When, therefore, the intention was, to unite parishes or to disjoin parishes, not ecclesiastically only, but to all civil effects, so that the patrimonial rights should be all arranged according to the nature of the design, it became necessary, to avoid the necessity of going to Parliament in every such case, that a Court of Civil Jurisdiction should be constituted, by the powers of which the erection, annexation, or disjunction, might take full effect in all these points. And surely, it need be no matter of wonder, that the Presbyteries or the General Assembly should, in many instances, where such a complete establishment, both ecclesiastical and civil, was desired and could be obtained, have applied to the Court who had power to sanction it effectually. Neither is it surprising, that even in other cases, in which difficulties may have arisen, even for an ecclesiastical erection, the sanction of such a Court should sometimes have appeared desirable. But, if the inference from the existence of such a Court, and the recognition of it by the Church, be, that no other jurisdiction could constitute a pastoral or parochial charge, it would prove a great deal too much; it being certain, that in the many and various ways and instances already enumerated, the Church courts have united parishes, and divided parishes, and raised new charges and parochial establishments, in all periods during the existence of the various Commissions. The Church never denied, that, wherever secular interests were meant to be included in the arrangement, the sanction of such a Court was necessary; and in the contemplation of secular benefits to be obtained hereafter, they might well desire to have such a sanction, even when it added little to their own act at first. But that will never prove, in the face of such facts as have been produced, that they ever imagined that, in pure ecclesiastical arrangements, they could not work by their own powers.

If we look for direct authority on the matter here at issue, it is not wanting. I see, no doubt, that reference is made to one authority, of the weight of which, in respect of the person, I shall say nothing. But I confess it is with some surprise that I see such an opinion relied upon in this question. I rather imagine, that, if not one, but all the eminent theologians in the Presbytery of Edinburgh, at the time alluded to, had concurred in holding the acts of Assembly here in question to be legal, it would scarcely have been acknowledged in this Court to be of any weight. Sure I am that, in so far as such authorities can be deserving of consideration, they are here in abundance. The case referred to was a very special one. There was no act of the Assembly transmitted to Presbyteries, and finally enacted. And what was the course of the proceeding? The thing proposed, which was the creation of a new parish of a very peculiar character, was brought forward by Dr Inglis, certainly a man of the highest eminence in the Church, and deeply versed in ecclesiastical law. He was supported in it, if I mistake not, by another gentleman also of the very highest eminence, knowledge, and skill, Dr Andrew Thomson; and though it was indeed opposed by other persons of great eminence, the resolution to proceed in it was carried by a majority of the presbytery; and it never was under the consideration of the General Assembly. I can very well suppose, that there might be very important ecclesiastical considerations, which might lead churchmen of equal eminence to take different views of the particular case. But, if reasons of dissent in the Ecclesiastical courts are to be received as authority in this intricate legal question, at least the opposite opinions, and the resolution adopted, should meet with

equal respect. If the reasons are to stand on their own strength, I can only say, with as much deference and respect as it is possible for man to entertain, that, having been compelled as a Judge in this Court to go into very deep study of the subject, I am entirely satisfied, that they proceed on imperfect information; but never could be intended to indicate a principle adverse to the general constitution of the Church of Scotland, as it was held by the same authority during his whole life. But surely, when the question which we are considering relates, not to the opinions of one individual, but to acts of the whole Church, begun on the motion of Dr Cook, whose profound knowledge of ecclesiastical law will not be disputed, in the case of the Parliamentary churches, and carried through with the utmost deliberation in the other acts, it is rather out of place to refer to single opinions on the one side or the other. If modern ecclesiastical authorities are of consequence, there can be no doubt on which side they preponderate.

But is there not authority on the subject more suitable to the deliberations of this Court? Is the authority of our best institutional writer nothing? Mr Erskine does not indeed lay down the doctrine as necessary to be declared in a book on municipal law; but he absolutely assumes it to be so clear, as to require no such declaration. Speaking distinctly of the powers and duties of the Commission of Teinds, he expresses himself thus:—"If therefore the Presbytery have erected a new church where there are no tithes," &c., "the Commission cannot decree a stipend," &c., which he truly says must be provided by other means. Again—"Nay, though a second church should be erected in an old parish without the authority of the Commission court, by the voluntary donations or subscriptions of the inhabitants," &c., the Court cannot give an augmentation "at the expense of the heritors, who perhaps never consented to the original erection." And once more—"The minister of a new erected church is entitled to a judicial augmentation only where the erection has been made, or at least ratified, by the Commission court, all the heritors having been made parties."[1] It is impossible for a moment to doubt what Mr Erskine held to be the clear and undoubted law, as to the erection of parish churches ecclesiastically only, when no civil matters proper to the Commission of Teinds was meant to be involved. It is even much stronger than if he had laid it down directly, that the Church courts have undoubted power to erect such parishes. He speaks of it as a thing which every body knew to be inherent in the constitution of the Church, and common in practice; and he merely occupies himself in pointing out the distinctions necessary to be attended to, concerning the effect of such erections, without the intervention of the Commission, that they cannot impair the civil rights of the heritors, nor come within the powers of the Commission in regard to patrimonial rights.

If the authority of such an institutional writer required support, it is found in the opinion of Sir James Stewart, in 1706, in regard to the settlement of a second minister in Falkirk. "I told my Lord," says he, "that the cure of that kirk belonged to the Presbytery, and that they could not be hindered to provide it with a second minister if needful. It is true that they could not provide him a stipend, nor compel them to pay any part of it. But that did not hinder them to provide a minister, whether he were to serve gratis or upon charity, or upon a settlement when it should be obtained."[2]

I find the very same doctrine broadly laid down by President Blair, in the case of St Andrew's Church. In such a case, he says, "It does not appear to me, that any thing more is necessary than the authority of the Presbytery, which is by law vested with the superintendence of all ecclesiastical matters within its bounds," &c.:[3] and he explains at length, that, although in similar cases the parties had sometimes applied for the authority of the Commission of Teinds, the practice was not universal, and that such authority never was understood to be necessary. Upon that advice, the pastoral charge was established by the Presbytery; and the ministers ordained to it have ever since sat in the Church courts.

There is, in like manner, the distinct authority of the Lord President Hope, in the case of the Parliamentary churches. "This was a matter within the proper province of the Assembly. They had the power to pass such an act, and they exercised that power."[4]

But finally, there is authority upon the precise point in several acts of the British Legislature, which I can by no means regard as of small importance in such a case.

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[1] Ersk. i. 5, 23. [2] See Respondents' Case, p. 57. [3] Ibid. p. 58. [4] Gordon, Feb. 15, 1836.

I allude first to the act, commonly called the Colquhoun Act, relating to the chapels and other newly erected churches, the object of which was to prevent the patrons of the original parishes from claiming the patronage of those churches. It is entitled "An act to regulate the appointment of ministers to churches in Scotland erected by voluntary contribution;" and it runs thus,—that where any church, chapel, or other place of worship, &c. built, or acquired and endowed by voluntary contribution, "shall, according to the provisions of the existing law, be erected into a parochial church, either as an additional church within a parish already provided with a parochial church, or as the church of a separate parish to be erected out of the part or parts of any existing parish or parishes, whether the same be established or erected merely *quoad spiritualia* by authority of the Church courts of the established church of Scotland, or also *quoad temporalia*, by authority of the Commissioners of Teinds," &c., no patron of any former parish shall have right to the patronage of such church.[1] The terms here used are plain and unambiguous; and they recognize most explicitly the power of the Church courts to erect a church and parish *quoad spiritualia*, either within an existing parish, or composed of parts of various parishes, as emphatically distinguished from parishes erected *quoad temporalia* by the Commissioners of Teinds. The act had distinctly in contemplation the chapels and new churches which the Assembly was at that time *in cursu* of erecting into parish churches; and it in express terms recognizes the power of the Church to establish such parishes *quoad spiritualia*, on the principle fully embodied in the act. True, this is done only indirectly and by assumption. But, in my apprehension, it furnishes only the more decided authority on that account, of what was universally known and understood to be the existing law on the subject; and this being a public statute of the United Kingdom, it is really a positive declaration of the legal power by the Legislature itself. To say, that the idea of doubt about the power had not then been taken up, would be to rivet a fact too apparent in all these proceedings, that up to that time the law was held to be clear on the subject.

But it is most important to add, that the legality of such divisions of parishes *quoad sacra* was again expressly recognized in the Act 1 and 2 Vict., c. 8, for founding additional parish schools. "And whereas under the last recited act (that for the erection of the Parliamentary churches,) a number of places of worship have been built, in the Highlands and islands aforesaid, and the parishes, in which such additional places of worship have been built, have been divided and disunited *quoad sacra*." The whole structure of the act depends on this assumption in the preamble; and if we shall now declare that such a division and disuniting *quoad sacra* was illegal, it will be very like a virtual repeal of that act of the legislature by an assumed power in the Court of Session.

Even this is not all: for the power was a third time expressly acknowledged by Parliament, in the act relative to Lady Glenorchy's Chapel. It may be asked, as formerly, were all the judges and lawyers asleep during this time? The plain certainty is, that the possibility of objecting to such things was then unknown; and no man had the desire or the interest to object to what was so clearly for the public good.

Thus I arrive at the conclusion on the whole matter.—1. That the General Assembly and other Church courts are invested by the constitution with absolute jurisdiction in all matters ecclesiastical; 2. That the matter here in question is matter ecclesiastical; and, 3. That thereby the acts complained of, being done in virtue of specific acts of the General Assembly, have been well and legally done.

But a question remains on which it is still necessary that I should express my opinion. I mean the question whether this court has any jurisdiction to interfere at all in the matters which form the subject of this bill of suspension. I do think that a question of deep and vital importance; but I shall now endeavour to speak of it with comparative brevity.

It must be admitted, on all hands, that the Court of Session has no jurisdiction ecclesiastical; and if it has been shown that the matter here in question is ecclesiastical, it would, I should think, be a necessary consequence, that it can have no jurisdiction concerning that matter. I know not whether this will be granted now, though it would have appeared to me to be little short of an axiom. But the question of jurisdiction, as now treated, lies a great deal deeper. There is an assumption in the

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[1] 4 and 5 William IV. chap. 41.

argument, which supposes the existence of a general power in this court, which I am not aware was ever given by any authority, and which seems to me to raise the Court of Session into a position of predominance in the State, which was not bestowed on it in its original erection, and never was conferred on it by any statute known to me.

To read some of the views stated on this subject, a stranger to the law of Scotland, and the history of its courts, would certainly suppose, that there was some statute of the land which declared, that the Court of Session should, in all cases, have a power of review of the proceedings, not only of all other Civil courts, but of all Ecclesiastical courts, even in the exercise of their proper spiritual jurisdiction. As I read the statute book, I find no enactment which creates any such jurisdiction, but exactly the reverse, in the most peremptory and commanding terms which could be invented. Whatever the Church may be, the Court of Session is certainly the creature of the State absolutely. But it does appear very strange to me, that, in the opinions from which I differ, it is throughout regarded as if it were the State itself; it is constantly spoken of as if it necessarily possessed the whole powers of the State; and any attempt to deny its jurisdiction, however excluded by the very terms of its constitution, is represented as a denial of the powers of the State. I do not understand this reasoning in principle; and I not only know of no authority by which it can be supported, but believe that every authority in the law of Scotland, and every authority in general law, where the state of the fact as to the Ecclesiastical courts of Scotland on the one hand, and the constitution of the Court of Session on the other, are understood, are directly against it.

The notion taken up seems to be, that the Court of Session, because it is the supreme court in all civil affairs, must necessarily have the power of controling all the courts of the kingdom, to the effect of restraining them in any supposed excess of their powers: and the common maxim is frequently repeated, that there can be no evil or wrong without a remedy; from which it is at once inferred, that if the Court of Session think that evil has taken place in the exercise of the jurisdiction of any other court, however clearly that court's jurisdiction in its own sphere may be exclusive, they must have jurisdiction to review the whole proceedings. There is an unfortunate fallacy in this reasoning; seeing that it begins with assuming the existence of an evil or wrong, which cannot possibly be known till after the jurisdiction, confessedly *extra ordinem*, has been taken up. In our present fallible state, this is rather a dangerous assumption: what appears to one set of judges to be an evil, may have appeared to another, equally or better qualified to form a judgment, a very great good; and with all the predilection I may naturally have for the wisdom of the Court of Session, I think that it is at least possible, that they may sometimes be very wrong in their estimate of what is right or wrong in the proceedings of other courts, to which entirely different departments of duty from those belonging to themselves are committed. No question of radical jurisdiction can be justly resolved on the principle—of first assuming and exercising the power of judgment, and then reasoning from that, to prove the jurisdiction. The jurisdiction ought first to be established on a due consideration of the constitution of the courts respectively; and instead of assuming a wrong to have been done, upon any notions which another court may entertain, the true presumption must be, that a court which is supreme in its own department knows its own constitutional powers, and has acted in conformity thereto.

But from whence is this claim to an universal jurisdiction of review, claimed for the Court of Session, derived, or on what authority does it stand? Is it in its original constitution? Is it in any later statute? Is it to be found, to any such extent or effect as now maintained, in any recognized practice, in its relation to other courts of supreme and co-ordinate jurisdiction?

In the constitution of the Court of Session, by the Act 1537, c. 36, we look in vain for any thing like either a primary or secondary jurisdiction in matters ecclesiastical, or any power to control or review the sentences or proceedings of the ecclesiastical courts. It is, in the strictest sense, created by the State for special purposes, which are defined in terms directly exclusive of any such jurisdiction. The judges of it are appointed to "sit and decide upon all actions civil;" and, though there are a great many particulars in the act, there is nothing which, by any twist or straining, can be made to alter this its specific character, or to bestow any power whatever in matters or causes ecclesiastical. Mr Erskine, in a precise description of its jurisdiction, confines it expressly to civil interests, except where special powers have been conferred in criminal or revenue transactions, from their connexion with civil interests,

or in other particular matters committed to them by express statutes. "The jurisdiction of the Lords of Session in civil matters, is—1. Universal as to extent; and 2. Supreme in degree."—"That court can set aside or suspend the sentences of all inferior courts, in civil causes, unless where that power is denied to them by special statute."[1] And the very fact, that various branches of jurisdiction, which might even be thought to have relation to civil affairs, were held to be incompetent till conferred by special statutes; as the judgments of freeholders, and the town-councils of burghs, in contested elections, and various other parallel cases, demonstrates, that this Court never had any power of control, except in what properly related to civil or patrimonial interests.

That it is no anomaly in the constitution of a State, or of the State of Scotland, that various courts should be created, with specific jurisdictions in distinct departments, each independent and supreme in its own peculiar duties, is at once established by the fact, that the Court of Justiciary for all criminal causes—and the Court of Exchequer for revenue causes, have each an independent and supreme jurisdiction, of great importance and extent, absolutely exclusive of all interference or control by the Court of Session. I do not think that these examples have ever received the consideration to which they are entitled, in such questions as this. The boundaries of these independent jurisdictions have at all times been acknowledged and preserved. To look at the Justiciary alone, I have never till lately heard it even insinuated, that the supposition of any wrong done by that supreme court would warrant the Court of Session to entertain any cause on the subject, either by suspension, or in any other form. Sir George M'Kenzie, indeed, in a passage which truly has an important bearing differently on the present question, does speak of such a thing having been done. But as I presume, that that will scarcely be accepted as sound law now, I must consider the rule to be absolute the other way. I do observe, that it is at least surmised, in an opinion which I must respect, that if the Court of Justiciary were to introduce a person as a member of that Court, who had no right to sit there, the Court of Session could interfere to prevent or redress it. This, certainly, is a proposition for which I was not prepared; and it appears to me to be rather extraordinary. Where is there any such power given? The case is scarcely conceivable. But if such a thing were averred in any form of process, this Court would have first to assume the fact, of which, as a Court, it could not possibly have any knowledge, and then to set its own judgment against the act of another supreme and independent Court, over which it has no superintendence or control whatever. And assuredly, if it ever were to take upon itself to pronounce such a decree, it could be no matter of surprise to any one, that the Court of Justiciary paid no manner of regard to it. I humbly think that the proposition could not be admitted on any sound principle.

But although I must regard this case of the Justiciary Court as a case of jurisdiction, which, in its own limits, is absolutely exclusive of the Court of Session, subject to certain admitted exceptions, and to which I think the jurisdiction of the Church courts, in matters ecclesiastical, is, at the very least, completely parallel, I cannot now go into any details on the subject. I can only say, that I have hitherto believed it to be a point undeniable in fact, and in principle, in the constitution of the courts in Scotland.

The Court of Exchequer is another court bearing the very same character, notwithstanding that it deals with matters which, it is much more conceivable, might have fallen under the cognizance of the Court of Session. But certainly it is an independent and supreme court, having jurisdiction exclusive of the Court of Session, and of all other courts, except by appeal or writ of error to the House of Lords.

Now, I conceive this state of the supreme courts of Scotland—the Session in civil matters, the Justiciary in criminal matters, the Exchequer in fiscal or revenue causes—to be of very decisive importance. It not only demonstrates, that the leading proposition relied on, that the Court of Session has a general supereminent power to correct all wrongs in all courts, and to review the proceedings of all courts, whenever it can be alleged, that something there done, though of the character to which their jurisdiction relates, has been incorrectly or incompetently done, is altogether without foundation. Whatever power there may be to give a remedy against abuses committed by inferior civil courts, there is evidently no such jurisdiction over the proceedings of other supreme and independent courts, which stand as co-ordinate jurisdictions

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[1] Ersk. i. 3, 18.

with the Court of Session. And I think it the more important to keep this state of these three supreme courts in view, because it appears to me to exclude all application of English analogies to the present question, as only calculated to perplex and mislead the judgment. The courts of England were constituted on very different principles. But if one difference is more marked than another, it is in the nature of the ecclesiastical jurisdiction vested in the Church courts of Scotland.

The jurisdiction of the General Assembly, and other Church courts, in all matters ecclesiastical, as being sole, independent, exclusive, and supreme, is even more clearly fixed, and more firmly rooted in the constitution of the realm, than that of any of the other courts. And clear it is, that one of the very objects of the struggle which ended in the Revolution Settlement, was to prevent the possibility of either the Privy Council, or any civil court, interfering with the spiritual jurisdiction of the General Assembly, Presbyteries, and other courts. Even Sir George M'Kenzie, in the very passage which has been referred to as showing that suspensions of the acts of Justiciary and the Commission had been entertained, puts even the Commission of the Kirk on precisely an equal footing with the Court of Justiciary, as to both of which he says, "which are certainly sovereign Courts." If, in point of jurisdiction, the General Assembly is at the least on a footing with the Court of Justiciary, though it is by no means the full amount of the case, it seems to me all that is necessary for deciding the present question; and the passage demonstrates the strict application of that analogy to the present case.

Upon this part of the discussion, we were referred to certain authorities which had been exhibited at great length in the case of Culsalmond, lately before the Court. I have examined all those authorities; and I take the liberty of saying, that there is not one of them which can warrant the general doctrine of jurisdiction now maintained, but very many which disprove it. Until the commencement of the present agitated questions, there is not one example of this Court interfering with the proceedings of the Church courts in matters properly ecclesiastical. There are indeed instances, as in the case of the Heritors of Corstorphine against Ramsay, in which this Court did assume a power of so far correcting the proceedings of Presbyteries, as to require them duly to execute the civil statutes, by which certain important interests were committed to them. But the sort of cases there referred to related distinctly to civil affairs; and, in particular, the case of the Heritors of Corstorphine related to the trial of a schoolmaster for malversation under a special civil statute, which conferred special powers, and imposed special duties on the Presbytery, and withdrew the matter entirely from the cognizance and the jurisdiction of the superior Church courts; and, though there was a clause in that act excluding all review, that was held to apply only to the judgment or proceedings, when the Presbytery had once taken cognizance of the case according to the provisions of the statute. Such cases are precedents which do not, in my humble judgment, give any the slightest countenance to the proposition which is necessary to support the jurisdiction in the present case. On the contrary, all the discussions in those cases implied that, if the matter were properly ecclesiastical, this Court could not touch the judgment of the Church court upon it. And even the case of Auchterarder, hard straining as I thought it on the just effect of the statutes, was made to rest mainly on the express clause of the Act 1592, combined with the act of Queen Anne, binding and astricting the Presbytery to receive and admit any qualified presentee of a lawful patron.

Taking a correct view of the constitution as I had understood it, the State—that is, the sovereign power of the nation—has made abundant provision for the prevention of wrongs, as far as the imperfection of the human faculties, in their present state, renders this possible. To the Court of Session it has committed the prevention of all wrongs in civil affairs, and the control of all inferior civil courts, subject to the review of the House of Lords. To the Court of Exchequer it has committed similar powers in all matters of revenue. To the Court of Justiciary it has committed the cognizance of all crimes, and the superintendence of all inferior criminal judicatories, subject to no review by any other court. And to the Ecclesiastical courts of the Kirk-session, Presbytery, Synod, and General Assembly, in their order, it has committed the sole government of the Church, and the exclusive jurisdiction in all matters and causes ecclesiastical—the redress of all wrongs in such affairs resting finally in the General Assembly. That error, or what some men may think to be error, may be committed in any one of these departments, is unfortunately too true. The Justiciary may err—the Exchequer may err—the Court of Session may err; and, with all deference, the House of Lords itself is not free from the liability to error. And so also the General

Assembly, albeit under many more checks and balancing provisions than any one of the other Courts, may fall into error, or may seem, to the unlearned in their laws and constitution, to have formed incorrect judgments. But these things do not affect the order and symmetry of the whole system of judicial government. Whatever were the arrangement, there must be an end, in each department, in some authority; still consisting in the judgment of mortal men, liable to error and imperfect judgment. It is in the nature of such institutions, that there may be error and wrong in fact, though the law holds that there can be none. But when the system is so laid down, the exclusive care of each class of interests being clearly provided for by plain ordinance of the State, what can be so extravagant, and what tend so directly to the disorganization of society, as that one of these courts should claim to itself all the powers of the State; actually identify itself with the State; and, not content with the extensive powers which it has received in its own proper sphere, insist on investing itself with a jurisdiction which the State has exclusively committed to other courts—repudiating and setting at nought the express declarations and enactments of that State itself, to which it owes its whole existence?

I am aware that it is supposed, that there are civil interests involved by the change in the component members of the presbytery, because they have a temporal jurisdiction in some few things. I have already fully adverted to that subject; and shall only now observe, that, while I hold that the constitution of the Church courts having been originally formed, and at all times determined, by the Church itself, and so recognized by the statutes, the consequential results of any change in the constitution of the presbyteries so regulated from time to time, can give no right to the Civil court to interfere with it, it is yet apparent, that, if there were ground for such interference on account of any particular civil duties to be discharged, it could only raise a special case for consideration, when such a special case of civil interest was brought before the Court. But is it a new thing, that the acts of the Church courts may be impugned, in so far as they affect civil rights or benefits, and yet stand unchallengeable in regard to all spiritual functions and interests? Look at the case of Lanark. The Church courts, under error as to the right of patronage, ordained and inducted Dr Dick into the pastoral charge of the parish. The error was declared, and the true patron was found entitled to retain the whole stipends of the parish. But the Court did not attempt to disturb the spiritual relation which had been formed. They gave the remedy which the act 1567 (clearly making the distinction) was held to warrant, and which Lord Kames justly, in my opinion, says was the only remedy competent in such a case.[1] But Dr Dick continued to be minister of the parish, in the spiritual duties of that office, for a very considerable time; and there are other cases of the same nature. Now, what is this but the subsistence of a parochial charge *quoad sacra*, while all the temporal interests in the benefice are completely separated from it? And so strongly was the principle held, that, even when the presbytery had done the thing illegally, and where there was a great and serious evil in the separation of the benefice from the pastoral cure, in so sacred a light was the act of the Ecclesiastical courts regarded, in that which belonged to their exclusive province—the constitution of the pastoral relation as a matter purely spiritual—that no man of that day imagined that the Civil court would interfere to prevent the effect of it.

Very different is the case with which the Court have now to deal. For is it indeed so palpable, so certain, so grievous an evil and a wrong, that the Courts of the Established Church, enabled by the voluntary efforts of the people of the land, aided by the Government, and countenanced by the express sanction of more than one act of Parliament, have, with much thought, care, and anxiety, put forth their hand to extend the blessings of religious instruction to the people; that they have been successful in these efforts, and been rewarded by the thanks and rejoicings of multitudes in every part of the country; and that at last they are bringing back into the fold of the Church a large body of men still firmly attached to her doctrines, and once more devoted to her best interests;—is this the flagrant wrong which must find a remedy, by breaking down the bulwarks which the statutes of the realm have set up between the Supreme Court of the Church and every other jurisdiction of the kingdom? I see it not; but I do see, that the same principle, which can sanction such an interference in a matter so clearly and expressly ecclesiastical as that I have described, may go

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[1] Dunse; Brown's Sup. 5, 568. Moncreiff; M. 9909. Culross; M. 9961. Unst; May 15, 1795.

on to break down all the independence, and with it, as I humbly think, all the usefulness of the Church, even in the things which are confessedly the most sacred and spiritual in their nature—ordination, deposition, the administration of the sacraments, the doctrines taught, the discipline exercised, the moral character of the ministers, the religious purity and order of the preaching of the gospel. If it be so, that, in the face even of the very letter of the statutes, and against their whole spirit, as I read them, there is now found to be no exclusive jurisdiction even in the most vitally spiritual affairs, I can only deliver my own conscience, by expressing my most deliberate and most decided opinion, against a principle, which, according to my best judgment, tends to results which I tremble to contemplate—in the dissolution, or entire mutilation, of that Church which has been the instrument, under Providence, of conferring such inestimable benefits on the State, and on the people of these islands, which has enabled the children of this our narrow and once dark spot of earth, by their intelligence and moral qualities, to raise their heads in honour among the nations, and which has ever been found the surest safeguard of the religious principle and the moral order of society in Scotland.

I am of opinion, that the interdict ought to be recalled, and the bill of suspension refused.

Lord Cockburn.—As I am mentioned in the case for the respondents, as having been one of the committee that prepared and recommended the act of assembly on which the presbytery proceeded, it may not be useless to state that, so far as I recollect, I never attended any meeting of the committee, or took any charge whatever of the measure.

I acknowledge the great principle that, as an establishment, the Church has no power —and especially no jurisdiction—beyond what the State has been pleased to confer upon it. I further admit that cases may arise in which it may be necessary for that supreme civil tribunal, to whose interpretation of their legal rights the highest authorities in the state must submit, to declare the boundaries between the civil and the ecclesiastical powers; and that, when a proper occasion for such an exercise of its civil jurisdiction shall occur, the decision of the Court must be received as conclusive. And whatever those who may think the judgment of the Court erroneous, may be entitled to do as individuals, acting under the guidance of their own reason or conscience, I hold that, as members of the establishment, they are bound to obey the law, as thus delivered by its appointed expounders.

The only question is, What is the law?

In answering this question, I shall merely state what my opinion is. The history and authorities have been explained with great minuteness, and as I think, with great accuracy, in the opinion of Lord Moncreiff; and in general I adopt the views and conclusions of that profound and powerful exposition. Indeed, the whole case, like most of the other Church questions which have unfortunately distinguished these times, depends on the single principle, of the greater, or the lesser, degree, or whether in any degree at all, the ecclesiastical authority is independent of the civil. This fundamental principle once established, either way, solves almost all other difficulties, and the results follow of course.

My opinion is—1*st*, That the presbytery has acted legally in what it has done; and, 2*dly*, That though it had not, the Court of Session has no jurisdiction to control it, or to correct its error, in the way that is now sought.

First. It has been very proper to search history for evidence of the original sources, and principles, and objects, of our ecclesiastical establishment; and I appreciate the light that has been thrown on the subject by these almost antiquarian researches. But, with me, this is far less an historical than a statutory question. The historical information is too meagre and disputable for the foundation of a legal judgment. The new, and opposite, and plausible views which are constantly exhibited, and all upon what are thought at the time to be the clearest documents, of far simpler and nearer transactions, make me receive this light, except in so far as it merely unfolds the general position of the Church and of the country, with considerable distrust. And I must confess that I am not sorry for this; because, so far from indicating any comfortable restraint on ecclesiastical pretension, the whole impression made by history upon my mind is of the very opposite tendency. Our establishment was founded chiefly by churchmen; and this amidst the triumphs of their presbytery, not only over Catholicism and Episcopacy, but, to a great extent, over even the Civil power itself; and the ancient church obtruded its intolerance both into all public affairs, and into every asylum of private life. If the spirit

of these days, as transpiring through all temporary annals, and as submitted to by the crown and the people, were to be allowed to operate much in questions like the present, the Church could scarcely set up any claim that could be too extravagant.

But the competition between the Church and the State underwent several parliamentary adjustments; and, as in the first case of Auchterarder, where a very large field of historical and other matter was at last all superseded by a single clause in an act, binding and astricting presbyteries to receive and admit qualified persons presented by patrons —this reduces the question to a mere point of statutory construction. Not that the construction may not be aided by collateral information; but still the real question is, What system, be it good or bad, do the statutes sanction? What interpretation has been put on them by the usage and understanding of the country?

Now, the more I study the statutes, the more do I feel this general conclusion irresistible, viz. that the old struggle between the Church and the State was settled by a clear separation of civil from ecclesiastical matter, and the exclusive subjection of each to its appropriate civil or ecclesiastical jurisdiction. The Act 1567, cap. 12, for example, declares that "there be nae other jurisdiction ecclesiastical acknowledged within this realm, other than that whilk is, or sall bee, within the Kirk, or that flows therefrae." By the Act 1592, cap. 8, the Church, composed of "sessions, presbyteries, assemblies, and spiritual office-bearers," is commissioned "to put order to all matters ecclesiastical within their bounds, according to the discipline of the Kirk." And though it be indirect, nothing can be stronger than the Act 1662, cap. 1, which, being intended to abolish presbytery, abolishes, as a thing inseparable from presbytery, "all Acts of Parliament by which the sole and only power and jurisdiction within this Church, doth stand in the Church, and in general, provincial, and presbyterial assemblies, and kirk-sessions, and all acts of parliament or council which may be interpreted to have given any Church power, jurisdiction, or government to the office-bearers of the Church, their respective meetings, other than that which acknowledgeth a dependance upon, and a subordination to, the sovereign power of the King as supreme." This statute fell in its turn, and presbytery being re-established by the Revolution, the Act 1690–5 restored and confirmed "the Presbyterian Church government and discipline, that is to say, the government of the Church by kirk-sessions, presbyteries, provincial synods, and general assemblies." The Act further provides, "That the Church government be established in the hands of, and exercised by, those presbyterian ministers who were outed since the first day of January 1661,—and such ministers and elders only as they have admitted or received, or shall hereafter admit or receive." It then directs "the general meeting (Assembly) and the representatives of the foresaid Presbyterian ministers and elders, in whose hands the exercise of the Church government is established, either by themselves, or by such ministers and elders as shall be appointed and authorized visiters by them, according to the custom and practice of Presbyterian government throughout the whole kingdom and several parts thereof, to try and purge out all insufficient, negligent, scandalous, and erroneous ministers, by due course of ecclesiastical process and censures; and likewise for redressing all other Church disorders."

There are many other parliamentary declarations of the same kind. But, indeed, to quote particular clauses is only to weaken the general force of the statutes, by seeming to confine their strength to the quoted words. The withholding of all ecclesiastical jurisdiction from the civil tribunals, and the conferring it exclusively on the Church in its judicial and legislative capacities, is the object, and the result, not of one statute, but of the whole train of them; and in so far as this principle is concerned, their harmony is not disturbed by a single repugnant enactment. Except in the Acts of Parliament which destroy presbytery, I cannot discover a single clause which gives, or indicates the existence of, a power in the civil tribunals to control the ecclesiastical acts of the Church. The reverse is the keystone of our ecclesiastical structure; not as described by ambitious churchmen, but as fixed by the legislature. In the only way in which I can read the statutes, the Court of Session is not more independent of the Church in civil matters, than the Church is independent of the Court of Session in matters ecclesiastical. It is the distinctness, the positiveness, and the variousness, of the Parliamentary declarations to this effect, that can alone account for the recency of the discovery, that the Church can commit no legal error which this Court cannot correct.

And of all the subjects to which the duties thus assigned to the Church can be applied, there is none to which they appear to me to be so pre-eminently applicable as to the regulation, ecclesiastically, of the modes in which the religious offices of the Church are to be performed, by its ministers or licentiates, in reference to the spiritual necessities of the people.

Now, what is it that the Presbytery has done wrong? Some of the circumstances on account of which its proceedings have been impugned, are so immaterial, and so devoid of general interest, that little notice was taken of them in argument, as substantive grounds of challenge. I therefore say nothing about them. The important objections are—1*st*, That the Presbytery has done what is described as a division of the parish, and as the erection of a part of it into a new parish, under a minister inducted without a presentation; 2*dly*, That they have recognized this minister as one of their members.

Some confusion has arisen from the use of the words "divide the parish," and "erect a new parish," because they are not always employed by the parties, respectively, in the same sense. But there can be no difference as to the thing done. Its substance is, that a supplementary church, with a district assigned to it, has been introduced, under the charge of a separate minister and kirk-session; the minister, as such, being made a member of Presbytery. The parties differ pointedly,[1] as to whether the original parochial minister be, or be not, prohibited from exercising his official functions within the new district, and whether the district inhabitants may, or may not, adhere to him and his church if they choose. It humbly appears to me to be awkward that this fact, as to which the parties are directly opposed to each other, is not regularly fixed. But forming the best conjecture I can, it seems to me that the exclusive separation of the two ministers within their respective spheres, is the most reasonable construction that can be put upon the declarations of the Presbytery, in reference especially to the act of Assembly on which they proceeded. But not only is the legal right to pews in the parish church reserved, but it is declared that it is all a mere ecclesiastical arrangement, and that all rights and interests, which are so purely civil as that the Church ought not to meddle with them, are left untouched.

Of the motives or expediency of what was thus done, I say, and try to think, nothing. We have probably all our sentiments on these subjects; but their introduction into this question cannot promote the extrication of its legal truth.

Viewing it strictly as a question of law, I am of opinion that it was not merely the right of the Church, but its imperative duty, to make provision, since it thought this necessary, for affording the people more ample religious instruction than what could be supplied by the solitary parish minister; and that the way in which this was done, including the assigning of a district, and a kirk-session, and admitting the district minister into the Presbytery, was not illegal.

I am not aware that any one says, nor can I conceive how it could be said with any, the very smallest, show of reason, that this is a subject with which the Church has nothing to do; and that in attempting to go beyond the individual endowed by the State as the ordinary minister of the parish, and trying to suit the supply of instruction to the demand, or (which is a very different thing) to the need for it, it is encroaching on a field altogether foreign to its office—as if it had made a clear encroachment into the region of criminal or fiscal jurisdiction. I cannot imagine the legal ground on which it could be maintained that, seeing a parish with fifty or a hundred thousand inhabitants, and only one minister, the Church is bound to submit to this state of things, and has no power of its own to apply the remedy of additional ministers, if it could get them. Accordingly, it is admitted (as I understand) that it could stock any parish whatever with as many missionaries, or chapels of ease, as it chose.

But it is said that it cannot give these ministers a session, or a seat in the Presbytery, or a district. And why can it not? Solely because these are said to imply an interference with civil interests; and this, accordingly, is the only ground on which the present application rests. And what is the civil interest? It is this:—The patron, it is said, has an interest to prevent the sphere of his patronage from being restricted to any thing short of the whole parish; each parishioner has an interest to resist the interposition of any spiritual instructor between him and the original minister; and this minister has an interest (a civil interest) in having the souls of the whole parishioners subjected to his exclusive cure. It is only as the protector of these, or similar secular rights, that this Court is expected to interfere.

But, in the *first* place, I cannot acknowledge these as civil interests. They are ecclesiastical privileges, or rather claims. Accordingly, in the *second* place, they are dealt with as such every day by the Church, in the unquestionable exercise of its ordinary business. The Church scarcely ever does, or can, restrain a minister, without affecting

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[1] Suspenders' Case, p. 9—Respondents' Case, p. 89.

all these supposed civil rights. His uspension supersedes, his deposition extinguishes them. There is not one word that can be urged, on the ground of civil interest, against the local limitation of his sphere by giving a portion of it to a supplementary minister, which may not be urged with equal, or with greater force, against these ordinary and undoubted exercises of the Church's purely spiritual jurisdiction.

Suppose the General Assembly to learn that there was a landward parish with a town in it, so large, wicked, and wretched, at the best way the minister could lay himself out, was to attend to the town al one or that there was another parish where his time was wasted, by his leaving the populou[s] part of it, and repairing to remote and nearly desolate islands—can it be doubted that the Church could lawfully direct the one clergyman to let the landward part of his parish alone, and the other to give up crossing the seas? I should not be surprised if it were to be found that such things have been occasionally done. Now, if this excision of a part f the parishes be lawful, the erection of a substitute church, minister, and session, forthe use of the parts cut off, instead of being any objection, would be the strongest recommendation of the measures. I have not a conception how the patron, the original minister, and the rejected parishioners, could come here, and ask the Court of Session to potect the one in the omnipresence of his presentation—the other in his passion for visiting the least approachable of his people—or the last in their taste for having no edification except from the regular minister—all upon the ground that these were civil rights.

I admit that the disposal of civil interests, where this is itself the object of what is done, is as much beyond the power of the Church, as the disposal of ecclesiastical interests, when this is itself the object of what is done, is beyond the power of the Court of Session. But what is to be held civil or ecclesiastical can never be determined by merely, looking at the interests by themselves. If this were all that was to be considered, both the Church and the Court would be paralysed at every step. The Church can never suspend without injuring valuable patrimonial rights; or, if the parishioners' preference of the existing minister be a civil interest, it does so every time it translates without their consent. And the Court of Session interferes with ecclesiastical concerns whenever its writ happens to imprison a minister or elder for debt. Yet unquestionably these are acts within the lawful jurisdiction of each. And how? Solely because the jurisdiction of neither is to be judged of by its collateral effects. If the acts be, in their own nature, ecclesiastical or civil, they cannot cease o be so on account of their indirect consequences. If they did, the power of the Court of Justiciary to transport would cease, if the victim happened to be reverend; and the Church could not merely never depose, but, as the minister's protection of his dignity and feelings is now said to constitute a civil interest, it could not even disturb or degrade by a rebuke.

The same principle disposes of what is said about the Presbytery's interference with the parochial institutions—such as the management of the poor, proclamation of banns, &c., which is alleged to be implied in the division of the parish. In so far as these are civil in their own nature, they are not only saved by law from the operation of what has been done, but by the express declaration of the Presbytery. In so far as they are not properly, but consequentially, civil, the Church, acting in the discharge of its proper functions, was not bound to let them obstruct it.

And I must say, that of all ecclesiastical proceedings, I can conceive few that can be less disturbed by civil matter than the one in question. No party—be it patron, minister, or parishioner—has stated how he can lose one sixpence by what has been done. The utmost amount of the grievance, as hitherto explained, is, that for spiritual purposes, and to merely spiritual effects, one portion of the parish is to have the ordinances of religion administered by a supplementary minister, instead of by the old pastor. That the power of having a preference is an important interest, may be conceded. But is it a civil one? If it be, then it is one that may always be enforced in a civil court—that is, a parishioner may not only obtain the aid of the civil authority to keep out an intruding district clergyman, but to compel the regular incumbent to do his duty. I say nothing of stipends, for they are patrimonial. But who ever heard of any compulsitor from the Court of Session to compel a minister to preach, visit, pray, or to do any spiritual function? If a parish minister were to refuse to do any duty, and the General Assembly were to sanction this conduct, the principle that the claim to have him in full action is a civil right, involves this result, that the Court of Session could oblige him to proceed, not to act ministerially, or in those civil concerns which are sometimes mixed up with Presbyterial business, but to perform his spiritual functions—a remedy certainly new both to the Church and the country.

The authority of the Church to admit the minster of the new district into its courts,

seems to me to be a much simpler and clearer case. Civil interests may be pretended to be involved in what is fancied to be the erection of a new parish; but how they are involved in the addition or subtraction of a new member of presbytery, I cannot discover. There may be what may be described as a political interest—that interest, namely, which every one of the people has, in the correct composition of all public bodies. But as a substantive ground of complaint, detached from all personal injury, there can never be even a title in a stranger to object to this before a court of law.

Accordingly, the only way in which the suspenders put this part of their case, is by saying that they are not subject, even spiritually, except to the Presbytery; and that consequently they are entitled to winnow it. The direct and instant result of this plea would be, that the power of deciding who belonged to its judicatures, must be withdrawn from the Church, and be exercised by the Court of Session, or indeed by any civil tribunal which may have a case depending on the act of any Church court to decide. When a party can show that his rights have been invaded by a body acting in the name of the General Assembly, but which truly was not so, a case will arise which has not yet arisen. It is not said that what was done here, was not done by a presbytery. All that is said is, that it was done by a presbytery into which one member had been improperly admitted. To which it is a sufficient answer, that it is the privilege of the Church to decide on claims for admission into its own courts. Effect may possibly be withheld civilly from what it does, if the act was the result of the admission of an improper member; but *quoad spiritualia*, and in relation to the Church, these are Church courts. It is conceivable that a person who ought to have been rejected may have been admitted into either House of Parliament, but still these remain the Houses of Parliament.

The great point with the suspenders is, that the Church is parochial. Indeed it is the basis of their system. And so it is parochial in a particular sense. In general, parishes are not too small or too large for a single minister; and the Church, finding them established, naturally adopted them as convenient boundaries. The general condition of the Church, therefore, is parochial at present; and its ancient tendency was to become so. But the inference drawn from this fact, viz., that no clergyman except the single, ordinary, parish pastor, can be a member of the Church courts, is refuted by all our Ecclesiastical history, both ancient and modern. I will not enter into any detail on this subject, for unless such details be gone into minutely, they had better be let alone. And I could have nothing to add to the full, and, as I think, the correct, exposition which has been given by Lord Moncreiff.

But I consider it as demonstrated, that at the distant period from which both parties seem anxious to derive the native principles of our Establishment, there were many members of the Church courts who had a cure of souls in more parishes than one—many who had the cure of only a part of a parish—and many who had no cure at all. In so far as concerned the distribution of the ecclesiastical forces, with a view either to the instruction of the people, or to the constitution of presbyteries, the Church had the matter entirely in its own hands. And though it usually adopted parishes for the limits of its ministers' labours, because these happened to be known, and were generally convenient enough,—he who believes that, in those days, the Church, acting with the entire concurrence of the State and of the law, would have considered itself bound to allow a parish far beyond the possible superintendence of one man, to have only a single minister, when two could have been obtained, or would have impaired the new minister's efficacy by excluding him from the Church courts, because the old one was there already, must see things in our history which I cannot discern. Can any one doubt how such a proposal—or how the present case—would have been disposed of by Knox?—or indeed by any one of the founders of our Church?

The more modern practice has been equally unequivocal. Whatever interest parishioners, minister, or patron, have in preserving the integrity of their presbytery, it is the same in whatever way this integrity be threatened. Yet though it be now doubted whether the Presbytery be not so vitiated as to cease to be a Presbytery, by the admission of a single minister who is not minister of a parish, it is admitted, or at least is indispensible, that the composition of presbyteries (and consequently of Assemblies) has been invariably regulated solely by the Church. It has been said that it has only been effected by changing the mere distribution of presbyteries, not by multiplying ministers. But changing the distribution implies a change in the composition. If it be true that parishioners, patron, or minister, are obliged to submit to have the half of their presbytery cut off, and united to another one—or to have it swamped by another being joined to it—or to have it suppressed altogether—they have surely very little to complain of, when all they have to say is, that one man has been added. But I consider it as cer-

tain, that presbyteries have always been liable to be altered by a direct ecclesiastical multiplication of ministers. This is not the first time that a minister has been set up only *quoad sacra*—second livings, and chiefly in towns, have been extensively introduced—theological professors, and ministers of foreign and colonial churches: these last having no cure in Scotland—all these have been introduced not merely into the Church, but into the Church courts, and solely by the Church's own discretion.

It is in vain to attempt to set all this aside by saying, that in so far as regarded the erection of new churches, the sanction of Parliament or of the civil court was sought. So it was, and so it would continue to be, although a statute empowering the General Assembly to erect new churches *quoad sacra* were to pass to-morrow. Civil support was sought anciently, and would be again, because civil benefits, such as endowments, &c., were, and will be, desirable. But the ecclesiastical arrangement was generally, if not always, completed by the Church's own authority, as to all ecclesiastical effects, before this subsidiary aid was asked; and I am not aware that it can be shown that, in a single case, the failure to seek this aid, or a refusal to grant it, ever stopped the scheme. Accordingly, though many of these erections seem to have been zealously opposed, there is never any indication of an attempt at legal obstruction—a fact which I cannot reconcile with the idea that the Church was understood to be exceeding its powers.

Nor have such arrangements, whereby the elements of the Church courts have been deeply affected, been left to stand upon usage alone. I am not aware of any direct authority (except one which I shall mention instantly) against them, and several of the highest eminence are in their favour. Sir James Stewart, Erskine, and President Blair, have announced it as the legal principle, that the Presbytery is by law vested with the "superintendence of all the ecclesiastical matters within the bounds;" and that, in virtue of this authority, "they could not be hindered to provide it (the parish) with a second minister, if necessary." And then comes the Colquhoun Act, which distinctly recognizes the existence of the identical power now disputed.

The only formidable authority on the other side is Sir Henry Moncreiff. No one can have a higher admiration than I have of this distinguished and most excellent man. I am not conscious of its being inconsistent with this feeling, to recollect that he was not a lawyer, and that he was sometimes deemed more sagacious in wielding the familiar rules of the Church, than learned in the history or principles of its legal constitution. Dr Inglis, certainly not an inferior name in Church law, differed from him, and was followed both by the Presbytery and by Andrew Thomson.

But of what importance is the conduct of any presbytery, or of any party men in a presbytery, compared not merely with the ancient practice, but with what has been done recently in the cases of the Highland and of the chapel ministers? These additions to the ecclesiastical courts were not merely made by the Church, but by a more numerous, a more varied, and a more unanimous, concurrence of men of all descriptions, than almost ever supported any public object. The truth is, that if what is complained of had been done in quiet times, the prevalent conviction of the power of the Church to do it, would have prevented its ever being questioned.

I do not think that the existence of the Commission of Teinds affects the case one way or other. The use which the suspenders make of the fact, is to argue that it affords all the relief that can be required, and that it is improbable that it could ever have been intended to bestow a similar power on every presbytery in the Church. But the commission was instituted for the adjustment of civil interests. Something of the same kind would be necessary, even although the authority now claimed for the Church were to be sanctioned by a declaratory act. The two powers are not inconsistent.

But *secondly*, although the Presbytery had mistaken the law, I do not think that this Court has jurisdiction to give the redress sought.

I am not of opinion that the Church is ever above the law. I do not understand the respondents, who represent the Church here, to claim any thing beyond what they think the law gives them. And it is only in virtue of the law that they claim it. And, all this being a matter of statutory construction, I certainly have no idea that this Court is so utterly excluded that it cannot read and interpret the Acts of Parliament. Nor do I understand the respondents to maintain this. All that they say is, that the jurisdiction of the Court is excluded by these acts, when legally interpreted. Their plea is one with which we are familiar in our daily practice. A cause is attempted to be brought into the Court of Session from the justices. It is objected, that by a particular statute the decision of the justices is final. It is not unusual to hear parties, who are provoked by being thus kept out of court, misrepresent this plea by exclaiming,

that it sets the justices above the law, and prevents the Court from even considering the meaning of a statute. But it plainly does no such thing. Neither does the plea of the respondents do so here. They do not dispute the right of the Court to construe the statutes, or the law. They only say, that the result of the legal exercise of this right is, that your Lordships must see it declared in the law, that, *quoad* the matter now at issue, our jurisdiction is ousted.

In the case of Lethendy, (14th June 1839,) there was what had the appearance of an attempt by a Presbytery to exclude one of two rival presentees from ever obtaining the fruits of the benefice, even though he should be ultimately found entitled to them, by inducting his competitor; and the question turned upon the legality of an interdict by which he had endeavoured to protect this civil interest. In that peculiar case, I thought that the Court was warranted in interfering. Subsequent reflection, however, has made me doubt this; and I am certain that I at least expressed myself far too strongly.

Your Lordships may adjudicate as to any civil matter that may be implicated, even though this should imply a total separation of the temporalities from the spirituality. But this is not what is now demanded. Your Lordships are asked to go into the Presbytery, and to control that body as a Church court, in its ecclesiastical act. It is this redress that I think you have not jurisdiction to give.

The moment that it is fixed that the act is ecclesiastical, the line seems to me to be drawn which this Court cannot pass. I hold the Court of Session to have no ecclesiastical jurisdiction, and the Church to have it all;—and this was an ecclesiastical proceeding. Not merely a proceeding by a Presbytery, but by a Presbytery acting within the sphere expressly assigned to it, as a Church court, by Parliament. In what it has done, the Church has usurped none of the powers of the civil court, and it is not pretended that the civil court has in itself any jurisdiction which could have enabled it to have done those acts, even though they had been proper, if the Church had refused to perform them. An attempt has been made to limit the ecclesiastical jurisdiction of the Church, strictly, to the three precise acts—1st, Of preaching the true word; 2d, Of correcting manners; 3dly, Of administering sacraments. A limitation which, if enforced with the rigidness proposed, would, in the first place, supersede probably nine tenths of all that the Church has been engaged in for the last two centuries; and in the second place, if applied rationally, it would comprehend all that has been done here;—adequate provision for the religious destitution of the people being necessary both for the preaching of the true word, and for the correction of manners.

The suspenders maintain, that the jurisdiction of the Court stands fixed by the judgments of the House of Lords in the two cases of Auchterarder. But I do not think so. All that was decided in the first case was, that the General Assembly had, by the Veto Act, infringed on the civil rights of a patron; and the redress given consisted in merely protecting these rights by declaring the Veto Law illegal, in so far as this civil interest was concerned. This is what it is conceded that we may do now. In the second case of Auchterarder, all that was decided was, not that this Court could control a Presbytery in acting ecclesiastically, but in its illegal refusal so to act. The Presbytery had refused to perform what was held to be a ministerial duty. Yet even here, the resolution not to perform it having been taken by a Church court, and therefore being, in a certain sense, ecclesiastical, it was not set aside, but an action of damages only was found to be open to the party injured.

The suspenders put extravagant cases of the Church exceeding its jurisdiction, or abusing it, and ask whether it can be maintained that the supreme civil power can afford no remedy for any usurpation or impropriety however monstrous. Extreme cases never test any principle; and this one would perhaps be sufficiently met by the easy retort of the respondents supposing some similar extravagance on the part of the Court of Session. But there is a better answer.

The Court of Session is not the civil power. By a confusion of terms, rather than of thought, the suspenders perpetually speak of these two as the same; and they sometimes call us the State. But we are not so. We are only a Court of law. The true civil power—that power which belongs to the nation, and is chiefly wielded by Parliament—is omnipotent, and is the only universal redresser of wrong. It made the Church; and it can restrain it, or unmake it. It seems to be thought that there is nothing between the public and ecclesiastical usurpation, except this Court. But there is surely nothing very extraordinary, in supposing a distribution of jurisdiction so judicious, that the whole system works well when it is worked properly; and that there is no ordinary control given to one Court over another, but that abuse is left to be cor-

rected by the legislature when it shall be necessary. Our supreme fiscal and criminal tribunals have been given as examples; and no answer, as I conceive, whatever—no approach to any answer, has ever been made to the analogies of these to the case of the supreme tribunal of the Church. Whatever merely civil effects the Court of Session may be supposed entitled to withhold from any act done, within their respective jurisdictions, by the Courts of Justiciary or Exchequer, I deny that it can restrain these Courts from doing the acts, or can, in any way, review any of their proceedings. Yet these Courts do not run wild because they are independent of the Court of Session; and if they were to do so, it would not be by any paramount jurisdiction of your Lordships that their excesses could be prevented, The State has reposed a similar confidence in the Church. Not that it may not go wrong, and culpably wrong; but its outrages are to be checked by that public authority which is the only security, and a perfectly adequate one, against the equally possible outrages of a Court of law.

If the principle contended for by the suspenders be well founded, viz. that we can always enter the Church courts, and control their ecclesiastical acts where these appear to us to be illegal, then it seems to me that this result—namely, that the Church has no independence whatever, is inevitable. This result is not avowed. On the contrary, it is deprecated. The suspenders profess the utmost reverence for the exclusive jurisdiction of the Church, in what they term its proper concerns; but they never give even a single example of what these concerns are. And I find that they do not consider the Church's jurisdiction as exclusive, in what I deem its most purely spiritual region. For instance, they hold the Church to be entirely subject to this Court, at least in the form of damages, in giving or withholding ordination, in suspension, in deprivation, and in disposing of claims for seats in its own courts; in other words, throughout the whole admission, exclusion, and discipline of its ministers, and in the power of determining the composition of the tribunals, on which the whole business of the Church depends. After this, I cannot fancy the act so spiritual as that the Court of Session cannot subvert it. It would be the greatest satisfaction to me, if I had one single such act specified.

The fact, which I consider as indisputable, that such a power has never, till within these few years, been exercised, is nearly conclusive that it was never understood to exist. Peculiar circumstances have, no doubt, recently brought the principles of our civil and ecclesiastical jurisdictions better out. But it is impossible for me to believe that, till lately, the Church has always conducted itself with such rigid correctness that no occasion ever arose for the interference of this Court. I have not a doubt that if the law had been understood to be as is now argued, many cases for its application have at all times been occurring. Yet there is no indication of any attempt by any of our predecessors to reduce the Church to the condition of a mere ordinary inferior court. Nothing but the universal conviction of the incompetency of all appeals from the Church to the Court, can account for the fact, that neither the violence of party spirit, nor the anger of private parties, justly believing themselves to be wronged, ever produced such an appeal.

The control of the Court may, in the opinion of some, be useful or necessary. To me this is a consideration that is totally irrelevant. We have no authority to make a new church.

Lord Ivory.—I concur with Lord Moncreiff.

The case was finally advised by the Judges of the First Division of the Court on the 19th and 20th January 1843, when the following opinions were delivered:—

Lord President.—My Lords, we are now called upon, in this Division, to pronounce judgment on one of the most important constitutional questions, from the manner in which it has been discussed, and the points which have been raised in it, that has probably ever before been submitted to the decision of this Court. Impressed with this conviction, when the cause was first brought before us by the report of the Lord Ordinary, we, in addition to the full and elaborate arguments contained in the cases, appointed the leading counsel on each side to be heard before the whole Judges, in order that the united opinions of the Court might be obtained in the final determination of the various questions that have been argued by the parties. The opinions of the Judges of the Second Division, and of the Lords Ordinary, are accordingly now before us; and, although it is to be regretted that there unfortunately exists so great a diversity of

sentiment among the consulted Judges, as well as among us sitting here, we have the satisfaction at least of knowing, that the decision to be pronounced is the result of the most anxious and deliberate consideration that could be bestowed on any case; and that, if an erroneous conclusion is arrived at, it will not be owing to any want of attention to the authorities and arguments that have been adduced on both sides.

Concurring, as I do, after the most careful and deliberate consideration, in the result of the opinions delivered by the majority of the consulted Judges, and particularly in the views that have been explained in so lucid a manner by the Lord Justice-Clerk and Lord Medwyn, I should willingly have contented myself with the simple expression of my coincidence with them, without enlarging further on the circumstances of the case. But, keeping in mind its importance not only to the parties particularly concerned in it, but to the Church and people of Scotland at large, and the propriety of removing all uncertainty as to the foundations of our judgment, I shall proceed to state the conclusions to which I have come; avoiding, however, as much as possible, to enter upon a very minute detail or examination of the various historical facts, authorities, and statutes that have been so ably illustrated in the opinions already before us. I cannot, however, refrain from expressing the satisfaction and assistance I have derived from the elaborate exposition of them that has been afforded by Lord Medwyn, on whose accuracy and diligence of research I have long had so much reason to rely; but as his Lordship has been so full in his citations from the sources to which he has referred, every person that applies himself to the subject, is at once enabled to appreciate the justice and correctness of the conclusions which he has deduced from them.

I should be guilty of an unpardonable consumption of your Lordship's time, were I minutely to recapitulate the proceedings of the respondents, the apparent majority of the Presbytery of Irvine, that have led to the complaint of the suspenders, and the measures adopted by them for redress. I shall content myself, therefore, with referring to the statement of facts as set forth in the record. These facts it is, however, necessary to keep steadily in view in deciding as to the legality of the proceedings complained of, namely, the respondents' reception and admission of the minister of the Associate Church in Stewarton to the *status* and full privileges of a minister of the Established Church of Scotland; their adding his name to the roll of the Presbytery on his merely signing the Confession of Faith, without any evidence of his having taken the oaths to Government, and allowing him to sit and act as a constituent member of that body; their afterwards, without the consent, and in fact in opposition to the declared wishes of the patron and heritors and minister, designating a certain district of the old parish, including a portion of its landward territory, for the new parish erected *quoad sacra;* and their appointing the minister and kirk-session of this new church of Stewarton to take care of the souls, and exercise spiritual jurisdiction over the persons, inhabiting within the district so designated.

The legality of the proceedings in question has been maintained, on the grounds of their having been adopted by the respondents in strict conformity with the injunctions of the General Assembly and laws of the Church, and particularly the Act of Assembly 1839, which sanctions the junction of the Associate Seceders with the Established Church; the Act of the same body passed in 1833, with regard to the ministers of Parliamentary churches; that in 1835 as to chapels of ease; and lastly, that of the General Assembly as to the newly built churches, and the designation of distinct parishes to them *quoad sacra.* The reference thus made to those recent proceedings of the Church in its legislative capacity, and in the exercise of what is maintained to be its independent spiritual or ecclesiastical jurisdiction, opens up a most extensive field of discussion; but there are two general views, which I trust will be sufficient to embrace all that it is necessary for me to state, as the result of the opinion I have formed upon the matters that are truly in controversy between the parties now before us.

First. I shall advert to the question of jurisdiction, blended as it is in some respects with the merits, and the objections that have been taken to the right of this Court to interfere in any degree in controlling the proceedings of the Church or its judicatories, with regard to the erection of *quoad sacra* churches and parishes, and the admission of their ministers, or those of Parliamentary churches, chapels of ease, and Associate Seceders, to the full privileges of members of presbyteries and other judicatories. *Secondly.* I shall consider whether the Acts of the General Assembly that have been founded on by the respondents, were warranted either by the law of Scotland, or by the established constitution of the Church itself, expounded as it has been by its best authorities, and its own observance and practice down to the year 1833.

I. In regard to the *first* of these points, I certainly understood, in common with the

Lord Justice-Clerk, that all idea of maintaining, that the supreme jurisdiction asserted by the Church in this case was rested on any other foundation than the statutes regarding it, was entirely abandoned by the leading counsel for the respondents. At any rate, I am most thoroughly convinced, that neither the jurisdiction, nor any other branch of the powers of the Church as an establishment, can justly be held to rest on any other foundation. It is impossible to suppose that Mr Erskine, in his great institutional work, could labour under any mistake, when expressing himself in the following explicit and unequivocal terms, in the well-known passage of his Institutes :—" The jurisdiction vested in churchmen is either spiritual or civil. By the present Establishment, our General Assemblies or convocations of the clergy may define or explain articles of faith, condemn heretical opinions, and make canons for the better establishment of the government and discipline of the Church, provided their resolutions be consistent with the laws of the realm from which our National Church derives its whole authority." [1] In thus referring to the laws and statutes of the realm, as the source of the authority of the Church, this learned author was indeed asserting only what is in truth evinced by the whole history of the Reformation, and the completion of the establishment of our National Church. For it is always carefully to be recollected, that when the Reformed Church was established in Scotland, it was not by an alliance being entered into between the Estates of Parliament and a known existing Church, as if wholly independent of each other, and based on treaties, the exposition of which might depend on the understanding of the different parties to them. On the contrary, after the Papal establishment was swept away by the Act of the Convention of Estates declaring it to be idolatrous, and never afterwards to be kept up to any extent, the Estates agreed to sanction a new form of religion, which, from the very first moment, received the impress of the authority of the legislature, by its agreeing to and adopting the first Confession of Faith, and placing it on the statute book. As the testimony of history afforded by Dr Cook, in his valuable work on the Reformation in Scotland, places this matter, in my opinion, beyond all controversy, I shall here refer to a few passages.

In treating of the Parliament of 1560, he thus expresses himself:—" The decided majority, however, being Protestants, the supplication, so far as it related to doctrine, was maturely weighed ; and some of the barons, in conjunction with the most eminent preachers, were enjoined to compose a summary of those tenets which they wished Parliament to sanction, as constituting the essence of the reformed religion." [2] He then goes on to state the manner in which the Confession of Faith was adopted, and " an Act passed by which it was solemnly pronounced to be the standard of Protestant belief in Scotland." [3] In another passage, the same learned author thus expresses himself :—" But while government thus sought to carry on the interesting work of the Reformation which Parliament had so decisively commenced, they did not altogether overlook the adherents of the ancient religion," &c. Various other passages to the same effect might be referred to ; but I shall content myself with one other quotation, in reference to his enumeration of the various legislative provisions enacted by the Parliament of 1567, with the view to secure and defend the Protestant Establishment :—" The Protestant Church thus constituted having been declared to be the Church of Scotland, Parliament next determined the duty of the sovereign with respect to it. It was enacted that all kings, princes, or magistrates whatsoever, holding their place, who shall hereafter at any time reign, shall at their coronation, or at the time of their receiving their princely authority, in the presence of the Eternal God, promise by oath to defend the true religion and the Protestant Church." [4]

According to this historical authority, and the statutes on which it rests, there cannot be a doubt that it was deemed on all hands to be essentially necessary at this early period, that the direct interference of the legislature should be interposed in laying the foundations of the new Ecclesiastical Establishment of the country. From 1567 down to 1592, when that act was passed which has been denominated the Charter of the Presbyterian Church, as finally settling its constitution, a great variety of acts were passed by the legislature relative to the Church, demonstrating that its authority was still deemed equally indispensible to the completion of the full establishment and regulation of the Church, and the measures for securing its maintenance ; while the proceedings of the various early General Assemblies, composed as they were, in those days, of the nobles, barons, commissioners of the counties and burghs, with the few Reformed clergy that were then in the country, are merely indicative of their wishes for the inter-

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[1] Inst. i. 5, 24. [2] Vol. ii. p. 329. [3] Ibid. p. 344. [4] Vol. iii. p. 305.

position of the legislature to carry them into full effect. I can, therefore, by no means accede to the opinion, that there was any thing like a Church existing in the country, to which the sanction or adherence of the State, through its Parliament, was merely made accessary, it being, on the contrary, manifest that the Church was established by the legislature, by which it was also afterwards regularly endowed, by its assigning to the incumbents of the different parishes suitable and permanent stipends.

Nothing that the early Reformers had in contemplation to substitute in the room of the Papal Church, that had been overthrown, can truly, therefore, be viewed as the new Established Church, till it received the sanction of the legislature, to whose acts alone, therefore, we must necessarily look for what were the rights and jurisdiction that were conferred on that form of religion which the legislature had resolved to adopt. I hold it, therefore, altogether useless to refer to what is contained in either the first or second Book of Discipline, though they were sanctioned by the General Assembly; or to the vague and imperfect accounts that are given by Spottiswoode or others, as to what points were or were not agreed to at the conferences between the clergy and the sovereign. These Books of Discipline or Policy, as they are denominated, never were ratified by Parliament, or declared to have the force of laws. It is, in my opinion, to the express terms of the statutes relative to the Church alone, that we can with any propriety look for the powers and jurisdiction conferred upon it by the legislature, when the Presbyterian religion was finally established as that of the realm and people of Scotland. In none of these enactments is the remotest trace to be found of any recognition of an inherent power in the Church itself, to declare or regulate its own constitution. It is, on the contrary, manifest, from the very nature of the circumstances in which the nation was placed, that the direct interference of the legislature was on all hands held to be indispensibly necessary, to sanction the new Church Establishment in its connexion with the State.

Looking, then, to the statutes, which have chiefly been relied on in support of the views of the respondents; namely, the Acts 1567, c. 6—1579, c. 66—and 1592, c. 116—they do not appear to me at all to support the claim maintained on the part of the Church to that supreme exclusive jurisdiction, which is relied on in relation to such proceedings as are now under consideration. The first of these seems merely descriptive of that new Church, the Confession of whose Faith the legislature had ratified by its authority; and, accordingly, the act bears,[1]—" Forasmeikle as the ministers of the blessed Evangel of Jesus Christ, whom God of his mercie has now raised up amongst us, or heirafter sall rayse, agreeing with them that now livis, in doctrine and administratioun of the Sacraments, and the peopil of this realme, that professis Christ, as he now is offered in his Evangel, and do communicat with the haly Sacraments (as in the reformed Kirkes of this realme they are publicklie administrat) according to the Confessioun of the Faith: Our Soveraine Lord, with advise of my Lord Regent, and three Estaitis of this present Parliament, hes declared, and declaris the foresaid persones, to be the onely true and halie Kirk of Jesus Christ within this realme: And decernis and declaris that all and sindrie quha outher gainsayis the word of the Evangel, received and approved as the heades of the Confession of Faith professed in Parliament of before, in the zeir of God 1560 zeires; as also specified in the Actes of this Parliament mair particularlie dois expresse, and now ratifyed and approved in this present Parliament, or that refusis the participatioun of the halie Sacraments, as they are now ministrat, to be na members of the said Kirke, within this realme now presently professed, sa lang as they keep themselves sa divided fra the society of Christ's bodie."

There seems no reason to doubt that what is here declared to be the true and holy Kirk, was exactly that which was established by the legislature, and that the ministers of the blessed Evangel referred to were those of parishes and benefices entrusted with cure of souls, at that time officiating as members of the Reformed Church. Some of them might be better or worse provided for than others, but all of them must have been doing duty at certain kirks throughout the kingdom, in room of the displaced Papal clergy.

The Act 1579 again bears:[2]—" Our soveraine Lord, with advise of his three estaites of this present Parliament, hes declared and granted jurisdiction to the Kirk quhilk consistis and stands, in the preaching of the trew word of Jesus Christ, correction of manners, and administration of the halie sacraments; and declairis that there is na uther face of kirk, nor uther face of religion, then is presentlie be the favour of God established within this realme; and that there be na uther jurisdiction ecclesiastical acknowledged

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[1] Act 1567, c. 6. [2] Act 1579, c. 69.

within this realme, uther then that quhilk is, and sall be within the samin Kirk, or that quhilk flowis theirfra, concerning the premisses."

The jurisdiction which is here "declared and granted" to the Kirk, (which words are mere redundant expressions as to what was conferred, as is exemplified in the immediately succeeding use of the words "consists and stands," as applied to the jurisdiction,) is defined in precise terms to consist "in the preaching of the true word of Jesus Christ, correction of manners, and administration of the holy sacraments;" as to which, when exercised in their usual way, no doubt the fullest jurisdiction is vested in the Kirk, and is never interfered with, as in reality pertaining solely to its ministers. The subsequent declaration, that "there is no other face of Kirk, nor other face of religion than that presently established within this realm," and that "there is no other jurisdiction ecclesiastical acknowledged within this realme, other than that which is, and shall be within the same Kirk, or that which flows therefrom," seems, in fact, to amount to nothing more than an emphatic recognition of that form of religion, with its Confession of Faith, which had previously been established by the authority of the legislature itself; and whose ecclesiastical jurisdiction it was by this statute deemed necessary to declare, should in future be the only one that should exist within the realm, in order to obliterate entirely all vestiges of the jurisdiction of that Church which had been recently abolished, and was never again to be revived.

It is unnecessary to recite the terms of the well-known Act 1592, c. 116, which is entitled, "Ratification of the liberty of the trew Kirk; of Generall and Synodal Assemblie; of Presbyteries; of Discipline, all Lawes of Idolatrie are abrogate; of presentation to benefices." The ratification and approval given by the legislature in this act, after agreement between the Sovereign with certain ministers convened for the purpose, of "the Presbyteries and particular sessions appointed by the said Kirk, with the haill jurisdiction and discipline of the same Kirk," the tenor of which articles is specially set forth, demonstrate that the Church itself did not claim what is there ratified, without actually obtaining the interposition of the authority of the legislature; every thing being particularly enumerated that is thereby sanctioned. The jurisdiction thus sanctioned, and power conferred "to put order to all matters and causes ecclesiastical within their bounds, according to the discipline of the Kirk," seem clearly to have had reference to the kirks and parishes within the bounds of their respective Presbyteries; and had it ever been contemplated that the Church or its judicatories might of their own authority create and establish new parishes, it is impossible to doubt that an express declaration to that effect would have been made in this act, which was putting, in reality, the legislative seal to the constitution of the newly Established Church. The important concluding words of this statute, moreover, clearly show, that its various enactments had reference to presentations to existing parochial benefices within the realm, as it expressly "ordains all presentations to benefices to be direct to the particular presbyteries in all time cumming, with full power to give collation thereupon: And to put ordour to all maters and causes ecclesiasticall within their boundes, according to the discipline of the Kirk: Providing the foresaids Presbyteries be bound and astricted to receive and admitt quhatsumever qualified minister presented be his Majesty or laick patrones."[1]

This statute, with the others in favour of the Church, though they had become inoperative during the subsistence of Prelacy, having been restored to their full efficiency by the statutes passed at the Revolution, in which the Confession of Faith now observed was formally adopted as its permanent creed, the powers and jurisdiction of the Church came just as before, to rest on the terms of the statutes that had formerly been passed for fixing and establishing its constitution. It is to these statutes alone, therefore, that the attention of a court of law must necessarily be directed; and, though they do recognize the jurisdiction of the Church in the special matters specified in the Act 1579, they give no countenance whatever to the power of the Church, by its own authority, to declare any extension of that jurisdiction, or to hold it applicable, as is now attempted, to any matter involving civil rights. It is also never to be forgotten, that a statute was passed at a later period, which, however repugnant it might have been to the views of the early Reformers, deprived the censures or sentences of the Church itself of all the consequences that had under the former system belonged to them.

Without dwelling further on the terms of the various statutes that were passed for the

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[1] Act 1592, c. 116.

establishment and maintenance of that Church, which the Scottish legislature had sanctioned as that of the State, I am very clearly of opinion, that the interpretation of all of them, and especially such as in any degree involve matters of civil interest, must of necessity rest with the supreme civil tribunal, the only legally constituted expositor of every enactment in the statute-book without exception. No statute whatever can be pointed out, which declares that the interpretation of the public laws of the realm is committed to any other tribunal than the supreme civil court, or that authorizes the Church or any of its judicatories to decide on the meaning or effect of any one of these statutes. Many of them, though relative to the Church, indisputably contain provisions recognizing the existence of civil and patrimonial rights, which can be adjudicated only in a civil court. Those in particular which acknowledge the rights and duties of the Church in the collation and admission of ministers to parochial benefices, which, to a certain extent, undoubtedly are of an ecclesiastical or spiritual nature, as unequivocally recognize the civil interests both of patrons and presentees, and which must necessarily, therefore, remain under the cognizance of the civil tribunal. The express reservation in the statutes alluded to, of the exercise of presentation under laic patronages to the just and ancient patrons, and the stringent astriction of Presbyteries in the Act 1592, already referred to, are amply sufficient to show, beyond all question, that these rights were not left by the legislature to be dealt with, or set at nought, at the pleasure or caprice of any Church judicatory, or dominant party within it. Can it, then, gravely be maintained that, because the General Assembly of the Church chooses, in any of its acts declaratory or legislative, to enact, that every thing regarding the admission of parochial ministers is spiritual or ecclesiastical, it can thereby arrogate to itself, without control, the sole determination as to any alleged violation or disregard of these statutes?

If such a right of deciding by its own authority what is its own constitution, after it has been fixed by positive statute, or what is or is not spiritual or ecclesiastical, and thereby of defining the extent of its own jurisdiction, ever belonged to the Church, it surely would have been declared, in the most explicit terms, in some of the numerous statutes regarding its establishment, or been recognized by judicial authority. But in none of them is the slightest indication to be found of any such idea having ever been entertained, nor could it, in fact, ever be entertained in any Church reformed from Popery. For, if such a power existed, there could be no limit to its despotic effects, as nothing would be more easy, according to the present passion for legislation in the Church, than to enact, in conformity with the views that formerly prevailed, that, as the teinds are the proper patrimony of the Church, it is entitled to dispose of all such as are unappropriated for the spiritual instruction of the parishioners under the newly erected churches; or at once to declare, by one of its acts, that the whole provisions for the maintenance of its clergy, their manses and glebes, and church accommodation, are, as matters connected with divine worship, of a spiritual or ecclesiastical nature—the whole cognizance and determination as to which must, of course, vest exclusively in the Church, and that any interference of the civil court with regard to them is an undue usurpation and encroachment upon the supreme jurisdiction of the Chuch. It can be no answer to the extravagance of such a doctrine to state, that the matters above alluded to are already specially provided for by statute, and subjected to the cognizance of the civil court, as the statutes regarding the exercise of the right of patronage, and the duties thereto incumbent upon Presbyteries, as well as those also regarding the erection of new churches and parishes, and the division or disjunction of old ones, as will immediately be seen, are expressed in as clear and unambiguous terms as those regarding stipends, manses, or churches.

But there is another statute directly affecting the interests of the Church and its ministers, which places in the most prominent point of view the absurdity of the unqualified pretension of the Church to determine without control, in all matters of an ecclesiastical nature, whatever they may be. The Act 5th Geo. II. c. 29, passed subsequent to the Revolution and the Union, when the rights of the Church are truly held to have been unalterably declared, requires, as is well known, all ministers and licentiates to take and subscribe, at their admission, the oath of allegiance therein prescribed, and declares those guilty of a violation of its enactments liable to prosecution for penalties in any court of law in Scotland. The legislature, in passing this act, never dreamt that it was encroaching on the spiritual rights or independence of the Church that, it is said, had been declared unalterable, because its enactments were thought material to the interests both of the Church and the State. But, it may be asked if the Church, under a new light as to the imposition of any such oath on a minister or licentiate before admission,

being either unscriptural or of a spiritual nature, and falling under its exclusive cognizance, is entitled to arrogate to itself the power of dispensing with the statutory enactment in future, and thereby setting it completely at nought?

From what has been seen in regard to the statutes by which the Church of Scotland was unquestionably established, it appears there is, therefore, no foundation for the supposition, that the State and the Church stand in relation to each other as if they were altogether separate and independent. The State having agreed to the establishment of a new form of religion, totally irrespective of the former Church that was done away for ever, and which was to be supported and endowed by the resources provided for it by the State, there remained, necessarily, a controlling power in the supreme civil court to secure observance on the part of the Church of its own proper functions and duties, and especially such as had been defined by statutory enactments. It is perfectly true, however, that the Confession of the Faith of that Church which received the sanction of the legislature expressly bears, that the Lord Jesus Christ is its sole and only Head. Though this is undoubtedly a fundamental tenet of the Presbyterian Church Establishment, it is in no degree interfered with by obedience being required to those statutes by which that Church itself was established in the land, and the due maintenance of which, in all respects, is in fact the foundation upon which it rests. This is, in truth, the fair and legitimate meaning of the 23d chapter of the Confession of Faith, to the adoption of which, as the creed of the new form of religion, the authority of the legislature was required and given. With the proper discharge of spiritual functions in the government of the Church, as defined in that Confession of Faith, the legislature has sanctioned no interference; but if, under cover of the exercise of such functions, flagrant excesses of power, violations of express statutes, and encroachments on civil rights are attempted, the Church and its judicatories can never be held as exempted from the control of the supreme civil tribunal of the country.

This matter is fully illustrated by Principal Hill in his "View of the Constitution of the Church of Scotland," who, after adverting to the Articles of the Church of England in regard to synods and councils, expresses himself in these words:[1]—"And the Church of Scotland, in her Confession of Faith, declares, what in effect comes to the same thing, that the civil magistrate has power to call synods, to be present at them, and to provide that whatsoever is transacted in them be according to the mind of God. It will always be the wish of every person who understands the true interests of the community, to avoid even the appearance of a collision between the powers of the Church and the State. But if the Church derive essential benefit from the State, it is agreeable to common sense and common equity that there should be some mode in which that supreme power, which is the guardian of the whole community, may be exerted, as circumstances shall require, in order to prevent the Church, which is a part of the community, from neglecting those duties, for the sake of which she enjoys protection and favour, or from exercising her rights in a manner which appears hurtful to the State."

There exists, in reality, therefore, no such thing as a conflict between the civil and ecclesiastical courts of a country, in which a Church is established and endowed by the State. All classes, lay or clerical, must necessarily be subject to what is the law of the State; and, if it depends upon positive statutes, their exposition, as already observed, can rest nowhere but in the Supreme Civil court. The Church, after having been established by the State within its territory as an association of Christians, on which it has conferred important privileges, but at the same time assigned to it equally important duties, can never be entitled to assert such a spiritual independence as would render it no longer subject to those very laws of the State, that have in fact established it and defined its own duties. The statutes by which they are confessedly bound, can never be left to be interpreted by Church courts for themselves. The Supreme Civil court is invested with the unquestionable power of interpreting all statute-law whatsoever; and there can be no co-ordinate jurisdiction of this nature in any court of the Established Church.

I have been led to enlarge at far too great length on the powers and jurisdiction of the Church, and the right of this Court to control its proceedings, as well as those of every other court, either on account of excess of power, or a violation of statutory civil rights, as these points have in reality been already authoritatively settled in various adjudged cases. To say nothing of the very recent judgment in this Division in the case

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[1] Inst. p. 152.

of Culsalmond, I need merely refer to the cases of Corstorphine and Kilberry with regard to the Schoolmasters' Act, in which the right of this Court to control proceedings of Presbyteries when deviating from their statutory duties, was fully vindicated. In the former of these two last cases I may here, however, observe, that the exclusive jurisdiction of the Church courts was strenuously, though unsuccessfully maintained, in a most able and elaborate argument by one of your Lordships' number in the other Division, in which almost the whole authorities referred to in the present case were brought to bear upon the question.

But, when we recollect the case of Auchterarder, in which the question of the nature and extent of the jurisdiction, both of this Court and of the Church, in regard to the collation and admission of ministers, was so fully and ably sifted, and that the judgment of this Court directly repelling the objection taken to its jurisdiction and right of interference with the legislative act of the Church, was, after the fullest investigation, affirmed by the House of Lords, it is in fact not too much to say, that it was hardly to have been expected that a similar question should again have been raised. I certainly, however, consider that judgment as completely decisive of the point, as the plea in this case as to jurisdiction is, in reality, in its nature much weaker than it was in the case of Auchterarder. The judgment of the House of Lords in that case, besides, affords a complete answer to every thing that has been urged in this case on the part of the respondents, relative to the distinction that exists between the constitutions of the Churches of England and Scotland, and the attempt that has been made to show the difference between the powers of the Court of Queen's Bench and those of the Court of Session. All that sort of argument, aided by the best exertions of English counsel, was powerfully pressed upon the attention of the House of Lords, but without producing the slightest effect on the two noble and learned Lords who concurred in affirming the judgment of this Court, which distinctly repelled the objection to the jurisdiction so much relied on.

II. Being, therefore, very clearly of opinion that its alleged supreme jurisdiction in ecclesiastical matters, and the spiritual independence of the Church as now claimed, afford no legal bar to this Court taking cognizance of the matters complained of in this suspension at the instance of the heritors of Stewarton, I shall now advert to the question, Whether, what was done by the respondents in regard to the new church in that parish, and the admission of the minister of the Associate Secession to the full status and privileges of a constituent member of Presbytery, rested as they are on certain Acts of the General Assembly, was warranted either by the constitutional and statutory law of the State, or the laws and constitution of the Church of Scotland itself.

Keeping in view the whole proceedings adopted by the respondents as detailed in the record, the result is shortly this, that upon a memorial from the minister of the Associate church in Stewarton, and the managers and members of that congregation, praying to be received into union with the Church of Scotland, they at once received and admitted to the full rights and status of a member of the Presbytery of Irvine, that minister; and that on his mere subscription of the Confession of Faith, without the positive provision of the Act of Geo. II. c. 29, already noticed, being complied with, he took his seat in the Presbytery accordingly; that subsequently, a certain district, including part of the landward territory of the parish of Stewarton, was designated; after which the Presbytery, notwithstanding the opposition offered, and interdicts obtained by the patron, heritors, and minister of the parish,[1] appointed "the minister and kirk-session of the new parish in Stewarton to take care of the souls, and to exercise spiritual jurisdiction over the persons, inhabiting the district comprehended within the following boundaries;" but declaring, "that no civil right of these parties, or of any others whatever, shall be in any degree affected by the aforesaid allocation; and they further declare, that the effect of this allocation is limited exclusively to matters of spiritual discipline and government; as also that heritors and their tenants, in that part of the parish of Stewarton thus set apart as a territorial district to the new church, having legal right to sittings in the original church, may, in their option, continue members of the congregation thereof."

That these proceedings, thus carried into effect by the respondents, limited as they are attempted to be in the deliverance of the presbytery, but followed up, as they have since been, in the face of the interdicts of this Court, by the subsequent admission and

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[1] Appendix to Record, p. 9.

ordination of another individual as minister of the new church, do affect and materially trench upon civil rights, cannot, in my opinion, be seriously disputed. Important civil interests unquestionably belong to the parishioners of an established parish, which are necessarily and directly affected by their being withdrawn from the superintendence and care of their regular minister and kirk-session, and subjected to the administrations and discipline of a new minister and kirk-session. There is no saving, even according to the qualification in the deliverance of the Presbytery, as to the rights of the holders of sittings in the original church, of the interests of all the other inhabitants of the newly designated parish, which are therefore plainly and materially affected by the allocation of it that has been attempted.

That other and most important civil interests of the present suspenders are also directly affected by the total alteration of the constitution of the Presbytery of Irvine, established by the Legislature itself, which has been accomplished by the admission to a seat in it of the minister of this new church and parish, no sort of doubt can be entertained. The presbyteries of the Established Church are by law entrusted with the performance, as the initiating court, of most important civil functions, directly affecting the patrimonial interests of the lieges, in granting decrees for the building of new churches and repairing of old ones, and for similar operations regarding manses; while they act also in the designation of grass glebes, in excambions affecting the interests of parochial ministers, and in the appointment and removal of parochial schoolmasters. As all of the above matters deeply affect the interests of the whole heritors of a parish, they are justly entitled to maintain, that the constitutions of courts possessing such extensive powers shall not be subverted by any additions made to their number, without the fullest sanction of the law. It is not, indeed, the first time that the heritors of the parish of Stewarton have been involved in litigation materially affecting their interests, in which the Presbytery of Irvine exercised a most important branch of their jurisdiction. I allude to the discussion which arose with regard to the obligation of the heritors as to the parish church, which, though unequal to the accommodation of the whole parishioners, was still capable of being repaired. In the course of the proceedings, the Presbytery having seen, as they thought, sufficient cause, granted their decree for the building of a new church; but which, having been brought under review, was by the judgment of the Second Division, of the 12th December 1811, finally suspended. Let it be supposed that, in that instance, (as appears from the proceedings in the present to have been the case,) the question had been decided against the heritors by the casting voice of the moderator, a recently admitted Seceding minister, or minister of a *quoad sacra* church; and can any man hesitate to pronounce, that the reception of that individual as a member of the Presbytery, if he had no legal title to be there, was a direct invasion of civil rights? Another case is now in dependence before us, in the suspension of a decree by the Presbytery of Greenock for levying an assessment for building a new church, on the distinct ground that a *quoad sacra* minister or ministers took part in their proceedings. These cases, therefore, are sufficient to show beyond all controversy, that the power exercised by the Church, now under consideration, goes directly to the disposal of important civil rights of the people of Scotland, which can, according to the plainest maxim of the Constitution, only be dealt with by Parliament itself, or that Court or Commission to which the legislature has, for nearly a century and a half, expressly delegated that duty. There is, therefore, no foundation whatever, in my opinion, for holding that what is complained of in this suspension is a matter purely ecclesiastical, or a mere exercise of spiritual power by the Church, and as to which it is subject to no control. Under whatever mask or colour it presents itself, it is, on the contrary, a palpable attempt to invest individuals with authority to dispose of the civil rights and pecuniary interests of their fellow-subjects; a pretension to which the Church itself, even in its multifarious proceedings of the present day, loudly protests that it lays no claim whatsoever. It is in truth a mere mockery, then, to represent the unlimited exercise of power by the Church to create at pleasure *quoad sacra* ministers and parishes to any extent, thereby overturning the constitution of the whole Presbyteries and other judicatories of the Church, established as they are under the authority of positive statutes, as a competent performance of spiritual duties. And considering that the functions of the Presbyteries of the Established Church, regarding churches, manses, and glebes, are undeniably of a civil nature, as is most explicitly stated by Principal Hill,[1] a power to increase the number of the members of such courts can of necessity only be conferred by the authority of the legislature, or by

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[1] Theol. Inst. p. 285.

the tribunal appointed for that purpose, and certainly not by that of any ecclesiastical judicatory. For it is surely altogether impossible to maintain that the Church can, at its own discretion, communicate to others those powers which it required all the authority of the legislature to bestow upon itself; it being a maxim of law, as well as of sound sense, that *delegatus non potest delegare.*

If it is clear, therefore, that the Church, by its own authority, cannot authorize the ministers of what are called *quoad sacra* parishes to perform those duties, which, as directly concerning civil rights, the law has only devolved upon the legally constituent members of the Presbyteries of the Church, it cannot surely be maintained that these ministers can be entitled to act as members of those courts to any effect whatever. Neither the law of the State, nor that of the Church at any period of its history, can be shown to have acknowledged so anomalous a class of parochial ministers as those who, when certain most important duties are about to be discharged by presbyteries, must invariably either be required to withdraw, and have their names expunged from the sederunt, or be prohibited from taking any part in the proceedings then before the court. The attempt to constitute any such nondescript class of ministers, is in itself fundamentally opposed to the principle of Presbyterian parity, so essential a characteristic of the establishment of this Church. It will never, therefore, do to await their having actually taken part in an illegal act, before determining as to the *status* of these ministers. They must either be qualified to act as constituent members in all respects whatever, or in none.

From a consideration of all that has been already adverted to, regarding its history and the statutes by which the Church was established, it appears to me that it may safely be affirmed that the Church of Scotland, so sanctioned by the authority of the State alone, was in its nature a parochial one, comprehending known territorial divisions into parishes, or those composed wholly or partly of towns to which incumbents were legally presented; and that, though at an early period the provisions made for the maintenance of its pastors had varied, by their stipends being derived from the thirds of benefices, the smaller benefices, the teinds, or other ecclesiastical sources, still it was to the holders of parochial benefices and occupants of parish kirks that the legislature looked as the ministers of the Established Church. This seems the fair inference to be deduced from the terms of all the statutes which refer to the kirks, or those who discharged the duties of them, when treating of Presbyteries or other Church judicatories. But, if any further evidence was requisite, nothing can more thoroughly show the parochial system of Scotland than the statutes relative to the poor, and especially that of 1579, c. 74. The terms of this statute, as well as others, clearly prove that at that early period, and when the Church was only in its infancy, the division of the whole kingdom into parishes was completely taken for granted, and acted upon. I can by no means, therefore, concur in the supposition that there existed, for any length of time, a set of ministers altogether unconnected with parishes or benefices; or that such a class did in fact compose those judicatories that were sanctioned by the Act 1592, and who were again recognized and restored at the Revolution by the Act 1690. All the proceedings that took place at the latter period, in providing for the restoration to their former situations of those that had been ousted under the religious establishment introduced under Prelacy, go directly to illustrate and confirm the parochial constitution of the Church. For the second Act of the Parliament of 1690 expressly bears,[1]—"Their Majesties, with advice and consent of the Estates of Parliament, ordain and appoint that all these Presbyterian ministers yet alive, who were thrust from their charges since the first day of January 1661, or banished for not conforming to Prelacy, and not complying with the courses of the time, have forthwith free access to their churches, that they may presently exercise the ministry in these parishes, without any new call thereto." This Act contains a further provision, that the existing incumbents in such churches "are hereby appointed, upon intimation hereof, to desist from their ministry in these parishes, and to remove themselves from the manses and glebes thereunto belonging, betwixt and Whitsunday next to come, that the Presbyterian ministers formerly put out may enter peaceably thereto." When we afterwards find, in addition to the preceding statute, in the Act 1690, c. 5, "ratifying the Confession of Faith, and settling Presbyterian Church government," the following words:—"And allowing and declaring, that the Church government be established in the hands of, and exercised by these Presbyterian ministers who were ousted since the first of January 1661, for non-

[1] Act 1690, c. 2.

conformity to Prelacy, or not complying with the courses of the times, and are now restored by the late act of Parliament, and such ministers and elders only as they have admitted or received, or shall hereafter admit or receive;"[1] no reasonable doubt can exist, that such ministers or elders as the restored ministers "have admitted or received, or shall hereafter admit or receive," and who were to participate in the Church government, were, and could only be, those who had been, or were to be, brought into connexion with parishes throughout the Church; as the words used are manifestly taken from the statutes of the Scottish Parliament, with regard to the admission and reception of ministers to parochial charges in the Kirk, upon the presentations of the legal patrons. It is, therefore, altogether an unwarrantable stretch to suppose that any statutory power was thus conferred, of admitting to the government of the Church any other class of ministers whatever.

In order to see that the providing for the maintenance, and, where necessary, the extension of the Presbyterian Establishment, was, according to the understandings of all men, whether lay or clerical, considered to be the duty of the legislature itself, or those invested with its power, and not that of the Church, it appears to me only necessary to attend to the various statutes of the Scottish Parliament, authorizing commissions to provide for the division and disjunction or union of parishes, and erection of new ones. At a very early period accordingly, such commissions were granted, the first by the Parliament of 1617, appointing special commissioners not only for making proper provision for the ministers of existing parishes, but conferring upon them the special power "to unite sick kirkes, ane or moe, as may conveniently be unite." The next commission was contained in the Act 1621, c. 5,[2] which gives power to the said commissioners "to disunite such kirks, one or more, as were united of before, and appointed to be served by one minister; and as they upon good considerations shall find requisite to appoint the same to be served by several functions and charges as distinct parochins after such manner as shall be found by them most expedient. Providing always that all parties having interest in the union and disuniting of the said kirks and plantation thereof, give express warrand and consent thereto." It may be observed in passing, that the language of this statute clearly shows that when the word *Kirk* alone is used in other acts, relative to the constitution of the Church Establishment, it is meant to apply to parishes and not to the fabric of churches alone.

Similar commissions continued to be issued by the Scottish Parliament during the whole of its continuance; but it is only necessary, in order to show that the Church itself, at the very time when Presbyterian principles are held to have flourished in their most palmy state, asserted no power of erecting new kirks and dividing parishes, to attend to the words of the commission contained in the Act 1641, c. 56,[3] empowering commissioners "to disjoin too large and spacious kirks, and plant them severally, and to cause build and erect new kirks, and appoint competent provisions for the ministers; to change kirks incommodiously situate to a more commodious part of the parish; to disjoin and dismember such parts and portions of parochins lying contigue, and whereof ane part is far distant from the proper parish kirk, and more near and ewest to the next adjacent and contiguous parish kirk from their own proper parish kirk, frae the quhilk the parts and portions are farther distant, and to unite and adjoin them to the other parish kirk, to the quhilk they are more ewest and also to unite kirks and parishes lying so near other; and being of so little bounds and small number of parishioners, that the union of them shall be found more useful and conducible for the good and ease of the parishioners of both the kirks and their edification: providing that dividing of large parishes, the dismembering of ane part of the said parochin in case aforesaid, and the uniting of kirks and parochins of the quality above specified, be done upon the special recommendation of the Presbytery, Synod, or General Assembly, given in in writ, and after the commissioners have cited and heard the parishioners of both kirks thereanent, and no otherwise."

It is most important to observe, that, in reference to the special recommendation provided for in this Commission, and which was all that was looked for from the Church, several erections of parishes were made by acts of Parliament, as noticed in the case for the suspenders, the applications for which had been made to the General Assembly, and recommended by them to Parliament.

Without noticing further the terms of the various other Commissions that were subsequently granted by Parliament, I must advert for a moment to the Act 1706, c. 9,

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[1] Act 1690, c. 5. [2] Act 1621, c 5. [3] Act 1641, c. 56.

"anent plantation of kirks and valuation of teinds."[1] This act, proceeding upon the preamble that, "considering the great prejudice that does redound to this nation, through the want of an established and fixed judicature, which may cognosce and determine in such causes and things as by former Parliaments were referred to their Commission for plantation of kirks and valuation of teinds," &c., appoints "the Lords of Council and Session to judge, cognosce, and determine in all affairs and causes whatsoever, which, by the laws and Acts of Parliament of this kingdom were formerly referred to, and did pertain and belong to the jurisdiction and cognizance of the Commissions formerly appointed for that effect, as fully and freely in all respects as the said Lords do, or may do in other civil causes," &c.; and particularly, "to disjoin too large parishes, to erect and build new churches, to annex and dismember churches as they shall think fit, conform to the rules laid down, and powers granted, by the nineteenth Act of the Parliament one thousand six hundred and thirty-three, the twenty-third and thirtieth Acts of the Parliament one thousand six hundred and ninety, and the twenty-fourth Act of the Parliament one thousand six hundred and ninety-three, in so far as the same stand unrepealed. The transporting of kirks, disjoining of too large parishes, or erecting and building of new kirks, being always with the consent of the heritors of three parts of four at least of the valuation of the parish, whereof the kirk is craved to be transported, or the parish to be disjoined, and new kirks to be erected and built, the minister in the meantime to serve the cure in the present kirk of the parish."

As nothing in regard to the objects in view can be more comprehensive than the powers thus conferred by this act of the legislature, we are not to be told that because their exercise is laid under some limitations, which are not in all respects agreeable to the views of a certain party now existing in the Church, this statute can be considered as inoperative for the regulation of the important matters embraced in it, as it in fact embodies the whole code of law, with regard to the erection, disjunction, and union of all churches and parishes connected with our establishment. For, supposing that the consent of the heritors of any parish, which by the act is required in regard to certain of its provisions, was far more difficult of attainment than it really is; and that the erection of new churches and parishes (where they are truly necessary) was thereby impeded, the remedy for any such evil is obviously only to be obtained by a new application to the legislature. But had the power, which was thus vested in the newly constituted Court of Teinds, been considered either at its date, or at any prior period, already to belong to the Church to any extent whatever; or that all the Presbyteries or inferior judicatories, amounting to seventy-eight in number, were legally entitled to remedy in any way the evils which this act was intended to remove, it is impossible to doubt that some declaration, or reservation of that right, would have been expressed in it instead of the declaration in its preamble of the great prejudice that had arisen from the want of a fixed judicature. The abortive attempt of the Presbytery of Dumfries to erect the parish of Garril, as noticed by Sir John Connel, was accordingly at once set aside by the Commission, "as it had been done only by the Presbytery, who had no power to erect or annex, but merely to represent to the Commission the conveniency thereof, who have sole power of ordering churches."

When we look back again to the Act 1592, by which the constitution of the Church was finally settled, and its jurisdiction truly defined, then was the time, if any such power of creating parishes of any description whatsoever at its pleasure was intended to be bestowed upon the Church, when we might expect to have seen it expressly conferred. The total absence, however, of any trace in that or any other statute of such a power being vested in or conferred upon the Church, while we see it expressly granted to the permanent Commission established by the legislature, is of itself in reality decisive of the whole question, as to the constitutional illegality of what is complained of in this suspension.

It is not, however, to be overlooked, that the proceedings of the respondents have been mainly defended on the authority of certain Acts of the General Assembly which have been referred to. These acts of the Church in its legislative capacity, are four in number; the first, the declaratory Act of Assembly 1833, admitting to the full *status* of parochial ministers, the ministers of the Parliamentary Churches in the Highlands, and designating their districts as parishes *quoad sacra;* the second, the declaratory enactment as to chapels of ease; the third, the act relative to new churches; and the fourth, the act anent reunion with Seceders.

The first of these legislative measures of the Church, which is paraded not only in

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[1] Act 1706, c. 9.

this case but elsewhere, as having been passed under the most august auspices—in having been preceded by the report of a numerous committee, in which were included all the judges and lawyers who were then members of Assembly, and of which number I am stated to have had the honour of being one—does, notwithstanding, appear to me, judging of it as I am bound to do according to law, to have been a most rash and unwarrantable act of usurpation, and excess of power, and, in fact, altogether *ultra vires* of the General Assembly, as in reality amounting to a direct attempt to repeal a positive act of Parliament. Though I have no doubt that I must have been nominated upon that committee, I certainly took no part whatever in any of its proceedings, nor did I concur, when the Act was passed by the Assembly. Had my attention ever been, indeed, called to it, or the grounds on which it was supported, notwithstanding what is stated as to Dr Cook having been the convener of the committee, I do not think that any consideration whatever could have led me to be a party to its enactment. For I know, in point of fact, that on the 27th May 1835, only two years after this act was passed, when a majority of the General Assembly declared the act relative to chapels of ease, and their ministers, to be a permanent and binding law of the Church—a measure in reality not liable to all the formidable objections applicable to the ministers of Parliamentary churches—I united with seventy-five other members of that Assembly, of whom I find the name of Dr Cook himself the second in order, showing pretty clearly the opinion he had then come to in regard to such legislation by the Church, in dissenting from that act; for this reason, among others, "*because the ministers of chapels of ease can acquire from that Act no valid right to sit and vote in Church courts, and by doing so will invalidate the proceedings of these Courts.*"

Under what circumstances, however, did the General Assembly proceed to admit to the full *status* of parochial ministers, and designate parishes, *quoad sacra*, to those persons who had been appointed by the Act, 5 Geo. IV. c. 90, passed on the 21st June 1824, to officiate in certain places of worship built and endowed in the Highlands? This act, conferring as it was about to do, so important a boon upon the people and Church of Scotland, must, it is presumed, (though I am not personally cognizant of the fact,) have been submitted to the consideration, and received the approbation, of influential members of the Church. In regard to its provisions, it is unnecessary to state more than that it enacts, that when the Commissioners shall determine that an additional place of worship shall be provided, they are "to require the heritor or heritors, making such application, to settle and agree with the Presbytery of the bounds, so as to define and set apart a certain district within such parish or parishes, for behoof of which district such additional place of worship is to be erected or provided, and to which the labours of the minister, to be appointed as hereinafter directed, to officiate at such additional place of worship, shall be confined."[1] It is further enacted, "that upon the representation of the Presbytery of the bounds, within which any such district shall be situated, it shall and may be lawful for the said Commissioners, at any time thereafter, to alter such district, and to define and set apart a new district for any such additional place of worship."[2] It is still further provided, that the minister or ministers of the parish in which the district is situated, shall provide for the attendance of members of the kirk-session to officiate at the place of worship appointed under the Act, and the minister of the district and elders shall give direction in all things relative to the additional church; and, after regulating that the decision of all questions which may arise in courts of law, relative to the ministers appointed to officiate at such places of worship, or regarding their civil interests and the administration of the weekly or other collections made at such places of worship, "shall be judged of, and determined respectively, according to the law of Scotland respecting the rights and interests of parochial clergy, and respecting the administration and distribution of the collections made at parish churches, so far as may be consistent with the provisions of this Act," the following emphatic words are inserted in its 25th section:[3]—"And regard being always had to the consideration, that the district set apart for the duties of such minister, appointed as aforesaid, is not disjoined from the parish or parishes to which it belongs, or erected into a separate parish; and that the elders officiating at such place of worship do not, along with such ministers, form any separate and distinct kirk-session, and cannot derive any authority as such from the provisions of this Act, but are merely members of the kirk-session or kirk-sessions of the respective parish or parishes in which the district has been set apart, and have no authority or jurisdiction, except such as by law belongs to them as mem-

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[1] 5 Geo. IV. c 90, § 6. [2] Ibid. § 7. [3] Ibid. § 25.

bers of such kirk-session or kirk-sessions, and acting as members of meetings of the same."

Now, though this act does contain a proviso, that nothing contained in it "shall interfere with, or be construed to interfere with, the discipline and government of the Church of Scotland, by Kirk-sessions, Presbyteries, Provincial Synods, and General Assemblies, as by law unalterably established,"[1] it seems most extraordinary that, after so unequivocal a manifestation of the declared will and purpose of the legislature in the act in question, as to the true nature of the additional places of worship, and the position which the ministers appointed and endowed by it were to hold in the Church, the General Assembly should have thought themselves warranted to pass the declaratory act in question. Had the legislature ever intended that *forty* additional parishes and proper parochial ministers should be added to the Establishment of Scotland, nothing was easier than to have at once declared it, as all difficulty in regard to endowment was removed by the liberality of the public grant provided by the act. But while the direct contrary is manifest upon the face of the act itself; and while there is not in it even a vestige of reservation of any right in the Church to supply any defect that might be conceived to exist in its arrangements, it seems very clear indeed that if any alteration was desired, it was to the legislature alone a new application ought to have been made, instead of the Church taking upon itself, in the very face of the statute, to pass the declaratory act which it did.

The right of the ministers of those Parliamentary churches to the benefit of the Widows' Fund of the Establishment, has since been brought into discussion in this Court on two different occasions, on the first of which the decision was in their favour; but on the second, that of Irvine v. Trustees of Widows' Fund, 24th May 1838, the Court, after a full hearing before the whole Judges, determined, by a majority, that the ministers of these churches were not liable to the contributions, or entitled to the benefit of that fund. The respondents, adverting to the *first* of these cases, have thought proper to lay great stress upon the opinion delivered by the late venerable head of this Court, as in favour of the legality of the Act of Assembly regarding the ministers of Parliamentary churches; but they have forgotten to state, that on the *second* occasion, when the whole question was so thoroughly sifted, his Lordship stated, in the most explicit terms, that he had entirely altered the opinion which he had formerly expressed on the points involved in the cause, as appears from the printed report of that case.

With regard to the declaratory Act of Assembly as to Chapels of Ease, which was passed in 1835, it may be proper to observe, that Principal Hill[2] thus notices the nature of this part of the Establishment of the Church:—"The increasing wealth and population of various districts of Scotland having produced many applications for chapels of ease, there being no public law upon this novel subject, and different Presbyteries having erected chapels of ease, upon plans widely dissimilar, and in some instances dangerous to the ecclesiastical and civil establishment, it was judged necessary to introduce into the Assembly 1796 an overture, founded upon the report of a committee, which had been appointed by the Assembly 1795 to consider the subject, that Presbyteries shall not pronounce a final judgment upon any petition for the erection of a chapel of ease, until they shall have received the special directions of the Assembly thereon." This overture having been adopted by the Assembly 1796, was transmitted to Presbyteries for their opinion, and was at the same time enacted as an interim order. It was retransmitted and re-enacted by the Assembly 1797; and a considerable majority of the Presbyteries of the Church having transmitted to the Assembly 1798 their opinions in favour of the overture, it was, by that Assembly, within two years after its being introduced, enacted into a standing law of the Church." Such was the cautious and deliberate manner in which the Church, at the date of this act, guided by those counsels of prudence and moderation which are now so much reprobated in certain quarters, provided for the regulation and improvement of one of its most valuable institutions, instead of adopting the rash and novel proceeding to which it has lately had recourse.

It will not surely be denied, that the above deliberate enactment affords the strongest proof of the universal understanding of men of all parties, at its date, that the Church possessed no power of itself to incorporate chapels of ease with the Establishment, and confer on their incumbents the rights and *status* of parochial ministers. For, if any such power existed, the act of legislation in the Church, so solemnly completed, was altogether unnecessary; because, according to the views that are now maintained of the

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[1] 5 Geo. IV. c. 90, § 26.

[2] Inst. p. 238.

legal authority of the Church, its judicatories were at once entitled to engraft every chapel of ease upon the Establishment, assign to it a parochial district, and admit its minister to the full *status* of a regular minister of the Church.

The fact, however, is, that no such idea of the constitutional powers of the Church had ever entered into the minds of any of its members. In consequence of the growing wants of the country, chapels of ease had gradually sprung up in various quarters, and had continued, with the benefit of ordained pastors, to provide very effectually for the spiritual wants of populous districts; and it is not easy to see why they might not have been continued and multiplied at the present day on their original footing, with the same advantages to the country at large. That they were considered as a most important and beneficial auxiliary institution of the Established Church, we have, as is noticed in the opinion of Lord Medwyn, the high authority of the venerable Sir Henry Moncreiff, who, anxious as he evidently was for the reunion of certain Seceders with the Church, thus expresses himself as to the mode in which it might be accomplished:[1]—"Would it be either degrading or unfriendly to the Established Church, if she were to declare her willingness to receive into her communion, on the same footing as her own chapels of ease, such of the Seceding ministers and their congregations as might be willing to return; sustaining their ordination, and leaving their congregations to provide for them as they do at present?" It never, however, seems once to have crossed his imagination, that the course since adopted by the General Assembly was within its legal competency of at once admitting Seceders to the full *status* of parochial ministers, and assigning to them districts as parishes, either *quoad sacra* or under any other description.

When the uniform mode of establishing chapels of ease in connexion with the Church, without any attempt having been made, for so long a period, to admit their ministers to the situation and privileges of parochial incumbents, or to assign to them sessions and territorial districts, is attended to, it may certainly be viewed as affording a strong interpretation of the existing law of the Church. Moreover, when legal institutional writers, as well as those acknowledged authorities who treat of the laws of the Church, are equally silent as to the existence of any power in the Church to incorporate these chapels with its establishment, and to declare their ministers constituent members of Presbytery, its sudden assumption, by a declaratory act of the Assembly, cannot but be viewed as a most unwarranted novelty, resorted to contemporaneously with other equally extraordinary assertions of power by the Church.

For, when it was, at any time before that period, deemed expedient, that an existing chapel of ease should be converted into an additional parochial church, a new parish erected, and its minister constituted a member of the Presbytery of the bounds, I must refer—as evidence of the clear understanding of the Church and its learned Procurator, of what was the proper course of procedure to be adopted, to the proceedings which occurred in a case in the year in which I first became a judge. A chapel of ease had existed for a long period in the town of Kilmarnock, situated within this very Presbytery of Irvine, when, in 1811, its managers and proprietors instituted a regular action before the Court of Teinds, calling as defenders the patron and heritors of the parish, the magistrates of the town of Kilmarnock, the two ministers of the parish, and the moderator of the Presbytery. The summons, founding on the Acts 1690 and 1707, as to the powers of the Court of Teinds, and narrating the increased population of the parish of Kilmarnock, the insufficiency of its parish church for the accommodation of its inhabitants, and the building of a chapel of ease to remedy that inconvenience, but stating that, "from the continued increase of population, it has become highly expedient and necessary, and will tend to the success of the Gospel, and the accommodation and comfort of the inhabitants of that part of the town in which the said chapel of ease is situated, that the north parts of the town, as after described, be disjoined therefrom, and erected into a new parish;" and, after setting forth an arrangement with the magistrates as to a bond for securing a stipend of £200 a-year, with allowance for communion elements, and the consents that had been granted to the disjunction and erection by the patron, heritors, and ministers of the parish, (it being, however, specially provided that no burden as to the stipend, or building, or maintenance of the church, should be imposed on them,) and the recommendation of the Presbytery of Irvine, the summons concluded, that certain parts of the town should be disjoined and erected into a new and separate parish and pastoral charge, to be called in all time coming "the High Kirk of Kilmarnock,"

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[1] Brief Account, p. 90.

and that the chapel of ease should be the church of the said parish, and that the inhabitants of the bounds set forth should repair to the said church for the hearing of the word of God, and the receiving of the sacrament, and all other acts of public divine worship; subject themselves to the ministers thereof, as their proper pastors and parish ministers; "and that the minister of the said church, when established, shall be received, held, and considered in all respects as a member of the Presbytery of Irvine from and after his settlement in the said church."

The summons contained further conclusions as to the choice of managers, who were to have the patronage of the church secured to them, and as to other matters, to which it is unnecessary to advert. After certain procedure, and a minute having been put in on the part of the patron and heritors, and production of the bond for the stipend, the Court of Teinds, on the 19th June 1811, granted decree in terms of the conclusions of the summons.

I have adverted thus minutely to the circumstances of this judicial proceeding as important evidence in showing what truly, at its date, was considered to be the proper and legal course of procedure under the circumstances that then occurred, and which might justly be predicated in regard to any other chapels of ease which it was desirable should be erected into parishes; for it will here be observed, that though no encroachment was to be made on the rights of the heritors of the existing parish, so as in any way to affect the teinds, or infer any obligation on their part as to the support of the fabric of the Church, or to produce any alteration as to liabilities for the poor in regard to the part of the town and parish disjoined, and erected into a new one, (the patronage of the new erection remaining with those that had endowed it,) yet, to accomplish the laudable object that was in view, the consent of the patron and heritors being spontaneously afforded, the authority of the Court of Teinds, acting under its statutory powers, was deemed indispensable to accomplish the erection of the new parish and church, and the reception of its minister "in all respects as a member of the Presbytery." There can be little doubt that all this proceeded with the full knowledge and assent of the Church at large, as it appears that a regular mandate was produced in process from the two ministers of Kilmarnock, authorizing the Procurator, the legal adviser of the Church, to appear and consent for them. The reverend members of this Presbytery at that time never dreamt of their possessing the power now asserted by their successors, or that it existed in the General Assembly, for their resolution of the 24th April 1810, as set forth in the summons, expressly bore, that "*being of opinion that the measure proposed would be favourable to the interests of religion in general, and greatly for the accommodation and comfort of the district therein described, did unanimously approve of the same, and earnestly recommended the proposal of such erection to the said Lords Commissioners.*" It would have been well, indeed, had the majority of their successors proceeded with the same propriety and caution, in regard to their attempted erection of the new church and parish of Stewarton.

Having stated my views so fully as to the illegality of the two first Acts of the General Assembly that have been founded on in this case, I do not consider it necessary to enter at any length into an examination of the two other acts as to the reunion with Seceders, and the erection of the new or *quoad sacra* churches and parishes. The exercise of the powers assumed by the Church in its legislative capacity, in regard to these and their other enactments of a similar nature, appears to me very clearly to be altogether *ultra vires* of the Church, and to rest upon no foundation in the statutes that were passed for its establishment and regulation. That relative to a reunion with Seceders, under the peculiar reservation permitted in it as to ministers having right "to correct in a lawful manner what may appear to them to be faulty in its constitution," seems truly of a very extraordinary nature, and capable of a most dangerous latitude of construction. Had a power of such immeasurable extent as is claimed by these legislative acts, and directly operating such important effects upon the civil as well as ecclesiastical interests of the whole people of Scotland, been intended to be vested in the Church, or held as comprehended within its constitutional powers, it is altogether impossible for me to conceive, that it should totally have escaped the notice of the legislature in any one of its acts.

It may further be observed, that the statutes establishing the fund for the benefit of the widows and children of the ministers of the Church, afford an additional argument against the supposed power of the Church to increase their number at its own pleasure. Had this power been conceived for one moment to exist, no doubt can be entertained that the members of the Church, learned and zealous as to its rights, who framed that

scheme, would have carefully provided that every additional minister appointed by the Church, and as such entitled to enjoy the other rights and privileges of a parochial minister, should, on admission, be held bound to contribute to the fund, and of course entitled to its advantages, it being a matter of essential importance, and in fact the true object of the measure, that the families of all the regular ministers of the Establishment should be shielded from want as far as possible. The statutes establishing the Widows' Fund, however, afford not the slightest countenance to such an idea; and it has already been noticed, that it has been solemnly determined that even the ministers of the Parliamentary churches, aided as they were by public endowments, and by the Act of the General Assembly, are not in law entitled to the benefit of that fund.

While the constitutional legality of the whole of the four legislative acts, which have been founded on as sustaining the proceedings complained of in this case, has been put in issue by the respondents, it has not been shown to be supported by any one of the statutes on which the establishment of the Church truly rests. It has, on the contrary, been proved by a reference to the various Parliamentary Commissions relative to the Church, the whole powers and duties of which were afterwards centred in the permanent Court of Teinds, that the legislature has expressly provided for the accomplishment of all those objects which the Church professes to have had in view by their legislative acts; and, as the legislature has hitherto withheld from the Church the power to which it lays claim, no good reason can be assigned for its now being invested with it by its own act.

It remains, then, to consider whether this power, asserted by the Church as part of its supreme ecclesiastical jurisdiction, has been sanctioned by the authority of usage or practice. Keeping in view that usage or practice, in order to be effectual in support of any claim or right, ought either to be uniform, or such as may fairly be considered as general, I certainly consider that a reference to usage has seldom been rested on more slender grounds than in the present case, or in any one where the alleged usage is more contradicted by the declarations and conduct of the body itself that appeals to it. It is certainly of importance to ascertain whether there is any foundation for holding that the Church or its judicatories had exercised the power of erecting parishes, and admitting their pastors as parochial ministers, even where there was no call for such pecuniary aid for their support as encroached on the interests of patrons or titulars; and whether any such erections had taken place previous to the first Teind Commission. Upon that point valuable evidence is afforded by the account given by Calderwood of the proceedings of the General Assembly in 1600, and in which he is confirmed by the Book of the Kirk, which states that "the question was proponit to the haill Assemblie, where congregations are so spacious, that a great part thereof may not commodiously resort to their own paroch kirk, be reason of the great distance of their habitation therefra, If it be lawfull to ane member of the said congregation to big ane new kirk, and entertain a pastor at the same upon their awn expences? The Assembly, after long reasoning, thought it lawful and expedient, and declares they would assist the same as a godly work, and crave the same to be ratified in Parliament so oft as it shall occur." I certainly agree with those who hold it to be impossible to conceive, that any more explicit declaration could be given by the Assembly upon any point, than what is contained in this resolution. While that venerable body thought that which was desired to be in itself lawful, it asserted no right or power whatever in itself to carry it into effect, but merely declared it would assist in it as a godly work, and crave the same to be ratified in Parliament so oft as it should occur. Here, then, we have the most explicit disclamation, on the part of the supreme judicatory of the Church, of that power which it is now asserted it had uniformly possessed, and which is endeavoured to be rested on continued usage.

It is very far from my intention to comment upon the various cases which have been founded upon on both sides, as to the proceedings of the Church and its judicatories since the date of the above explicit resolution in 1600, as any thing that I could state would only tend to weaken what has been so satisfactorily explained and illustrated by Lord Medwyn; and particularly as to the cases of Prestonpans, Port-on-Craig, and Denny, I certainly can find nothing leading to the conclusion that there is any thing like sufficient evidence of the Church judicatories having been in the practice of doing that, which I consider was only commenced in 1833. For it has always appeared to me a most material circumstance in this case, that the denomination of parishes ecclesiastical or *quoad sacra* lately adopted by the Church, is in reality altogether a novelty in the nomenclature of ecclesiastical law. It is, no doubt, well-known that there have

existed, for a long period of time, annexations of particular districts of one parish to another *quoad sacra*, as to the civil effects of which no doubts exist, when the matter is truly considered. But no institutional writer has pointed out or described the nature of a *quoad sacra* minister or parish, such as is now delineated by the Church. Mr Erskine's words on the subject of these annexations are as follow:—"It sometimes happens that lands, where they lie at too great a distance from the church to which they originally belonged, are, by the Commission court, annexed *quoad sacra* to another parish, the church whereof lies at a lesser distance from these lands. By annexing *quoad sacra* is understood, that the inhabitants of the annexed lands are, for their greater conveniency in attending divine service, brought under the pastoral care of the minister of the church to which they are annexed. But such annexation affects only the inhabitants; the lands continue in all civil respects part of the old parish, and therefore they remain burdened with the payment of the stipend to that church from which the inhabitants were disjoined; and it was adjudged that the owners of those lands do not, by the annexation, become liable in any part of the expense necessary for upholding the manse, or even the church of the parish to which they are annexed, and which the inhabitants constantly resort to for divine service; but that they continue, even in that respect, to be accounted part of the old parish."[1]

Although quite precise as to the effects of these annexations, made by the Commission, however, and not by the Church as he states, (although it is possible they may, in some cases, have taken place by the authority of the Church alone,) this learned author does not afford the slightest hint of there being any thing known, either to the law or the Church, such as a parish *quod sacra;* and therefore that new institution in the Church owes its existence only to proceedings of no earlier a date than 1833. But, when we recollect the different acts that were passed by the General Assembly, commencing in that year, and conferring the *status* of parochial ministers not only on those of the Parliamentary churches, but on the whole body of ministers of chapels of ease, of all the newly built churches, and of such bodies of Associate Seceders as might rejoin the Church, with districts allotted to all of them, to form *quoad sacra* parishes; these extraordinary measures, following so rapidly in succession, seem too plainly to have been persevered in by the prevailing party in the General Assembly for the purpose of swelling their majority, and supporting their attempt to fetter the rights of the patrons of Scotland by that act, which they had placed upon their statute-book, but which has since been solemnly adjudicated to have been *ultra vires* of the Church, and directly contrary to law.

The few instances that have been referred to, as showing that the Church had erected parishes and admitted ministers of its own authority, in districts not connected with towns, appear, when thoroughly examined, to afford little or no authority in support of the views of the respondents, they having very frequently been soon followed by ratifications by Parliament; a proceeding quite conformable with the declared opinion of the Assembly of 1600. Other instances, again, have been found to have existed as old parishes, prior to their supposed erection by the authority of the Church. The power, however, assumed in 1833, of erecting *quoad sacra* parishes, had, if it truly ever existed, been altogether in abeyance for more than two centuries, though the growing wants of the country for church accommodation had been continually increasing during a great part of that period.

The practice which has been referred to, as to the reception of second ministers in royal burghs and towns, appears to me to be of very little importance in the case, arranged as the matter frequently was between the inhabitants and the magistrates, as the holders of grants, of teinds, and chaplainries, and the consent of all parties; and these ministers being at first received in some cases only as helpers, though afterwards admitted as members of Presbytery, and their continuance there acquiesced in without further challenge. The reception, however, of these second ministers in towns, be it observed, led to the erection of no new parishes, nor the formation of new kirk-sessions, as was the case of the third minister of Stirling, who had many years ago been so returned; and, after having been laid aside for many years, his place was again filled up in 1817, and has since been sanctioned by the Court in 1836. The practice, again, followed in Edinburgh, of appointing collegiate ministers, and of admitting others to newly built churches, sometimes under the authority of the Magistrates and Council, and at

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[1] Inst. 2, 10, p. 64.

other times under special Acts of Parliament, as fully detailed by Sir John Connel, cannot justly be held as establishing what is contended for by the respondents.

The opinion of President Blair, which has been so much relied on, applies, however, only to the appointment of a collegiate minister to St Andrew's Church, and not at all to the general question as to the powers of the Church to erect new parishes throughout the country at its own pleasure; while it must, at the same time, be kept distinctly in view, that the appointment to the collegiate charge in question, had been fully arranged with the magistrates, and consented to by all parties concerned. We have not, however, seen the memorial on which his opinion proceeded, nor whether the procedure which had taken place in regard to a church in the city of Glasgow, no longer before than the year 1782, had been brought under notice. In that case, however, so far from resting upon the power of the Presbytery of Glasgow, or Church at large, to authorize the erection of the new church and parish of St Enoch, a regular process was instituted before the Court of Teinds, the summons in which sets forth, in express terms, "*that the said kirk cannot be properly established, and the minister who shall serve the cure thereat cannot be entitled to the privileges of members of the Church of Scotland; nor can the said right of patronage be properly secured, unless the authority of the Teind Court shall be interponed to the proceedings.*" The very same procedure, we are assured, was again followed in 1818, when the church of St John in Glasgow, was erected by the authority of the same Court, the first minister of which, it appears, was the Rev. Dr Chalmers himself. These examples are sufficient to show, that both before and after the case of St Andrew's Church of Edinburgh, the procedure of a process before the Teind Court, in regard to the erection of a city church and parish, was held to be that which it was proper to follow.

The practice also, in other towns, of resorting to the Teind Court for the erection of the various churches and parishes enumerated by the suspenders in their case, such as Gorbals, Newton-on-Ayr, Perth, and Dundee, as well as that of Kilmarnock in 1811, already noticed, shows the thorough understanding, not only of the parties concerned, but of the lawyers consulted, and the Church itself, as to what was the legal constitutional course to be adopted, in regard to the erection of new churches and parishes in cases, even where there was to be no interference whatever with the teinds of any existing parish, or the legal consent of landward heritors required.

The respondents, in addition to all their other arguments, however, lay great stress on the alleged legislative recognition of the power asserted by the Church, in two statutes recently passed,[1] the first entitled an "Act to regulate the appointment of ministers to churches in Scotland erected by voluntary contribution," dated 30th July 1834 —the other[2] entitled an "Act to facilitate the foundation and endowment of additional schools in Scotland," passed on 10th August 1838. The very titles of these acts are of themselves sufficient to show, that they were passed for purposes totally different from any recognition or ratification of any recent acts or proceedings of the Church. The object of the first was merely to enact, that the right of patronage of the newly erected churches, referred to in its first section, recited in the pursuers' case, p. 77, should not pass to the patrons of parishes within which they had been built, as had been found as to the second minister of Haddington long ago; but that the appointment of ministers to the churches and parishes erected shall be made in the manner and according to the conditions prescribed by the Church courts. The reference made to the mode of their erection, whether "merely *quoad spiritualia* by the authority of the Church courts of the Established Church of Scotland, or also *quoad temporalia* by authority of the Lords of Council and Session, as Commissioners of Teinds," cannot therefore be held as a legislative recognition of the legality of the proceedings of either of these courts, as the statute itself has reference only to endowed churches built and erected "according to the provisions of the existing law," and containing also an express declaration, that nothing herein contained shall be construed to limit or affect the power of the Commissioners of Teinds, exercised under the provisions of the act of the Scottish Parliament." It seems, then, very obvious that, unless it can be shown that, at the commencement of their proceedings, the Church courts possessed, according to the provisions of the existing law, the power of erecting churches and parishes *quoad sacra*, it is not by the statute in question that that power can be held to have been either conferred or confirmed.

The respondents have further stated, that "the necessity of judicial authority is, in

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[1] 4th and 5th Will. IV. c. 41. [2] 1st and 2d Vict. c. 87.

truth, superseded by the subsequent legislative authority to the legal efficacy of the Act of Assembly 1838. This was interponed in the statute 1st and 2d Victoria, c. 87, not by way of supplying any defect of power in the Assembly, but of acknowledging the sufficiency of their enactment." It is only necessary, however, to attend to the terms of the statute in question, in order to be satisfied that the above statement proceeds on an erroneous view of it. It is entitled, as already observed, "An Act to facilitate the foundation and endowment of additional schools in Scotland;" and, after founding in its preamble upon three acts, namely, the Scottish Act 1696, c. 26, for settling of schools, the Act 43 George III. c. 54, "for making better provision for the parochial schoolmasters," &c., and the Act 5 George IV. c. 90, entitled, "An Act to amend an Act for building additional places of worship in the Highlands and Islands of Scotland," and proceeding thus:—"And whereas, *under the said recited act*, a number of places of worship have been built in the Highlands and Islands aforesaid, and the parishes in which such additional places of worship have been built have been divided and disunited *quoad sacra;* and whereas the parish schools, and other means of education existing in the Highlands and Islands aforesaid, are wholly inadequate to the education of the people, and some places are altogether destitute of such schools, or other means of instruction, and it is desirable that provision should be made against so great an evil;" it then enacts, that provision shall be made by the Lords of the Treasury for the endowment of additional schools in such parts of such divided parishes aforesaid as they shall deem proper. The third section commences its enactment with these words:—"That in all parishes which shall have been divided *quoad sacra* under the said last recited act, if in that district or division of any such parish in which there shall be no school, or not an adequate number of schools, or in which there being a school or schools, but no endowment, or no sufficient or permanent endowment for the schoolmaster or schoolmasters of the same;" and then goes on to direct that the heritors shall provide an adequate schoolhouse and schoolmaster's dwelling house for such parish or district, and that when completed, a sum, not exceeding the maximum provided by the Act 43d Geo. III., shall be paid to the schoolmaster, under the authority of the Lords Commissioners of the Treasury, out of the funds appropriated by the act.

It is unnecessary to refer to more of this statute, its object manifestly being to provide for the endowment of schools in those districts of the Highlands and Islands where additional places of worship had been built and endowed under the Act 5 Geo. IV., which is expressly founded on in its preamble. In referring to that statute, the act now founded on, no doubt states, that the parishes in which those additional churches had been built had, "under the said last recited act"—(namely, the 5th Geo. IV.)—"been divided and disunited *quoad sacra;*" while it is totally silent as to any such division or disunion having been effected by any act or proceeding of the Church or General Assembly, there not being within its four corners the slightest allusion to any such exercise of power regarding *quoad sacra* churches and parishes. How this act should have borne that the parishes referred to had been so divided or disunited, it seems difficult to comprehend; because the 5th Geo. IV., from beginning to end, does not contain one syllable with regard to *quoad sacra* parishes, but merely directs, as has already been seen, a certain district to be set apart, by an arrangement between the heritors and Presbytery, for the additional place of worship directed to be provided, and under the express limitation already noticed—"regard always being had to the consideration, that the district set apart for the duties of such minister, appointed as aforesaid, is not disjoined from the parish or parishes to which it belongs, or erected into a separate parish," &c. There is, in fact, therefore, no real foundation for the assertion in the preamble of this act, as no such division as there stated ever was, or could be, made under 5 Geo. IV., but had solely been attempted by the Act of the General Assembly 1833, admitting the ministers of the additional places of worship, endowed by that act, as members of the Church judicatories, and declaring their districts to be parishes *quoad sacra*.

It is quite impossible, then, to hold, that what is contained in this act of her present Majesty amounts either to a ratification or declaration of the legality of any such division or disunion, though its enactments, in providing for the endowment of schools and schoolmasters in the districts in question, will stand effectual, as having conferred a most important benefit upon the country.

While holding that the matters complained of in the present case must undoubtedly be determined only according to the principles of the law of Scotland, and that it is utterly extravagant to hold that, because the Church chooses to view it as one altogether of an ecclesiastical nature, and falling exclusively within its proper jurisdiction,

it is not, in fact, competent for this Court to pronounce any decision upon it, it has always, however, appeared to me to be of great importance to ascertain, whether the power now laid claim to by the Church has, during its past history, really been held as pertaining to it by the body of the Church itself, the eminent men who have treated of its constitution, or those who, from time to time, have adorned it by their wisdom and learning, and been possessed of its confidence as its guides and leaders. We have seen the opinion of the Church, recorded as far back as 1600, while the whole stream of its proceedings, from that period downwards, may fairly be said to have run in consonance with that opinion, any few instances of any apparently opposite character being, in truth, altogether insufficient for the constitution of a contrary usage. We have seen, again, the proceedings of that tribunal which was established by Parliament after the cessation of former statutory commissions, for the express purpose of accomplishing what the Church affirms is the sole object of the exercise of the power it lays claim to, thereby demonstrating that the legislature had provided what it deemed to be the constitutional remedy for any evils that might arise. And, lastly, we have seen that, till 1833, no one vestige occurs, with the exception of an abortive endeavour in 1821, to be immediately noticed, of any attempt to create that before unheard of anomaly, denominated a parish *quoad sacra;* and which no man can pretend to deny, is directly adverse to every thing previously known in the parochial system of Scotland.

When we look again to those accounts which have been published of the constitution of the Church of Scotland for the guidance of its members, as well as the people at large, there appears a total absence of any statement, that the Church possessed any power of erecting by its own authority parishes *quoad sacra*, any more than parishes *quoad civilia*. Principal Hill, in his treatise, which has been already referred to, has the following passage:[1]— "The number of parishes which may compose a Presbytery is indefinite. In some of the populous districts of Scotland there are thirty ministers in a Presbytery: in some remote situations, where a few parishes cover a great district, not more than four. As the General Assembly has the power of disjoining and erecting Presbyteries at its pleasure, their bounds can easily be altered, or their number increased, according to the change of circumstances. At present, there are seventy-eight Presbyteries in the Church of Scotland. A Presbytery consists of the ministers of all the parishes within the bounds of that district, of the Professors of Divinity, if they be ministers, in any university that is situate within these bounds, and of representatives from the kirk-sessions in the district." No indication can here be discovered of the existence of any power in the Church to erect parishes and augment the number of the clerical members of Presbytery, the only description given of which being that of the ministers of parishes and Professors of Divinity. The existence of such a power, had it belonged to the Church, could not possibly, however, have been unknown to the reverend author of this treatise on its constitution, who had himself been so long a parochial minister, as well as the acknowledged and distinguished leader of the General Assembly. His authority, therefore, may be considered as decisively hostile to the pleas of the respondents.

I have already had occasion to refer to the opinion of another venerable aud most eminent authority contained in his "Account of the Constitution of the Established Church of Scotland," by the late Sir Henry Moncreiff, Bart., with regard to the mode in which the reception of Seceders into her communion might be effected, namely, on the same footing as her own chapels of ease. This passage may, in my judgment, be held as fairly indicative not only of the author's opinion having been in no way unfavourable to the continued existence of chapels of ease as a part of the Establishment, which he then saw flourishing under the standing law of the Church, enacted, as has been seen, exactly twenty years before; but that it had never occurred to him in 1818, when he published that work, and after he had been nearly fifty years himself a most exemplary parochial minister, that it was a competent or legal proceeding for the Church to admit, *per saltum*, the ministers of Seceding congregations to the full *status* of parochial ministers, and erect for them parishes *quoad sacra*.

We have now, however, further proof of the most decisive and unequivocal nature, that the above sentiments of that venerable person had not been hastily entertained, but have been stated as his deliberate and fixed opinion of the true nature of the constitution of the Church; and desirous as a Judge to be informed as correctly as I can, as to what is the genuine constitution of the Church, I cannot but feel the weight that is due

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[1] P. 214.

to so lucid a statement of it. For by the recent production of the reasons of dissent, which Sir Henry Moncreiff felt himself compelled to enter against the decision in 1821 of the Presbytery of Edinburgh, which, by a majority of only one voice, on the application of the governors of Heriot's Hospital, had resolved to erect by its own authority a parish *quoad sacra*, we have the grounds of his opposition stated in terms the most succinct, forcible, and complete that can be conceived. The motion of the Rev. Baronet, which preceded that dissent was, "That the Presbytery should find it inexpedient *and incompetent for them, as a Presbytery*, to grant the prayer of the petition of the governors of Heriot's Hospital; and recommend it to them, if they shall judge it proper, to apply to the Lords of the Commission for the plantation of Kirks." It was upon this motion being lost that the reasons of dissent were given in. In addition to the other most powerful grounds of dissent now before us, against the decision of the Presbytery, and which, by the complaint of another member was to be submitted to the review of the Synod, as appears from the proceedings, what can be more decisive than the second reason expressed in the following emphatic terms:—"Because the new erection created by the Presbytery is declared in their decree to be an erection *quoad sacra* only, though it is an unquestionable fact, that down to the present time there is not one example upon record of the erection of a parish *quoad sacra tantum*, either by the Lords of plantation of Kirks, or by any Presbytery of the Church; and that though there are many examples of *annexations quoad sacra*, these cannot, as precedents, warrant the disjunction and erection of new parishes *quoad sacra tantum*, without any direct precedent or authority whatever."

When I see by whom such reasons were inserted on the records of the Presbytery, and that, though he had at first been successfully opposed by Dr Inglis, one of the most eminent men of his day, and whose views in Church questions were generally different from those of the Rev. Baronet in question, the whole project of the erection of this *quoad sacra* parish, for which decree had actually been granted by the Presbytery, was abandoned at a subsequent meeting of that body; I think it is justly to be inferred, that his reasons of dissent had been felt to be unanswerable, and therefore that the opinions and authority even of the original proposers of that measure themselves, may justly be held as ultimately unfavourable to its legality.

Independently of the testimony as to the opinion and understanding of those eminent, and now departed, authorities of the Church, to which I have thus referred, it is not, likewise, to be overlooked, that the acts now in question of the General Assembly with regard to chapels of ease—the new churches—and the reunion with Seceders, were firmly opposed when passed, and afterwards dissented from by a large and influential body of clergymen, who, in point of talents, respectability, and knowledge of its constitution, yield to none of the present leaders of the majority of the Church. And without particularizing others, I feel myself fully warranted in stating, that the venerable and talented professor of divinity in the King's College of Aberdeen, no mean authority in matters of Ecclesiastical law, has recently and publicly announced, at the Synod of Aberdeen, his firm adherence to the principles expressed in his reasons of dissent, along with others, against the legality of the Declaratory Act of 1835 with regard to the ministers of chapels of ease, to the terms of one of which I have already made reference, when adverting to that act.

I cannot conclude without noticing a view of this case which has been a good deal dwelt upon in the course of its discussion, namely, that in regard to the consequences which it is assumed must necessarily follow, from the proceedings of the General Assembly regarding *quoad sacra* parishes being found to be illegal. It seems to be taken for granted that, after all that has been done towards church extension, and making provision for the additional religious instruction of the increased population of Scotland, by the alterations made as to chapels of ease, and their erection, along with the other churches lately built by voluntary subscription, into parochial churches, with designations *quoad sacra*, their destruction would instantly follow from the acts of the Church regarding them being found to be *ultra vires* of it; and that the inhabitants of large districts—of such parishes as the Barony of Glasgow, or St Cuthbert's adjoining this city—must again be involved in total spiritual darkness, from the inability of the regular ministers of those extensive parishes to take charge of their spiritual wants. I must, however, altogether deny that any such evil would necessarily result from its being determined, that the ministers of what were formerly chapels of ease, and the newly-built churches, are not legally constituent members of the Presbyteries of their bounds; nor that any parish has yet been legally designated, or proper kirk-session appointed to

them. It would, in fact, merely follow, that all of them would just become chapels of ease in full communion with the Established Church, and having the benefit of clergymen who have been ordained by its authority, though not entitled to the full privileges of parochial ministers. Although this change, therefore, were to take immediate effect, it is manifest that the spiritual wants of the people under the charge of the above mentioned class of ministers, will remain just as carefully attended to as those of the many chapels of ease that existed prior to 1835, and over which we know that the law promulgated in 1798, had provided for the watchful superintendence of the Church. Besides, it will be observed, that there actually exist at this moment churches or chapels, lately built by subscription, for the express purpose of promoting the extension of religious instruction in the county with which I am particularly connected, that have not been erected into *quoad sacra* parishes; and yet the people of the adjoining districts are in the full enjoyment of religious instruction in communion with the Established Church.

We have already also seen how easy it is to have any such chapel of ease, or newly-built church, regularly erected into a legal parish, should it be deemed an expedient measure by those interested in it, as was exemplified in the case of Kilmarnock. It is obvious, therefore, that those who are of opinion that, in the proceedings now complained of, the Church has exceeded the bounds of its legal jurisdiction, and which must accordingly be set aside, are just as friendly to the proper application of measures for extending the blessing of religious instruction among the people of Scotland, as those who entertain contrary views of the powers of the Established Church.

Upon the grounds which I have now stated, I fear at too much length, I am decidedly of opinion that the suspenders are entitled to prevail in this process—to have the letters suspended, and the interdict consequently declared perpetual.

Lord Mackenzie.—After the opinion of your Lordship, and that of the Lord Justice-Clerk, I need say nothing respecting the facts or procedure in this case. Nor need I attempt to repeat over again exhaustively the grounds of decision. I may only say, that I concur generally in the opinion of Lord Medwyn, and the majority of the consulted Judges, and that I shall briefly notice what I chiefly rest on.

The main question, I think, comes in substance to this, whether the Presbytery (or other Church court) has power, by dividing a parish, to make a new parish *quoad sacra*, and follow that up by granting to the new parish, and its minister, the rights ecclesiastical of a separate parish and minister of the Established Church of Scotland, in relation to preaching, sacraments, discipline, and seats in the Church courts? And whether, if the Presbytery have not in law this power, and yet have illegally assumed and exercised it, we have jurisdiction to interdict such proceedings?

I. In regard to the *first* of these questions—

1. What strikes me at once as the most important consideration, is the fact, not deniable, nor denied, that from the Reformation down to the present moment, parishes (which existed anciently) have been united, separated, divided, partially joined or disjoined by Parliament, or by temporary commissions granted by Parliament, or by the perpetual Commission granted by Parliament at the Union to this Court, and that in the name, and by the authority of Parliament, or of its Commissioners, and *quoad omnia*, without restriction of, or exception from, the effect of such acts, in any respect.

I am aware of no instance where such definition of a parish or parishes was made in the name of Parliament, or its Commissioners, temporary or perpetual, jointly with that of the General Assembly of the Church, or the Synod, or the Superintendent, Bishop or Presbytery or Presbyteries, or Kirk-session or Kirk-sessions. Any of these, as well as the people and heritors of the parish or parishes, may have been applicants for, or movers of the application to Parliament, or to its Commissioners, to obtain their act to such effect, but the name or authority of none of them is joined in the legal act itself. Parliament, or its Commissioners, do never, in such acts, so far as I see, say, "We, with the concurrence of the kirk-session, superintendent, bishop or Presbytery, Synod or General Assembly:"—nor, "We, in respect that an act touching the same matter has previously been made by the kirk-session, superintendent, bishop or Presbytery, or Synod or General Assembly;"—but always proceed simply and directly in their own name, and by their own authority alone, to unite, separate, divide, or partially join or disjoin the parishes or parish. The only thing that has the appearance of being an exception to this, is the statute 1641, c. 30, appointing a Commission, which provided, "that the dividing of large parishes, and the dismembering of ane

part of the said parochins in case aforesaid, and the uniting of kirks and parochines of the qualitie above specified, be done upon the special recommendation of the Presbyteries, Synod, or General Assembly, given in in writ, and after the Commissioners have cited and heard the parishioners of both kirks thereanent, and no otherwise." But this is one of the rescinded acts—rescinded as not having been made in a legal Parliament. And at any rate, though at that time the influence of the Church was excessive, yet this statute did not give the Church courts the power to dismember or unite parishes to any effect, or make this their act to any extent, but only make it the act of the Commission, judging for itself, on a recommendation from some Church court, which is a very different thing. In the ordinary Teind Commissions, the consent of the heritors is required to the dividing of parishes; but that never made it to be imagined, that such divisions were, to any extent, the acts of the heritors. But I repeat, this act was rescinded; and it will be observed, that this particular provision of it was not repeated in the legal statutes constituting commissions for regulating parishes.

Again, no instance is produced where Parliament, or its commissioners, ever united, separated, divided, or partially joined or disjoined parishes, or a parish, *quoad civilia tantum*, or in any other way than *quoad omnia*, *i. e. sacra* as well as *civilia*, with this sole remarkable exception, that, in some cases, the Commissioners united some small parts of parishes to other parishes *quoad sacra tantum*, eminently marking the full power of the Commissioners as exercising *quasi* parliamentary power over the *sacra*, even when the *civilia* were not affected along with them.

And no instance has been produced where any such act of Parliament, or of its Commissioners, temporary or perpetual, has been resisted or complained of, as *ultra vires*, or illegal in any respect whatever. On the contrary, it appears from the appendix of Defoe's History of the Union, referred to by Lord Medwyn, that the General Assembly of the Church, at the Union, anxiously asked for the appointment of a perpetual Commission of this kind, which they obtained in the appointment of the Court of Session to act as Parliamentary Commissioners in the matter; and there is not the least appearance of their desiring to have the powers of the Commission restricted *quoad sacra*. Nor is it surprising that the power of Parliament should be exercised in this unlimited way. The very notion of defining the extent of parishes *quoad civilia tantum* is an absurdity. The primary idea of a parish is a district for the ecclesiastical duty of a pastor or minister of religion. Any authority not having power to fix that, could do nothing in defining parishes. The *civilia* of a parish were all secondary, and suited to the *sacra*. To have made acts of Parliament, or authorized commissioners to make acts, uniting or separating, or joining or disjoining partially parishes, in respect of benefices, stipends, manses, glebes, communion elements, &c., while they had no power over the limits within which the minister was to act, as such, would have been preposterous. And it plainly was never thought of by any mortal before the present agitation. This, then, is one most important point in the present question.

2. The *second* point is, that in no act of Parliament, not even a rescinded act, is there the least mention of any power in the Kirk-Session, Superintendent, Bishop, Presbytery, Synod, or General Assembly, to unite, separate, or partially join or disjoin parishes, to any effect whatever, either *quoad omnia* or *quoad sacra*. Considering what frequent mention our statute books make of parishes, and the uniting and otherwise disposing of them, this fact seems conclusive against the existence of any such power in any of these persons or bodies. If Parliament had recognized or viewed as legal the formation of parishes by the Church courts *quoad omnia*, there would have been no use for special statutes, or for the Commissioners at all. If Parliament had recognized or viewed as legal the appointment by the Church courts of districts for the religious services and duties of a minister of the Established Church and his flock, can it be doubted that Parliament would have directed the Commissioners of Teinds to provide stipends for such legally established ministers? Or that they would have given to the presbyteries the power of designing churches, glebes, and manses for them, as for other ministers? But no such thing is even pretended to have been done, or thought of. The statutes every where enact or assume, that every minister of a parish was to have a church, and a benefice—or stipend, manse, and glebe. How, then, could Parliament contemplate as legal the multiplication without limit of parish ministers, without church or benefice—or stipend, manse, or glebe? Nor is any legal authority produced stating, or any decision of a Court of law finding, that any Church court had any such power. The only decision I see on the subject

is the case of Douglas in 1627, cited by Lord Medwyn, in which it was found, "that no new parish kirk can be erected but by act of Parliament." The alleged usage of defining parishes by the Church courts vanishes under the examination of Lord Medwyn. It does not appear with certainty, that in any one instance the Church courts even pretended to unite or divide a parish permanently, to any effect or extent, except by applying to Parliament, or its Commissioners. It is needless, therefore, to remark, that if there had been a few instances of usurpation which had escaped redress, that could never have been sufficient to establish a general power of this kind.

But the chief reliance of the respondents seems to be upon an alleged universal spiritual or ecclesiastical power, acknowledged by Parliament, as divinely existing in the Kirk of Scotland, *i. e.* the office-bearers or representatives of the particular religious society, which, at the date of the statutes, bore that designation, under which power it is said the Courts of the Kirk may in Scotland do, or refuse to do, any thing whatever irresponsibly, and at their mere absolute will and pleasure, provided only they add the words *quoad sacra*, and that the things done have relation to religion, or spiritual interests.

Now, it does seem plain, that if the Parliament of Scotland acknowledged such sacred power to be in the Kirk, then, of course, the Parliament did itself thereby utterly renounce all power or control whatever in itself, *quoad sacra*. The only remaining function of Parliament, *quoad sacra*, was that of implicit obedience to its acknowledged superior, the General Assembly, or other representative of the Kirk, which was the visible representative on earth, (or at least in Scotland,) of the Divine Head of the Church. Considering the immense power of religion over mankind, its power of ruling every action of human life, nay every thought of the human heart; and considering how religion is mingled and connected with every thing man can do, or leave undone, such a concession would have been no very remote approach to a surrender of all power whatever. But I see no evidence that Parliament ever intended to make, or made, such an admission, but very clear evidence to the contrary. For it settled the religious concerns of the nation, not at all by merely acknowledging as valid the acts of the General Assembly, but by direct legislation in its own name. By such enactments Parliament prohibited and made penal, and even capital, the Popish religion—utterly excluded it from Scotland. By such enactments Parliament established the Church of Scotland as a true Church, and prohibited all other face of religion in Scotland; that is, prohibited all dissent or secession. By such enactments Parliament fixed the doctrines of this Established Church. Parliament fixes by statute the Articles of Faith, and does not leave to the Church the power of changing them. In particular, it makes denial of the Trinity, or of the authority of the Scriptures, a crime, punishable capitally by the Court of Justiciary. Nay, it enacts the whole Confession of Faith, in all points, as the true faith, and only faith tolerated in Scotland. So it fixes by statute the constitution of the Church. In particular, it prohibits by statute the licensing or ordination of any candidate who does not sign the statutory Confession of Faith, and also take the oaths to Government. It has fixed by statute all along the mode of choosing and admitting ministers, whether under the act 1567 or 1692, or the statute of King William, or that of Queen Anne. It fixes, by direct statute, the grounds of deposition of ministers. It sanctioned first Superintendents, then Presbytery, then Episcopacy, then Presbytery again, and finally Presbytery, It sanctions the General Assemblies of the Church, not, however unconditionally, or without a declared and most important right of interference by the civil magistrate in ecclesiastical affairs. "The civil magistrate may not assume to himself the administration of the word and sacraments, or the power of the keys of the kingdom of heaven; yet he hath authority, and it is his duty to take order, that unity and peace be preserved in the Church; that the truth of God be kept pure and entire; that all blasphemies and heresies be suppressed; all corruptions and abuses in worship and discipline be prevented or reformed; and all the ordinances of God duly settled, administered, and observed: For the better effecting whereof, he hath power to call Synods, to be present at them, and to provide that whatsoever is transacted in them be according to the mind of God."

Along with all these most important enactments, there must be taken the acts which declare and grant jurisdiction to the Kirk, and the articles in the Confession of Faith respecting that jurisdiction, referred to by the respondents, particularly the act 1567, "which has declarit and granted jurisdiction to the Kirk, which consists and stands in preaching of the true word of Jesus Christ, correction of manners,

and administration of the holy sacraments." I may observe, that so far from the word "granted" in that statute being nothing more than "declared," and "declared" being a mere admission of right already existing, I think it plain that the very reverse is the truth, viz. that even the word "declared" is used to enact and grant right. For in the very next sentence to that in which Parliament declares and grants jurisdiction to the Kirk, it "declares that there is nae uthir face of Kirk, nor uthir face of religion than is presently by the favour of God established within this realm; and that there be nae uther jurisdiction ecclesiastical acknowledgit within this realm uther than that which is, and shall be within the same Kirk, or than quhilk flows therefrae concerning the premisses." Now surely this prohibition of all other religion is not a mere admission of previously existing divine law; but a positive statute, establishing intolerance of all but the established religion, and yet this is effected by the use of the word "declared." It is, however, more important to observe, that taking this statute along with the various enactments establishing the Church, it seems to me utterly vain, and even extravagant, to attempt putting upon it the wide and exclusive interpretation attempted by the respondents, as if it admitted the divine right of the Kirk, or granted to the Kirk exclusively, not only the preaching of the true word, or the administration of the sacraments, or the ecclesiastical correction of manners, but all jurisdiction, and all legislation which related to these things. If all legislation and jurisdiction relating to these things was by God alone, or by Parliament, acknowledging the supreme law of God, granted to be in the Church, what became of all the statutes under the authority of Parliament itself, fixing the doctrines, duties, constitution, and establishment of the Church? It seems to me manifest, that the interpretation of Lord Medwyn is the true one, and that the function of the Church, though agreeably to Scripture, was granted by Parliament; and though not absolutely limited to the right of preaching, administering sacraments, and enforcing religious discipline, but admitting, as is indeed expressed in the Confession of Faith 1690, the setting down of "rules and directions for the better ordering of public worship of God, and government of his Church," yet never for a moment was contemplated as setting the General Assembly above, or in place of Parliament, or as extending further than was necessary in matters not settled by Parliament, but left to the Church to regulate for itself.

And if once we reject the plea of a universal and exclusive divine right of jurisdiction and legislation by the Kirk, in ecclesiastical affairs, and hold the authority granted to the Church to have been granted under such reasonable limitations, there never can remain a doubt that Parliament, having all along fully provided for the defining of parishes *quoad omnia* by its own acts, and its appointment of commissioners, and never having given expression to any grant of such power to the Kirk, the Kirk can legally possess no such power, either wholly or partially. Indeed it seems quite certain, that the very idea of making parishes *quoad sacra tantum* had never occurred at all to the Scotch Parliament, and never to the Scotch Church, until very recently;—that it is completely contrary to the whole system and spirit of our ecclesiastical constitution, and has been founded on a new notion, that the Established Church of Scotland is an independent sect, with whose religious affairs Parliament never had, or pretended any right to interfere at all; though it happened that the State has made to this sect a free unqualified donation of certain civil rights and privileges; a notion which to the founders of the Kirk of Scotland seems to have been unknown, and which never for one instant was adopted by Parliament. I may here again observe, that in truth the power of uniting, separating, dividing, or partially joining and disjoining parishes *quoad sacra*, could not possibly exist in the Presbyteries, or other Church courts, while the general disposal of parishes was vested in the Parliamentary Commissioners. Inconsistency and confusion must inevitably have arisen from such a conjunction. If such double power existed, when the Teind Commission had settled a parish, and fixed, by their act, directly or consequently, the stipend, church, manse and glebe, in reference to the size and population of the parish they had defined; then the Presbytery might next week disjoin one third, or a half, or nine tenths, or indeed the whole of it *quoad sacra*; and in a week after, the Teind Commission might rejoin it *quoad omnia*. Or if the Teind Commission, with consent of the heritors, divided a parish into two, and ordered two churches, manses, glebes, and stipends, and ministers, the Presbytery might immediately unite them again *quoad sacra*, and leave one of the ministers to enjoy his living in absolute idleness. It is quite impossible to suppose that our law has all along admitted a system so preposterous; and that it should have admitted it without any statutory arrangement whatever, for preventing its bad effects, is inconceivable.

It seems to me that the very fact, that the Teind Commissioners always had a full power of defining parishes, *quoad omnia*, is conclusive against the Presbytery having the power of defining them either *quoad omnia* or *quoad sacra*.

On the merits, therefore, I have no doubt that the attempt by the Presbytery in this case to constitute a parish is *ultra vires*.

II. There remains the question of jurisdiction; and on that point I cannot help thinking, that the statute constituting this Court the commission for fixing the limits of parishes *quoad omnia* excludes all doubt in this case.

That statute, 1707, c. 9, appoints the Lords of Council and Session "to judge, cognosce, and determine in all affairs and causes whatsoever, which by the laws and acts of Parliament of this kingdom, were formerly referred to, and did pertain and belong to the jurisdiction and cognizance of the Commissioners formerly appointed for that effect, as fully and freely in all respects as the said Lords do, or may do in other civil causes;" and it particularly specifies "to disjoin too large parishes, to erect and build new churches, as they shall think fit,"—with the provision, however, "that the disjoining of too large parishes shall be with the consent of the heritors of three parts of four of the valuation of the parish." Now, if this give to us, and to us alone, as I think it plainly does, the right and duty of dividing and limiting parishes, to be exercised in the same way as the rest of our civil jurisdiction, are we, as the Supreme Civil Court under Parliament, not bound to maintain this jurisdiction, when action is brought before us by parties interested in maintaining it? Can we, when so called on, refuse to act, and allow the Presbyteries to seat themselves on the bench of the Teind Court, or exercise its functions by an act (it would now be called, I imagine,) of *Non-intrusion?* And if we are not to allow them to usurp the whole function of that Court, why to usurp part of it without remedy? I understand very well how, in that which *is* within the statutory jurisdiction of the Church, their judgments may be final and exclusive. But in matter *not* within their jurisdiction at all, and which does belong to our jurisdiction, I cannot comprehend how they can have any such privilege. And that is enough for our guidance in this case, just as it is in the case of any other litigant, who does what he has no right or competency to do.

It is, however, attempted to be maintained in argument before us, that we have only jurisdiction in civil matters, not ecclesiastical; and that, therefore, we cannot judge in this question. But what are the ecclesiastical matters in which we are excluded? Those only, I apprehend, that are by statute committed exclusively to the Church. In regard to matters not so committed, they are not ecclesiastical, in that sense. Nor are we excluded more than if the Church had never any exclusive jurisdiction given to it at all. To say, that there is a department in which the Church has no jurisdiction, and in which, nevertheless, the ordinary supreme and general civil and criminal courts of the land are excluded, because they are not ecclesiastical courts, seems to me quite unwarranted. There is no extent of neutral territory lying between the Civil courts and the Courts of the Church, from which both, and particularly the Civil courts, are excluded, by the limited terms of their constitution. If any thing be made out to be appropriated to the Church courts, the Courts of Session, Exchequer, and Justiciary may be excluded; but if any thing cannot be shown to be appropriated to the Church courts, it must, I think, fall within the general jurisdiction of these courts, civil or criminal.

It is really needless, however, to enter into that more general consideration; for, can it be doubted, that, as the general civil court, we have jurisdiction to defend from usurpation the function which Parliament has committed exclusively to ourselves, to be exercised by us, like the rest of our civil jurisdiction?—that function, which was first exercised by Parliament itself, when there were no clergy in it, then by Commissioners of Parliament—not clergy—and, lastly, is granted to ourselves—is the adjudication, in a competition for this right, so purely spiritual under the statutes, that we cannot judge on it? That certainly does seem to me a very strong proposition.

But it is said, that as we have no power to review the proceedings of the Presbytery, or any ecclesiastical court, when they are acting within their own powers, so we have no right to judge whether the Presbytery, or any ecclesiastical court, has exceeded its powers or not, but are bound to hold that every act done by them is right, just as we do hold all their acts to be right, when done within the limits of their own legal powers. It is said, that if they exceed their powers, Parliament may restrain them, but we cannot. In this respect, it is said they are in *pari casu* with the courts of Exchequer and Justiciary. Now, I cannot admit that this doctrine, if

pushed far, would be found to hold good, even in regard to these courts, especially if it could be supposed that they usurped our functions. Their judgments are liable to review, by appeal from the Courts of Session and Exchequer, and by pardon in case of conviction in the Justiciary. I need scarce observe, that, in case of absolvitor, a sentence *ultra vires* is of itself a mere nihility. Nor could such be given except against a pursuer, who himself had brought the action into the incompetent court. These things are sufficient to prevent the necessity of any interference by one of these courts with the proceedings of another, even though out of its province. Further, the Judges of these courts do not exceed their jurisdiction, or usurp ours. They are, like this Court, merely judicial bodies, determining, on actions brought, the interests of others. And the judges of these courts are all removeable in a mode pointed out by the constitution. They never could, or did, pretend to be any thing but the mere servants of the State, *i. e.* of King and Parliament. But the Church is a body of quite a different kind. It has always pretended to certain powers by divine right, subject, within its province, to no human control. It claims, and with modification enjoys, a *quasi* oligarchic constitution; its office-bearers being appointed not without its concurrence, and removeable by itself; and it has always struggled to get this power entirely into its own hands, excluding the State altogether. It is not a merely judicial power, determining the interests of others, but always studying and urging its own. Look at the present state of the Church. Is the General Assembly altogether like an ordinary court of justice, deciding between litigants, whom it regards with indifference, and judging of its own jurisdiction with equal indifference? When I ask this question, I am not censuring the Assembly at all. I am only doubting their similarity to a mere court of justice. It is, therefore, a very serious question, whether Parliament, granting to such a body, among other privileges, an exclusive and uncontrolled power in certain things—powers of acting, judging, and regulating—must be held to have also given to it, by a false analogy with the ordinary courts of justice, an exclusive and uncontrolled power of determining the extent of its own authority; and so of exercising, without control, whatever power it pleases to assume. It seems manifest, that the one may be perfectly safe and expedient, while the other is dangerous, or plainly inconsistent with any thing like liberty or good government. And where is the authority for holding, that the Parliament of Scotland—either in the time of James, who feared much more than he loved the Kirk, or William, who was jealous of it—intended to make so perilous a concession? Does statute say so? Not a syllable to that effect. Nothing of the kind in the statutory Confessions of Faith, or anywhere else in the statute-book, or in any decision or authority in law. What sufficient grounds, then, have we for holding that Parliament, which has no other means provided for holding this formidable claimant within the bounds of what was granted to it, abandoned the means of maintaining the limits of its grant by its only effective servants, the courts of justice? What sufficient grounds for holding that Parliament intended to bind these courts, to leave their own provinces undefended, if the Church, by the excess of its powers, should invade them? I see no such grounds. I do not believe, that either James or William, or the Parliament of either, would have passed an act which they understood was to produce such an effect. I cannot hold, therefore, that if the Church courts exceed their powers, the Civil and Criminal courts are precluded from restraining them. If, under the name of examination and admission of a minister, or under pretence of using their own legal power of suspending or deposing ministers, a Presbytery makes an attack upon the civil right of patronage; if, under the name of preaching the word, a minister were to utter, or a Presbytery order to be uttered, treason, sedition, or calumny; or were, under pretence of discipline, to compel payment of teinds (as spirituality) to the minister—or adopt any similar excess or abuse, I think the courts of justice would be neither excluded from, nor at liberty, if called on, to refuse affording redress. I do not think the injured party would have to wait for a new Act of Parliament as his remedy. And so, in the present case, most eminently, where, under the alleged power of legal regulation of preaching, and the administration of the sacraments and discipline, the Presbytery is usurping the office of this Court, in dividing parishes, I think we are not at all warranted to refuse redress to parties injured by such usurpation. On this last point, however, I am sensible I need scarcely have said any thing, after the decisions of this Court and the House of Lords in the cases of Auchterarder and others.

There are some other grounds of judgment, noticed by Lord Meadowbank, which seem well worthy of attention. But I do not feel it necessary to rest on these specialties; nor have I any thing to say on them not said already.

LORD FULLERTON.—Following the example of your Lordships, I shall, in delivering my opinion in this case, abstain from entering into the details of the procedure of the Presbytery of Irvine, which led to this litigation; and shall confine myself to the consideration of the principles, on which the legality of that procedure is assailed, on the one side, and defended on the other.

The question raised in this suspension, may be described in the most general terms, as this; whether the acts of the Presbytery of Irvine, done in compliance with the directions of the General Assembly, are beyond the powers of the Church, and are an infringement of the civil rights of the suspenders. The affirmative is maintained by the suspenders, and is rested on the following circumstances, said to be involved in those measures, 1st, the change on the parochial constitution of the parish of Stewarton, to which they respectively belong as patron and heritors: and 2dly, the change on the constitution of the Presbytery of Irvine, by the admission of a new member; that court having, as it is said, a jurisdiction affecting, in some particulars, certain civil rights of the suspenders.

Besides the point truly composing the merits of this case, I mean the power of the Church to do those things, which are complained of by the suspenders, there has been here raised another question, regarding the jurisdiction of this court to interfere for their prevention. Now, it rather appears to me that this question is, in this particular case, of little substantive importance. It is in truth nearly, if not absolutely, identified with the other point, that of the powers of the Church. In this particular the present case differs materially, from some of those which have lately engaged the attention of the court; and in which the separate question of jurisdiction was of primary importance. In those cases, the judicial act done by the Church was one which the Church undoubtedly had power to do—For instance, in the case of the suspension of the ministers of Strathbogie, and that of the interdict against the admitted presentee preaching, in the case of Culsamond, there could be no doubt that those were judicial orders which the Church courts, and the Church courts alone, were entitled to pronounce—and the question came to be, whether, in those particular cases, the civil court had jurisdiction to suspend or interdict the execution of those judicial orders, (in form within the powers of the ecclesiastical court,) on the ground that those judicial acts or orders were pronounced on principles and for purposes interfering with, or in violation of, the law as previously laid down by the civil courts.

In those cases, I stated at length my reasons for dissenting from the opinion of the majority of the court; reasons, however, which necessarily assumed that the judicial acts pronounced by the ecclesiastical courts were, in their form and character, unquestionably within their powers, and which rested on the inference that the review or suspension of these acts was, therefore, *ultra vires* of the civil court.

There was in those cases, therefore, a clear and distinct point of jurisdiction. But here, so far from its being admitted, it is denied that the measures now sought to be suspended are, even formally, within the powers of the Church. In truth, they are not acts of jurisdiction at all; they are acts ministerial on the part of the Presbytery, carrying out a legislative act of the General Assembly; and the very question is, whether the Church possesses such powers or not? If it should ultimately be held that it does, there will be an end to all pretence for the interference of this court. The decision on the question of power would, on that view, embrace the decision on the question of jurisdiction. On the other hand, if it is to be held, that the Church had no power to direct the execution of those measures, which are more properly acts of administration and legislation, than of jurisdiction, then I should have great difficulty in denying to this court jurisdiction to interfere. There might be a question of the title and interest of the suspenders to seek the interference of the court; but if there existed such a title and interest, I do not see how the interference could be disputed by a plea to the jurisdiction. If the suspenders, admitting the powers of the Church in the general case, questioned those measures, on the ground of the superfluousness, inconvenience, or inexpediency of the exercise of them in this special case, there would be room for a plea to the jurisdiction on the part of the respondents. But although the suspenders do, in some parts of their argument, refer to those considerations, their case is substantially put, upon the broad ground, that by the law of this country, the Church had, through their organs of Presbyteries, Synods, and General Assembly, no power to introduce these alleged innovations on the parochial constitution of Stewarton. That is the question, then, to which we must address ourselves, and so the matter has, indeed, been treated in the greater part of the elaborate opinions which we have before us.

That it is a question of great difficulty and importance, there can be no doubt. *Of difficulty*, because it necessarily demands for its solution an enquiry into some of the

comparatively obscure points of the constitutional history of the Church. *Of vast importance*, because it is impossible to disguise, that from the extent to which the practice of the Church, though not of very old date, has been carried, the legal existence and powers of the Church courts in Scotland, from the lowest to the highest, are put in issue in this very question.

After the learned and elaborate expositions which have been given in the opinions before us, of the history of the Church Establishment, it is not my intention to go over that ground in detail. I felt great difficulty in forming an opinion upon the matter: but the result is, that I have come to the conclusion of Lord Moncrieff. I have not been able to satisfy myself that the Church has not the power of adopting and completing those measures, which the suspenders seek to interdict.

In arriving at that conclusion, I do not feel it necessary to adopt, to the full extent, all the propositions which, if not maintained by the respondents, are imputed to them by the suspenders. I am perfectly willing to allow to the suspenders, that the Church, acting by its judicial, administrative, and legislative organs, has no powers or jurisdiction but what must be traced directly or constructively to the authority of the State. Indeed, it seems to me that no court of law can recognize *power*, in the constitutional sense of the term, or jurisdiction in the legal sense, unconnected with that source. We may, indeed, and often do hear of *powers* in another and looser sense; of powers of masters over their servants—of fathers over their children—of managers and directors of public bodies. The word there is only used to express a certain class of civil rights between the parties, arising either at common law, or in virtue of express or implied contract. But when we talk of *power*, as a constitutional right to do certain acts on behalf of the public, or of *jurisdiction*, as the right to pronounce judgments in regard to the interests, not of those judging but of those judged, it seems to me that such powers and jurisdiction necessarily imply their recognition by the supreme power of State.

On the other hand, however, I entirely concur with Lord Moncreiff in thinking, that to support such powers and jurisdiction, it is not necessary to have separate and explicit statutory authority for each specific act to be done by the constituted body. If, either by statute, or even by immemorial usage, there has been introduced, and has existed, an institution like that of the Church, confessedly entrusted with powers judicial, administrative, and even legislative—usage, above all when that usage has followed upon express statutes conceived in general terms, is the best and most decisive commentary on the true limits of the powers and jurisdiction of such a body.

It is surely unnecessary to go into any antiquarian investigation, to show that the Established Church, with the gradation of its courts, from the kirk-session up to the General Assembly, is part of the constitution of this country, clearly recognized by the State. It is equally indisputable that the Church has powers both judicial and legislative. The only question is regarding the limit of those powers; and here, as in every case of the kind, I think we must be guided not only by the letter of the statutes, but by the practice which has followed on those statutes, as the only test for determining the various specific acts which were understood to fall within the more general enactments. And I do *not* think it going too far to state, that in this view it is not necessary, in order to support powers or jurisdiction, to produce instances of usage in all respects identical. When a particular act is challenged as beyond the power of any legally constituted authority, it is enough to give a series of instances, which, although not absolutely identical in *circumstances*, are identical in *principle*; instances of things done and recognized as lawful, which could not have been done and recognized, except upon a principle which must equally support the powers of the constituted body to do the thing of which the legality is disputed. It is upon applying these principles to the case before us, that I have felt myself compelled to dissent from the proposition, that the measures now under consideration were beyond the powers of the Church. When I look to the general terms of the statutes which recognize their powers, and to the manner in which those powers have been exercised for centuries, I am not able to discover any distinction in principle between the acts which we are now called upon to prohibit as being *ultra vires*, and those which are shown, either by the words of the statutes, or by the usage following upon them, to be a lawful exercise of their authority.

This leads me, in the first place, to consider in a condensed form the undoubted powers of the Church, deducible from those two sources.

The Act 1567 declared and granted jurisdiction to the Church; and declared that there was no jurisdiction, in relation to matters ecclesiastical, but in the Church itself. That was confirmed again, in the same terms, by the Act 1579, c. 7, (p. 114.) It is clear, however, from what took place in the conference reported by Spottis-

woode, that the powers of the Church, as claimed on the one hand, and conceded on the other, were not confined to *jurisdiction* in the usual sense of the term—the determining of disputes according to existing rules; but extended to *legislation*—the alteration of existing rules, and the introduction of new, if required. The Report of that conference contains the statement, that such claims were made on behalf of the General Assembly, and that they were agreed to. And certainly there can be little doubt that *de facto*, that power was exercised to a very great extent before the Act 1592. Repeated Assemblies of the Church were held, and various orders made, and measures carried through; clearly showing that the word "spiritual" or ecclesiastical, as designative of particular matters, was very liberally construed. It is clear that the return of commissioners of burghs to the General Assembly owes its rise entirely to the act of the Assembly itself; and indeed, the whole constitution of the Assembly, and of the other Church courts, were the acts of the Church alone, though afterwards ratified in Parliament by the Act 1592.

Such being the powers exercised before the Statute 1592, it is of importance to look narrowly into the terms of that statute, in order to see how far the powers, *de facto* at least, previously enjoyed by the Church, were narrowed by any of its enactments. I will not go over them in detail. It is enough to observe, that while it "ratifies and approves the General Assemblies appointed by the said Kirk," it does not in any way confine, even by any enumeration, the powers or duties of the General Assembly, as it does in regard to provincial Assemblies and Presbyteries; but leaves those powers to stand on the usage which had prevailed prior to the statute. Accordingly, in the clause repealing statutes unfavourable to the liberties of the Church, it describes them as statutes, "against the liberty of the true Kirk, jurisdiction and discipline thereof, as the samen is used and exercised within this Realme." There is nothing here in any way confining the legislative power previously understood to exist in the General Assembly of the Church, and *de facto* in use to be exercised before the statute was passed. On the contrary, when the statute, simply, and without any restriction, except as to the time and mode of meeting, ratifies "the General Assembly as appointed by the Kirk," the fair inference is, that the ratification included not merely the existence of the Assembly, which would have been unnecessary and nugatory, but the extent of its powers as in use to be exercised. But this, at least, may be safely assumed, that the statute does not specially deprive the Assembly of any of those powers. There is no one matter, ecclesiastical in its character, which is either by that or any other statute now in force, expressly placed beyond its cognizance. And even admitting, that in the unsettled state of the Church, before its final establishment in 1592, pretensions might have been advanced by the Church, irreconcileable with the just claims of the State, after it was established; there surely can be no safer criterion for determining the powers sanctioned by the State, and ratified by that Statute, than the powers which the General Assembly of the Church, uniformly and without challenge, continued to exercise after that statute was passed.

1. According to the very terms of the statute itself, referring to the existing "use and exercise within the realme," combined with the evidence of what the General Assembly of the Church had been in the use of doing; the statute afforded, at the lowest, a good *ex facie* title or authority to the Church, to make all arrangements regarding the internal constitution of its various judicatories. The statute approved of the General Assembly as appointed by the Church—of Synodal Assemblies which owed their origins to the same source—and "the *presbyteries and particular sessions appointed by the said Kirk*." Now these last expressions cannot be construed as limited to the judicatories which had been appointed, and were in existence at that particular time. For the Presbyteries, of which the number, as fixed by the Church, amounted only to 53 in 1592, amounted in 1638 to 64: the addition of the eleven being exclusively the act of the Church itself. And from the statement given at page 26 of the respondents' case, which I do not understand to be contradicted, the practice of dividing Presbyteries and creating new Presbyteries, was continued without challenge from 1707 down to 1836; in which last year, two new presbyteries were created; one, Isla and Jura, consisting of parishes disjoined from the Presbytery of Kintyre, and the other, that of Dunkeld, consisting of parishes disjoined from the Presbytery of Weem; so that there are 29 Presbyteries more now than existed at the date of the act 1592; all created by the authority of the Church alone. Synods, as I understand, have been treated in the same way, having been erected, suppressed, or modified by the exclusive authority of the Church.

It is also the undoubted fact, that it has been the practice of the Church, acting through its legislative organ the General Assembly, to transfer parishes from the Presbyteries and Synods, in which they originally stood, to others, considered from some

circumstances, to be more suitable and convenient. So that it is impossible to deny that, according to the act 1592, as construed in practice, the Church does possess the power within itself of altering the constitution of its inferior judicatories, of creating them anew, and of changing their component members.

2. It is established in practice that the Church has the power, not only of new-modelling those judicatories, out of previously existing members of Presbytery, but also of adding to the number of the members of a particular Presbytery, without subtracting that additional member from another Presbytery. All the numerous cases of second and other additional ministers are instances of that kind. This practice existed from the earliest period down to 1784, when an additional minister was named to St Andrew's church in Edinburgh, sanctioned by the opinion of a very high legal authority. This has been carried so far, that there is hardly a town of any importance in which such additions have not been made. The observation that such additional ministers were only appointed in towns is evidently irrelevant—and the circumstance of the concurrence or consent of the magistrates, in those matters, is no less so. If the power of adding a member to a particular Presbytery was not understood to reside in the Church, the attempt in the town or the country must have been equally illegal. And the concurrence or consent of the magistrates, clearly could not supply any defect in that power; because, wherever that power may be supposed to reside, it certainly was not within the resort of the magistrates.

The consent of the magistrates and the other heritors, and their contribution of the funds for the endowment of the charges, may have led to the appointment of these additional ministers; but most certainly the appointment, and above all, the admission of the parties to the privileges of ordained ministers, including a seat in the respective Presbyteries, must have been exclusively the act of the Church. Neither is it possible to consider a practice so long and so frequently followed as a usurpation. Such appointments were repeatedly brought under the notice both of the Court of Session and the Court of Teinds. Several cases occurred, in which the incumbents in charges, owing their origin entirely to the Church courts, claimed stipends from the Court of Teinds.[1] In some cases those claims were sustained, in others they were rejected; the distinctions between the two not being very clearly explained. But the advancement of such claims, and their occasional success, is enough to show, that the powers of the Church, in this particular, could not be questioned. Indeed it was only in the Church that the power did reside. For, although the Commission of Teinds had the power conferred so late as the year 1693, to grant (out of the parsonage teinds, given to patrons by the act 1690, c. 23,) "provisions to two ministers in one parish," none of the commissions contain a power to erect second charges. Other cases, such as those of Haddington, Dundee, and Stirling, were distinctly brought under the notice of the Court of Session, and not a question ever raised as to the legality of such appointments. In particular, the additional third charge at Stirling, originally instituted in 1731, was suppressed in 1747, and was restored in 1817—all by the authority of the Church alone—and the legality of the proceedings was clearly sustained by the Court in finding in 1837, that the third charge formed a benefice within the sense of the act establishing the Widows' Fund, and that the vacant stipend was subject to its provisions.

3. I think it is sufficiently established that the Church had the power to create kirk-sessions, in addition to those existing at the date of the Act 1592. Indeed, this may be fairly inferred from the practice already alluded to in regard to Presbyteries. The statute "ratifies and approves the Presbyteries and particular sessions appointed be the said Kirk." And as the subsequent practice showed that the ratification is not limited to those *actually appointed* at the time, but must include those appointed at any time by the Kirk, the same construction must apply to kirk-sessions. Indeed it would be difficult to explain, on any reasonable principle, the grant of the power to appoint additional Presbyteries, and the denial of it to appoint additional kirk-sessions—a judicatory of a subordinate and purely ecclesiastical character. But this construction, too, has been supported by usage. It seems to me not to be seriously disputed that many of the kirk-sessions now existing, both in Edinburgh and Glasgow, owe their origin entirely to the Church; and I think that some of the cases of landward parishes referred to by the respondents, are decisive instances of the same kind.

And this leads me to consider,

4. The practice in regard to one of the points mainly contested in this case,

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[1] Connel, p. 112.

namely, the power of the Church to attach a particular district, *quoad spiritualia*, to a church erected or endowed by private contributions. Looking merely at the character of the thing actually done in such a case, it would be difficult to conceive any thing more purely ecclesiastical. Indeed, the opposite view arises entirely from the introduction of the element of a district into the description of such a measure. It seems always to be considered that this is a sort of attempt by the Church to alter, by their own act, the civil divisions of the country. For unquestionably, the division of parishes now involves many most important civil rights and obligations. But, I think, this is little better than a verbal objection when applied to this case. The district, or division, is here only employed for the purpose of marking and identifying the congregation of whom the minister is to have the pastoral superintendence. Viewed in this light, the matter is purely ecclesiastical. And indeed, on this point, I do not well understand the distinction taken by the suspenders. They admit,[1] "that to ordain a minister to a congregation is, doubtless, within the power of the Church;" and they repeat the same admission in various parts of their case. Now, I do not well see how a minister could be ordained to a congregation, without in some way or other describing the congregation to whom he was so ordained. I rather think that the description of the congregation, by a reference to the locality of their dwellings, is as little objectionable as any other description, and does not alter the purely ecclesiastical character of the things done.

Neither do I see any authority for stating that the Church itself ever disclaimed such a power. The passage quoted from the proceedings of the General Assembly in 1600, seems to me to prove directly the reverse. "The question was proponet to the haill Assembly, where congregations are so spacious, that a great part thereof may not resort commodiously to their awn paroch kirk, by reason of the great distance of their habitation therefra, *if it be lawful* to ane number of the said congregation to big ane new kirk, and entertain a parson at the samen, at their awn expences. The Assembly, after long reasoning, *thought it lawful* and expedient, and declared they would assist the same as ane Godly wark, and crave the samen to be ratified in Parliament so oft as it shall occurre."

The question is put to them, if it be lawful to build a church, and entertain a pastor at the same; which last point, it is clear, could not be lawful without the concurrence of the authority of the Assembly. The Assembly *thought it lawful* and expedient; declares they would assist the same; and that they would crave the same to be ratified by Parliament. I am not able to understand the reasoning, by which it is made out that the Assembly considered the proposed measure to be unlawful. The explicit answer is, that the measure is lawful; implying, I think, that they had power to name a pastor to the said congregation: But further, they would assist in getting the ratification of Parliament; a measure very expedient, and even necessary, in order to complete the civil as well as spiritual separation of the newly constituted congregation from the old. The answer clearly is, not that it was unlawful without ratification by Parliament, but that it was lawful; although it might be assisted and rendered more effectual by such ratification.

This is in exact accordance with the practice, as exemplified in many of the cases referred to. I think it clear that in some of the cases, such as Stranraer, the ratification by Parliament never was granted. There are various other cases, besides that of Stranraer, which are shown by Lord Moncreiff to have been cases of the same kind; I mean cases of the appointment of ministers to districts, and the creation of kirk-sessions, without the evidence of any ratification by Parliament. But, besides, there are certainly various cases of such appointments and creations, which, although ultimately ratified by Parliament, stood unchallenged for years without such ratification. And all those are instances of the exercise of the power in question. They are just examples of the application of the principle laid down in the Assembly in the year 1600. They held it lawful to appoint a minister, to appropriate a district, and to create a kirk-session; and they did so. But they were afterwards well pleased, of course, to obtain the ratification of Parliament, and thus to make the separation of the new parish complete, which had formerly been only qualified and imperfect.

In support of this, too, I think we may legitimately refer to the practice of the Church courts in detaching certain portions of land from one parish, and annexing them to another, *quoad sacra*. It is stated by Sir John Connel, in treating on the matter, that he had heard of several instances of the kind, but that he had not received the authentic evidence at the time of the publication of his work. The case he does refer to, however,

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[1] Suspenders' case, p. 5.

is conclusive as to the recognized practice; for it is one in which the act of the Church court, and its effects, were brought under the notice of the Court of Session. The Presbytery of Glasgow had, in 1771, disjoined the lands of St Ninian's croft from the parish of Govan, and annexed them to the parish of Gorbals. In 1808 a question arose, which of these parishes was bound to maintain a child exposed in the streets of Hutchinsontown, built on St Ninian's croft. The first interlocutor of the Lord Ordinary, Lord Robertson, was, that the parish of Govan was liable, in respect there was no disjunction; the act of the Presbytery of Glasgow not having been produced. But a representation was given in, accompanied with the act of annexation. The interlocutor was in substance adhered to, deciding against the parish of Govan; but on the special ground that as the annexation of the lands was only *quoad sacra*, "it does not affect the civil rights of the parties."[1]

Here it is clear that, though there was a question as to the nature and effect of the annexation, no doubt seems to have been entertained of the legality of the annexation itself; and when it is considered that the learned Judge by whom the judgment was pronounced—I mean Lord Robertson—is universally allowed to have had the most extensive knowledge on such matters, the ultimate judgment, finding, not as before, that there was no disjunction, but that the annexation had only a limited effect, is the most conclusive evidence that the practice was understood to be in itself unchallengeable.

In this matter, too, I cannot throw out of view the later statutes, in which the power of the Church has been, if not legislatively declared, at least legislatively recognized to exist. I think they are entitled to much more weight than they receive in the argument on the part of the suspenders. I do not, however, mean to found any thing on the Act of the 1st and 2d Victoria; as it would seem that the division of parishes, *quoad sacra*, there alluded to, contemplated rather the division sanctioned by the Act of George IV. respecting Highland churches, than that carried through by the Act of Assembly 1834. As the former statute is expressly referred to, and the Act of Assembly is not once mentioned, the presumption is, that the expression, though incorrect, was intended to apply to the division authorized by the former statute.

But I think the Act of the 4th and 5th of William IV. is of very great importance. It provides, that where any church, chapel, &c., "built, or acquired, or endowed by voluntary contribution, shall, according to the provisions of the existing law, *be erected into a parochial church*, either as an additional church, &c., or as the church of a *separate parish*, to be erected out of a part or parts of any existing parish or parishes, *whether the same be established and erected merely quoad spiritualia by the authority of the Church courts of the Established Church of Scotland*, or also *quoad temporalia* by authority of the Commissioners of Teinds;" neither the King nor any private patron shall have any claim to the patronage of such newly erected church, in virtue of the patronage which they may have held in the original parishes, from which the newly erected parishes were disjoined.

Now this does not amount to a declaratory enactment, that the power was in the Church; had that been the case, there would have been an end to the question. But, on the other hand, I cannot allow that the words, "according to the provisions of the existing law," are to be read as a condition qualifying the enacting clauses. It would have been a most extraordinary kind of legislation, to found an enactment on the supposition of a thing being done, of which at the very moment the legislature meant to question the legality. I think the necessary reading of this is to view the words, not as expressing a doubt, but as expressing an assumption, that such was the law. The expression is of the same effect as if it had stood in the preamble, instead of being mixed up with the enacting clause; as if the statute had run, "Whereas by the provisions of the existing law," a church built by voluntary contribution may be erected into a parochial church, either as an additional church, or as the church of a separate parish, "whether the same be erected merely *quoad spiritualia* by the authority of the Church courts, or also *quoad temporalia* by the Commission of Teinds;" and upon that preamble founded the enacting clause, that the patron of the parish, out of which such new parishes had been formed, should have no claim to the patronage of the new church or charge. The reason for passing the act was, that such claims had been made, and even sustained, as appears from some of the cases referred to. It is impossible, then, to doubt, I think, that in the statute, the legality of the formation of parishes, *quoad spiritualia*, by the Church courts, was taken for granted; and in this view, though not a declaratory law,

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[1] Fac. Coll., Nov. 17, 1808.

it is a most important article of evidence of the universally understood usage in regard to the powers of the Church. And this view is naturally strengthened, by considering the object of the statute as expressed in the preamble. "Whereas, in many parishes the means of public worship are inadequate, it is expedient to encourage the erection of additional places of worship by voluntary contribution." Considering this preamble with the enacting clause, I think it is impossible to doubt, that the church of a separate parish erected, *quoad spiritualia*, by the Church courts, was just one of the classes of additional places of worship, which it was the declared object of the legislature to encourage.

Neither can I discard from this view of the case, even the private Act relating to Lady Glenorchy's chapel. In that statute, I understand the particular Act of Assembly 1834 was recited, and on that recital, and the statement that in consequence of the terms of the foundation of the chapel, the Act of Assembly could not be carried into effect, powers were given to the trustees by Parliament to remedy this inconvenience. It is true that this is a private act; but it is well known that such acts do not pass as matters of course. If the grounds of them involve matters of law, they require to be supported by the opinion of at least two Judges, which, of course, must have been given in that case. This too, then, though not a declaratory enactment conclusive of the law, is good evidence of the practice and understanding relating to it. The passing even of a private statute, on the special ground of the propriety of removing the obstacles in that particular case to carrying out the Act of Assembly, is surely an important element of the evidence, of the open and recognized exercise of those powers, in virtue of which that Act of Assembly was passed.

Combining all these various considerations—1*st*, the very general terms of the older statutes, particularly of the Act 1592; 2*dly*, the powers which have been unquestionably exercised by the Church before the passing of that Act; 3*dly*, the usage which has followed on it, down to the present day, and the recognition of that usage contained in the later statutes referred to, I do not feel authorized to deny to the Church, acting through its legislative instrument, the General Assembly, the power to new-model the inferior judicatories—to admit new or additional members to those judicatories—to increase the number of those judicatories, and even to appoint and sanction the erection of new churches, to which congregations, described by the locality of their residences, *i. e.* within a particular district, may be attached.

And this is enough to resolve the only question which is now before us; I mean, the power of the Church to do the things complained of by the suspenders. For, if the Church has that power,—if, in other words, these matters are matters ecclesiastical, within the cognizance of the Church, we, clearly, can have no jurisdiction to enquire into the grounds on which the power was exercised. It may have been inexpedient to make such arrangements,—it may have been rash and ill-advised to set apart a district, while no sufficient provision was made for the intended incumbent,—all this may lead to inconvenient consequences; but still, if the Church had the power, as in matters properly ecclesiastical, we, the civil court, can have no power to control, or modify, or rescind their determinations on such grounds.

And I must say, that the measures which were contemplated here are, when attentively considered, a very guarded and moderate exercise of the particular powers in question. They are challenged mainly on two grounds: 1*st*, inasmuch as they alter the composition of the Presbytery of Irvine, by admitting a new minister, the minister of the contemplated new Church—and 2*dly*, inasmuch as they divide the parish, and withdraw the inhabitants of the newly formed district from the pastoral superintendence of the parish minister.

1. In regard to the first, I cannot think it can raise any reasonable doubt. If there be any one point which is ascertained, by usage, following on the general statutes, to belong to the Church, it is their power to new-model the inferior Church judicatories, even by the admission of new members. When we see twenty-nine new Presbyteries in full and recognized exercise of jurisdiction, owing their origin, solely, to the act of the Church,—when we see numerous ministers, in almost every town of any importance in Scotland, sitting and voting in Presbyteries, by the sole authority of the Church,—their right so to sit and vote, unquestioned, on every matter ecclesiastical or civil which can come before them; I do think that this objection is absolutely inadmissible, unless we are prepared to throw loose, the whole existing constitution of the Church as evidenced by the most conclusive of all titles—general statutes, explained and construed by immemorial usage.

Accordingly, the force of these difficulties is attempted to be evaded by a dis-

tinction. It is said, true, there might be new Presbyteries created, and even new members added to Presbyteries,—but, here, it is proposed to make a new kirk-session, and to allocate a separate district to the new minister.

2. I have already observed that if the Church have the power, under the Act 1592, as explained in practice, to create a new Presbytery, it would be a singular anomaly, if they had not the power to create a new kirk-session, particularly when this last is limited in its authority to matters purely ecclesiastical. Besides, I think it is made out that the Church have been in the use to appoint both kirk-sessions and new districts, attached to the new charge created, and solely by their own authority.

But it would be most unfair to the respondents to put their case on that general ground; and to throw out of view the conditions and qualifications, by which their contemplated measures were guarded in the present case. We are to judge of what they intended to do, and what the suspenders require to be interdicted, by the terms of the minute of Presbytery of 10th December 1840. That minute bears, that the Presbytery appoint "the minister and kirk-session of the new church to take care of the souls, and exercise spiritual jurisdiction over the inhabitants within the district there described; but they specially declare and provide, that no civil right of these parties, or any other whatever, shall be, in any degree, affected by the foresaid allocation; that the effect of the allocation is limited exclusively to matters of spiritual discipline and government, and also, that heritors and their tenants, and that part of the parish of Stewarton thus set apart, having legal rights to sittings in the original church may, in their option, continue members of the congregation thereof."

Now really the terms of this minute seem to me sufficient to disarm the measure of all those dangerous and illegal qualities which the suspenders ascribe to it. It is true, that there is a district set apart, *i. e.* the inhabitants of that district are constituted the congregation, entitled to the ministrations of the incumbent, appointed to the proposed church. But there is, first, the general *salvo*, "that no civil right of these parties shall, in any degree, be affected by the foresaid allocation; and that its effect is limited exclusively to matters of spiritual discipline and government;" and then there is the special declaration, "that heritors and their tenants, in that part of the parish thus set apart, *having legal right to sittings* in the original church may, in their option, continue members of the congregation thereof."

I think that, by the force of these qualifications, the whole matter of the allocation of a district, whatever difficulties it might otherwise present, is here rendered purely and absolutely ecclesiastical; and what is more, I think it utterly impossible to discover any sort of interest, civil or ecclesiastical, which these suspenders have to object to it. The supposed infringement of the rights of the minister of the parish must be disregarded. He is no party to this suspension and interdict. The patron *is* a party: but what interest has *he*, in that character, to advance this objection? Can it be seriously pretended that his civil rights are infringed, because the incumbent to be appointed by him, is relieved of the pastoral superintendence of that *part* of the population of a particular district, which had no right to seats in the parish church? *But, again*, who are the remaining suspenders? They describe themselves as "heritors and parishioners of the parish of Stewarton," from which I infer, that each of them possesses *both* of those characters. These suspenders, then, are either within the allotted district, or within the remaining part of the parish. If they are in the latter case, what conceivable effect has the allotment on their interests? But if they are within the allotted district, they are the very parties who have, with their families and tenants, a right to sittings in the original parish church, and have consequently, in virtue of the qualifications in the minister, the *option of remaining with the original congregation, or joining the new.* They are thus to have two Churches instead of one, without any additional charge for the support of the additional Church. And if these gentlemen have no legal interest of their own to urge such an objection, can it be said that they have a legal interest to maintain, that certain other parties, for whom *they*, the heritors, do not afford accommodation in the parish church, shall not be accommodated with sittings, and entitled to the benefit of the services of the minister, in the *new church*, to be erected by voluntary contributions?

In regard to persons who happen not to be heritors, as well as parishioners, I see no evidence that any one of them makes any complaint. None of them are suspenders.

But the objection would be equally preposterous in the mouths of those of the inhabitants of the allotted district, who had no right to sittings in the original parish church. It would, indeed, be most extraordinary, if they should be found to have a legal title and interest to maintain, that while they had no sittings in the parish church, no new

church should be built, in which, by the force of the allocation, they *might have sittings if they chose*. We have often heard of a proposed measure being *innocuæ utilitatis*; but it would be difficult to suppose a case to which the term applied so clearly and accurately as to the present.

Upon this point, then, I think it will not do to describe this proposed measure, as the erection of a new parish, and the infringement of civil rights by the act of the Church courts. In so far as any thing turns on the allotment of a district, we must look at the object, character, and qualities of the particular kind of allotment, which the suspenders call upon this court to interdict. And when so viewed, I think it is utterly impossible for the nicest eye to discover any thing in it which is not purely ecclesiastical, or which, indeed, can be considered to affect or prejudice any existing interest whatever.

Upon these grounds, I do not feel myself authorized to give effect to either of the objections urged by the suspenders.

There is yet another difficulty, which it may be proper shortly to notice; I mean that founded on the power of the Commission of Teinds. But here it is necessary to look narrowly into the grounds on which the existence and power of that court can be supposed to affect the present question.

I am not aware that the argument admits of being put but in two ways. It may be said, either that the power to do what the Church has attempted in this case, is vested in the Court of Commission, and, therefore, cannot be in the Church; or that, because it has not been given to the Court of Commission, no such power can be supposed to exist.

Now, if put in the first form, I demur to the premises. I do not think the Court of Commission has the power to do what the Church asserts here its power to do.

That court is essentially civil; and it is through the medium of the various civil interests and obligations involved in the existence of a separate parish that its powers are let in. It is true, that the most primitive notion of a parish may have been that of a district, within which spiritual ministrations were afforded, and discipline exercised, by the same pastor. But if that had remained, the only quality of a parish, it is pretty clear that there would have been no necessity for a Court of Commission. That evidently arose from the civil rights and obligations connected with it. The heritors and inhabitants were understood to have right to accommodation in the church, and to be under obligations to support the church and manse, to pay the incumbent out of the teinds, and to maintain the poor—all of which were civil rights and civil obligations. And as the division of a parish necessarily affected those rights and obligations, it was perfectly natural that a civil tribunal should be appointed to determine on the propriety of such division. Indeed, the nature of the interests, which are the foundation of the powers of the Court of Teinds, appear clear enough from the requisite, forming the condition of the division of parishes, viz. the consent of a certain proportion of the *heritors*, *i.e.* not the members of the congregations whose spiritual interests were concerned, but the *heritors* whose civil interests might be affected by the proposed division. The Court of Teinds having the power to divide parishes, have indirectly and consequentially the power to affect the ecclesiastical position of the inhabitants. They effect a division *quoad sacra*; but how? Only through the medium of the power to divide *quoad omnia*. The ecclesiastical division is incident to that total and civil division which they are empowered to pronounce.

And the power, which they sometimes exercise, of separating land from one parish and attaching it to another, as it is called, *quoad sacra tantum*, involves no inconsistency with this. For in all of these cases there is still a civil element. The heritors and inhabitants of the lands annexed, have a right to sittings in the church; and, as it is now fixed, they are under the obligation to maintain the church to which they are annexed, while they are relieved from that obligation in regard to the church from which they are disjoined; all matters purely civil—beyond the reach of the Church courts—and which, of course, let in the jurisdiction of the Court of Teinds. All these annexations, though termed *quoad sacra tantum*, are substantially, to a certain extent, *quoad civilia*.

But what the Church proposes to do here, is something essentially different—viz. to annex to a church, built by voluntary contribution, a district, within which the inhabitants shall be subject to the pastoral superintendence of the incumbent; under the proviso, that it shall affect no civil rights whatever, and that even those who had rights of sittings in the parish church, should have the option of remaining part of the original congregation.

I do not see how the Court of Teinds could have the power to pronounce any such

division; which is, in truth, a purely ecclesiastical arrangement, involving no civil interest whatever, so as to let in their jurisdiction.

Accordingly, it is the other view of the case which is taken by the suspenders, when they found on the powers of the Court of Teinds, as I understand. They deny that there can be any such thing as a parish *quoad sacra*, or *spiritualia; i. e.* they deny that even the Court of Teinds could make such a division. Now, it will be seen, that this just comes to the other proposition, which I alluded to, viz. that because the Court of Teinds has no such power, it can exist no where else.

When the argument is so put, I demur to the inference. Why should it follow, from the circumstance of the Court of Teinds not having the power, that it should not reside in the Church? That is a question which must be solved, not by any arbitrary inference, but by the consideration of the nature of the thing done, compared with the admitted power of the Church, and their practical exercise of their powers in analogous cases. Now, taking this view, it appears to me that the power here claimed is purely ecclesiastical, and within the powers of the Church. But at all events, the question whether that opinion be wright or wrong, cannot be in the least affected by the non-existence of the power in the Court of Teinds.

Even the other and hypothetical way of putting the case, viz. that if it existed any where it must be in the Court of Teinds, could not do, unless it could be made out, that that Court formed the only instrument for effecting any change whatever on our ecclesiastical constitution. But that would be a most desperate proposition. When we see Presbyteries separated, created, and new-modelled; when we see additional ministers admitted into Presbyteries, and removed from one Presbytery to another; and when the undoubted fact is, that none of those things can be done by the Court of Teinds, and have always been done by the Church, it is utterly impossible to take the powers of the Court of Teinds, as affording any just measure of what may be lawfully done by the Church.

As to the supposed possibility of a collision between the power now claimed by the Church, and that undoubtedly vested in the Court of Teinds, I certainly am not prepared to say that it might not, in form at least, present some difficulty—practically, I think, there would be little or none. The case is not very likely to happen, and, until it does, it is unnecessary to discuss seriously the principles on which it ought to be determined, So long as there is an incumbent doing the duty of the district allotted by the Church courts, (gratuitously in regard to the heritors,) it is no very probable supposition, that the requisite number would concur in an application for a division, which would burden them with his maintenance; and I rather suppose, if such an unlikely case did occur, the matter would be easily adjusted, either by the Court of Teinds confirming the division previously made by the Church, as was done in the old cases of ratification by Parliament, or by the Church suppressing the charge created by themselves; and which had been rendered necessary only by the failure on the part of the heritors, to furnish an increase of church accommodation suitable to the increase of the inhabitants.

On the whole, then, I see no such clear ground for holding the proposed measure to be illegal, as to warrant our interposing in the way of interdict; and I cannot help thinking, with Lord Cockburn, that in quieter times the manifest utility of the power thus claimed on the part of the Church, would have secured the exercise of it from all challenge; and that it is not so much the principle, as the extent to which it is practically carried, which has roused so zealous an opposition. And I am not disposed to undervalue the importance of this. The power vested in the Church in its legislative character, to alter to any extent its constitution, and that of the various bodies subordinate to it, is one of a very startling and anomalous kind. It may, if carried too far, be highly inexpedient, and justify (on that ground) the interference of the legislature. But that is a matter with which we have nothing to do.

This only I will say, that if expediency were allowed to enter into the discussion, the remedy now sought by interdict would, when tried by that test, be much worse than the disease. According to the principles maintained by the suspenders, and those who follow the same course, there is not a Church court in Scotland, certainly not one of the higher tribunals, including the General Assembly, which has not for these last ten years been tainted with an inherent illegality, vitiating their whole proceedings. This is no imaginary alarm. We have seen various instances in which procedures on charges of the most heinous kind has been staid, on the ground that the Church courts contained members, introduced there, exclusively, by the incompetent warrant of the Church itself. In short, the principle goes to the full length, of paralyzing, for an indefinite time, the whole jurisdiction and discipline of the Establishment. Of course, these considerations cannot influence our decision, but they do justify the greatest caution and scrupulosity

in scrutinizing premises which lead to such a conclusion; and while I admit to the fullest extent the difficulty of the case, I can only repeat my ultimate conviction, that, consistently with the statutes recognizing the power of the Church, and the usage which has followed upon them, those premises are not sufficiently established. I am, therefore, of opinion that the note of suspension ought to be refused.

Lord Jeffrey.—I adopt generally the views and reasonings contained in the opinion of Lord Moncreiff, though I think some of the points insisted on by him not necessary to warrant his conclusion; and I concur also, not only in the result of the opinion last delivered, by Lord Fullerton, but in all the grounds he has alleged in support of it, though I am not inclined to narrow these grounds so much as I understood him to do: my own impression of what is necessary, and sufficient for the decision of the case having been all along more simple and peremptory.

The sum of my opinion in short is, that the matters now in question are *purely ecclesiastical*, and involve no civil interest whatever; and that, as this Court can dispose of civil interests alone, and can neither review, interdict, nor enjoin any merely spiritual proceeding, so it has *no jurisdiction* in the case before us, and ought, therefore, to reject the present application as incompetent.

From this way of stating my opinion, it will be seen, that I do not think it necessary for the respondents to make out that the Church—which, both in its legislative, judicative, and administrative capacity, has confessedly, and by statutory grant, very large jurisdiction and authority in matters ecclesiastical—has in this particular case acted at all points conformably to the limitations or conditions which the legislature may be thought to have attached to the powers so bestowed. Even if it had exceeded these limits, my conviction is—and it is here I differ in some degree from Lord Fullerton—that this Court would still have no power to interfere; unless it could be clearly shown that it had not only trespassed beyond its own province, but encroached upon the precincts of ours, by assuming to dispose of civil rights and interests.

This view of the matter would, no doubt, very materially narrow and abridge the discussion on which we have been invited to enter; and to my mind it may probably have been recommended, in part at least, by that consideration. But though I think it of the utmost importance to bear in mind that the case, according to this view of it, may be safely disposed of on the single ground of *our* want of ecclesiastical jurisdiction, and without entering at all on the question as to the extent of that which undoubtedly is in the Church, it is obviously a great confirmation of that view, that I am also satisfied that there has been in this instance no excess on the part of the ecclesiastical authorities, and that all they have done appears to be fairly within the powers with which they have been legally invested. I shall go, though very summarily, over some of the grounds on which I rest the several points of this opinion.

The *first*, of course, is, that the proceeding here complained of was a purely ecclesiastical proceeding, and touched no civil interests whatever; and to make this out, I really think, with Lord Fullerton, that nothing more should be necessary than to look to the terms in which the orders and appointment of the Presbytery now complained of are actually expressed. The suspenders themselves describe what was projected as an attempt to erect a new parish—*quoad sacra tantum*; words I must think sufficiently precise and familiar; and which appear to me, of themselves, to disclaim and *exclude* all interference with civil concerns. But the full tenor of the appointment is still more anxiously guarded. It is confined to the mere nomination and appointment of a certain minister and kirk-session, "to *take care of the souls*, and to exercise *spiritual jurisdiction* and *discipline*" over the residents within a certain district; and it ends by expressly "providing and declaring that *no civil rights* of the suspenders, or of any other persons whatsoever, shall be in any degree affected by this appointment and allocation, *which is exclusively limited to matters of spiritual discipline* and government." If there be meaning in words, I think the act objected to is thus effectually qualified *in gremio* as a purely spiritual proceeding; and I will confess that it appears to me like a contradiction in terms, to say that this imports, or can import, any encroachment upon civil interests; and, indeed, if a vague and general appointment had been complained of to this Court, as admitting of such a construction, I do not see in what way *we* could have more effectually removed the ambiguity, and excluded the danger, than by providing and declaring in the very terms here used by the Presbytery.

I observe, however, that it is said, or rather perhaps insinuated, that it may be considered as part of *the civil right* of the patron, to have his presentee entrusted with the cure of the whole souls in the original parish; part of the presentee's civil right, to exercise such cure; and part of the people's civil right, to continue under his undivided

ministry. Now, I must confess that I do not very well know how to deal with such a proposition; since it appears to me too clear to admit of argument, that whatever wishes —or if they are pleased so to call them, interests—these parties may have in the matters specified, they are not in any respect civil or patrimonial, but religious or spiritual interests only; and must be asserted, therefore, in the ecclesiastical, and not in the civil tribunals. As to the patron, the only civil right he had in the matter, and certainly the only right he had to give, or which the presentee could possibly receive *from him*, was a *right to the benefice;* a strictly civil right, no doubt; but one with which, *ex concessis*, there was to be no interference; while with regard to the cure of souls, with which alone there *was* to be any interference, I take it to be perfectly clear that the patron never had any concern. *That* necessarily belonged to, and could only be given by, the Church; the patron's connexion with it being, at the very best, no more than a right to have his presentee taken on trials, and (if found qualified) admitted to the cure, *as a part of his title to the benefice.* But *this* right he is still to retain, undiminished and entire; and it will still give his presentee as good a title as ever to the whole undivided benefice. It is to me, therefore, quite inconceivable how any *civil* interests, either of patron or minister, can be supposed involved in the arrangement in question. That arrangement confessedly relates only to the cure of souls—a matter in itself, beyond all doubt, purely and exclusively spiritual; with which the patron, as such, has no concern whatever; and as to which the minister, though he has a great *spiritual duty* to perform, certainly has no other *right*, than that of suggesting to his ecclesiastical superiors upon what system it would be best discharged for the religious advantage of the people; a topic upon which it would obviously be absurd to come to a civil judicatory. And as to the people themselves, the case is if possible still clearer. If the relation proposed to be established between them and a new pastor, be (as must be admitted) purely spiritual, it can only be in a Church court that any thing they may have to say in regard to it can be considered;—and as to their personal right of access to the churches, the grievance suggested for them seems to amount to this, that those who had sittings in the old and more distant church, are still to retain them, and *also* to be admitted, if they choose, to a share of these in that to which they are nearest; while those who had no right to sittings in the old church at all, are now to have them in the new.

This relates more directly to the local or proper parochial interests and arrangements. But it appears to me that the other part of the proceeding objected to, as to the admission of the new minister to sit and vote in presbyteries and other Church courts, relates at least as obviously to spiritual interests only as the former. Indeed, if it were not for what I cannot but consider as the *accidental* circumstance, that certain civil functions have, at different times, been put upon those bodies by the legislature, I do not understand that it could ever have been doubted that their business and constitution was entirely spiritual; and that no *civil* interest could possibly be affected by any addition to the number, or change in the qualification, (if it were so,) of their constituent members. But it is never to be lost sight of, that their original, and up to this day, their *only proper and constitutional character* is that of *courts of the Church*—constituted and appointed by the Church, for the adjustment of spiritual rights, and the promotion of religious objects and interests exclusively. I am not now enquiring, it will be recollected, into the right or legal power of the Church to make these appointments; but into the preliminary question, Whether any civil interests could possibly be thereby affected? And as to this, I cannot but think it too clear for argument, that while acting merely as courts of the Church, and performing those functions that are expressly assigned to them by the Act of 1592, it is impossible that any such interests could be touched by their proceedings; and the question, therefore, comes to be, Whether the circumstance of their having been subsequently invested with certain branches of civil jurisdiction, in relation to manses and glebes, building of churches, and schoolmasters, and the poor, and occasionally taking cognizance of those matters as Parliamentary Commissioners, has so far altered their original character, as *to subject the appointment or qualifications of their members, generally*, to the control of the civil authorities? And to me, I confess, it appears that there is no difficulty in that question. They are still fundamentally and properly courts of the Church, and nothing else; necessarily composed, as at first, of ministers and elders only, dealing, *as such*, only with spiritual interests, and holding their only character, as courts, in subordination to the law ecclesiastical. The mere admission, therefore, of new or additional members into the Presbyteries, Synods, or Assemblies of the Church, can of itself affect no civil interest, nor warrant the interference of any civil court; and this is all that I think is now before us. It is quite another question, whether the alleged want of certain qualifications in such new member may disqualify him from exercising the *civil* jurisdiction bestowed upon the body into

which he has been adopted; and when any such question is raised by a party having a civil interest in its decision, I do not dispute that it will be *competent*, at least, for this Court to decide it. But at present we have no such question; and no such civil interest is alleged by any of the suspenders. They do not even ask prospectively for a *limited interdict* against the new minister taking part in any of the *civil* proceedings of the presbytery, but generally against his being admitted or acting as a member of it at all. Now, holding as I do that the presbytery is properly and constitutionally a court of the Church, and appointed as such for spiritual objects exclusively, I cannot understand how any civil tribunal can entertain an objection generally to the multiplication or qualification of its members. If, before the statutes were passed, which engrafted on its original and only proper functions, certain civil duties or powers, there could have been no such interference, it is inconceivable to me that its radical privileges and independence as an ecclesiastical judicature should, in consequence of this mark of public confidence, be subjected *in toto* to the control of an extrinsic authority.

I conclude, therefore, by asking, *first*, What civil interest of the suspenders, or any one else, can be affected by the new minister of Stewarton taking his place in the Presbytery of Irvine, and acting as one of its members in all the matters committed by the Act 1592 to its discretion? And if there be no such interest, I ask, *secondly*, On what footing can its character as a spiritual court be disputed, or the interference of any civil authority invoked, *to interdict his so acting?* Yet this, and nothing less, is what is now asked by the suspenders.

But if the proceeding now before us thus appear to be in all its parts entirely spiritual, and touching no civil interests, I am constrained to hold, on this ground alone, that we have no jurisdiction in the matter; and are entirely precluded from enquiring whether or not it has been well and rightly dealt with in the Church courts; or even whether, in what they have done in it, they have exceeded or kept within the legal extent of their powers.

It is now fully admitted that the Church *has* a large jurisdiction and authority in matters ecclesiastical, and that within the proper sphere of that authority it is absolutely independent of our control; and I think it is also admitted, or, at any rate, I must assume it to be certain, that this Court has *no* proper or direct jurisdiction ecclesiastical whatever. Now it is on this last proposition that I rely, in my present view of the argument; and I humbly conceive it to be sufficient *per se* for the decision of this cause. I do not enquire, therefore, at present, whether, or to what extent, the powers confessedly belonging to the Church in matters ecclesiastical, are subject to limitation; or whether their supposed limits have been exceeded in the proceedings now complained of. It is enough that the Church has *some* jurisdiction ecclesiastical, (*all*, indeed, I think that is not held to have been reserved to Parliament itself,) and that we have *none;* for I think it necessarily follows, from these simple premises, that even assuming that the Church has exceeded its legal powers, but on a matter of purely spiritual concernment, it is not on *our* province that it can have encroached, but on that of the supreme Government; and that it is not for us, therefore, but for Parliament alone, to repress the encroachment.

The analogies to which the suspenders have resorted, and which have met with countenance in some of the opinions before us—of other jurisdictions admitted to be independent and beyond control *within certain limits*, and yet familiarly subjected to the correction of this Court *when these limits are exceeded*—appear to me, I will confess, to be wholly inapplicable to a case like the present; and only appearing to bear upon it by overlooking this important consideration, that in every one of these instances *the subjects* committed to the cognizance of these special jurisdictions are all *matters of civil interest;* and, as such, naturally and originally within our peculiar jurisdiction, though left to a certain extent, and on certain conditions, to the final and exclusive disposal of more limited judicatures.

This Supreme Court of Session has, by its original constitution, an universal cognizance of *all causes civil;* and any civil interest, therefore, which by subsequent statutes has been committed to the disposal of Justices of the Peace, Police, or Small-debt courts, Commissioners of Supply, or Road or Harbour Trustees, &c., might no doubt have been originally brought for adjudication before this high tribunal, either primarily or by process of review. When an exclusive jurisdiction, as to particular matters *of this sort*, was, therefore, given to those other courts within certain limits, this was truly but a partial narrowing or encroachment on our formerly universal jurisdiction as to all such matters; while all beyond these limits necessarily *remained* subject as before to our supreme civil control. It implied, therefore, or required the supposition of no *general* superintending power,

or high and extraordinary function of repressing *all* judicial encroachments—or redressing all wrongs—or of keeping *all* other jurisdictions within their proper limits—or of interpreting all statutes touching jurisdictions of every description—to explain why this Court should be entitled to repress the encroachments of all *such* limited jurisdictions within their proper bounds—and to annul whatever they might attempt in violation of the conditions imposed on them. It is simply because *they are all civil* as well as limited jurisdictions; and that this Court alone has supreme and universal jurisdiction *in civilibus;* and, *therefore*, necessarily disposes of every thing civil that has not been clearly assigned to the exclusive cognizance of some special judicature. When the Court of Session, therefore, sets aside the decreet of a Small-debt court for a sum of £20, though the decrees of that court are final as to sums below £10, it does not do this in virtue of any general power to repress *all judicial excesses*, but merely because it has itself an original jurisdiction in all civil questions; and this is only excluded by that of the Small-debt court where the sum is below £10.

It will be found, accordingly, that this superintending power, and authority to keep limited exclusive jurisdictions within bounds, is *not peculiar* to the Court of Session, which can exercise it only as to proper civil interests, but is common to all other supreme courts, within whose general province any such limited and exclusive jurisdictions may happen to have been established. By many police statutes, for example, the jurisdiction of these courts is made final as to various minor offences of a proper criminal description; and similar powers are vested by other statutes in Sheriffs and Justices of the Peace. If the limits of such special jurisdictions, however, are transgressed, either as to the description of the offence, the measure of punishment, or even the forms of procedure, their proceedings of course are liable to be controlled and annulled. But by whom? Not surely by the Court of Session, by virtue of any high prerogative or general power of redressing wrongs, but by the Court of Justiciary; which has an universal jurisdiction in matters criminal; and, as such, is entitled to take cognizance of every thing in that department that has not been properly excluded from its review. And the same is believed to be the case as to the Supreme Court of Exchequer, whose general jurisdiction over all fiscal cases I rather think is excluded, as to certain small matters, by a *final* jurisdiction being given to Justices of the Peace, whose excesses or abuse of such jurisdiction would clearly be liable to the correction, not of the Court of Session, but of the Barons of Exchequer alone.

In all these cases, then, exclusive jurisdictions, if given under express limitations, may no doubt be restrained within their assigned limits; but not by any one court holding such a restraining power as its peculiar prerogative, but by all the different supreme courts within whose general province the matters entrusted, *sub modo*, to these special judicatures, are respectively comprehended, and over which they consequently hold severally a sovereign jurisdiction, *ratione subjectæ materiæ*.

But from this very circumstance it must be apparent, that there can be still less reason for the assertion of a *general* controlling power in this Court of Session, in reference to those *great branches of jurisdiction* which have been in most countries committed to separate and independent judicatures; or those great lines of demarcation, by which the provinces of our several supreme courts have always been divided; and from the extent and direction of which, each has received its specific constitution, denomination, and authority. In regard to these, the distinction is not of order or degree, but in the generic difference *of the ends and objects of their institution;* and where these are so palpably diverse, as that they can have no point of contact or collision, it seems evident that no one can possibly (but by special and express enactment) have any right, or even access, to correct the errors or repress the excesses of another—all being equally sovereign and equally independent, and moving in orbits that can never cross or disturb each other.

Upon the principle already referred to, I could understand how a pretension to restrain the excesses of the Court of *Exchequer* might have been set up by this Court, on the ground that the rights adjudicated in that court are truly civil rights—and so, liable in the last resort to their original and high jurisdiction. Even in that instance, however, we have declined taking cognizance of the alleged failings of another supreme judicature within its appropriate department. But with regard to the *Church courts* and the *Criminal courts*, the incompetency of such interference is still more palpable and complete. The causes that come before those courts are none of them civil causes, or such as could at any time have been originally cognosced or adjudicated here. The distinction between them, therefore, is radical and generic; and the objects and purposes of their institution are totally apart. The business of this Court is, to adjudicate and award patrimonial and temporal rights—of the Criminal court, to investigate and punish crimes, by the infliction

of temporal pains—and that of the courts Ecclesiastical, to maintain the means of religious instruction, and to exercise spiritual discipline by the instrumentality of spiritual sanctions alone. Those, indeed, are the three great natural distinctions of courts and jurisdictions; which have been exemplified in many parts of the world, besides this kingdom of Scotland, by the establishment of separate *systems* of judicature, each of which within its own sphere is supreme and independent; and, while they mutually repel and exclude each other, can never come into actual conflict or collision.

But it is said that, as all these separate and independent jurisdictions are conferred by the supreme power, and for the most part under limits and conditions which may be occasionally transgressed, there ought plainly to be somewhere a superintending power to repress their excesses, without which there might obviously be many a wrong without a remedy. Now to this I would answer, first, that on principle and theory, it obviously is not possible, among fallible mortals, absolutely to exclude such a result, or even very much to diminish the risk of it; since, however cunningly the censorial or correcting court may be constituted, it may itself require correction—*et quis custodiet cutodes?* Besides that, it seems but a rude and clumsy contrivance to vest this extraordinary power in one of these very courts that is itself limited in its jurisdiction; and that it is not easy to see why—if a supreme *civil* court ought to have authority to repress the possible excesses of supreme *criminal* or *ecclesiastical* courts—these ought not also, in their turn, to be charged with the duty of repressing those of the civil court. But the second answer is more conclusive—and it is, that as there is confessedly no statute vesting the Court of Session with this power, and no recognition of its existence in any book of authority, so I humbly conceive it to be certain, that no such general restraining power has ever been practically asserted by this Court, in relation to the proceedings of other supreme courts, but, on the contrary, has been, and is daily and familiarly, disclaimed and denied.

And here, I go at once to the High Court of Justiciary; both because its proceedings are open to our daily observation, and because it is *in pari casu* with those of the Church, in not being liable to correction or review by the House of Lords. Now it cannot be denied that that High Court may fall into errors—and errors for which it would even seem more necessary than in any other case that some corrective should be provided; both because its proceedings touch life and liberty more directly than those of any other court, and because, from the peremptory nature of its most important diets, there must be a greater rather than a less hazard of its coming occasionally to rash or erroneous decisions. Yet it will not, I suppose, be contended at this day, that this Court of Session could correct the errors or repress the excesses of the Court of Justiciary, even in the case of the most fatal mistake, or flagrant misapplication of the law. If that court were to convict a prisoner on the verdict of an unsworn or disqualified jury—or on a libel palpably irrelevant—or on the evidence of witnesses plainly inadmissible—could *this Court* reduce the conviction, reverse the sentence, and order the convict to be discharged? If it be said that, in such a case, there would be a remedy in the mercy of the crown—I answer that, in the case of the Church courts, there would be a parallel remedy in the interference of the legislature. But I avoid the replication altogether, by merely supposing that the blunder, or abuse of the law, has been committed *in favour* of the prisoner, and not against him; that preposterous objections to the relevancy had been admitted—jurors pledged to acquit, allowed to pass on the assize—or witnesses received in his favour, against whom there were insuperable exceptions. There could be no appeal to the crown against an acquittal so obtained. But could this Court, on that account, or because there would otherwise be a great wrong without a remedy, assume to annul the sentence, and ordain the Lord Advocate to indict, and the Court of Justiciary to proceed *de novo*, to the trial of a man who had already tholed his assize? I take it for granted that no one will seriously maintain such a proposition.

The cases I have now stated, it will be observed, are extreme, and such as, in any practical view of the matter, may be rightly held as impossible cases. But it must be at once apparent, that my object in choosing them of this description, was not to gain any undue advantage to my argument, but truly to subject its soundness to the severest possible test; since, if this Court could not interfere, even to redress such flagrant and scandalous wrongs as are there supposed, it must be, *à fortiori*, certain that it could not so interfere, when the call for its intervention was much less urgent or importunate; and accordingly it would be easy to illustrate my proposition by cases of ordinary and familiar occurrence; by any of the cases, for example, which, on account of some difficulty as to points of jurisdiction or statutory construction, are daily certiorated to the High Court from the Judges on circuit; or ordered for argument before that court, on advising

advocations on similar grounds, from the inferior courts of criminal jurisdiction. What would be thought of an attempt, in such circumstances, to apply to the Court of Session for an interdict against carrying the ultimate sentence of the Justiciary into execution? or even of a declarator, for having it found that they had exceeded the limits of their jurisdiction, though without touching at all on civil interests? or mistaken the construction of a statute, relating exclusively to criminal prosecutions?

And this last suggestion leads me to say a word or two on another form of the claim to a general controlling power in this Court, which I find indicated in some of the papers before us, and which seems to result in this, that though we may not have a right to interfere with other supreme courts, where they merely go beyond their powers, as settled by common law and usage, it may yet be otherwise where the illegality consists in the disregard of *positive statutory* injunctions; in as much as it is alleged that it is competent to this Court alone to interpret and expound all the statutes of the realm; and that what they declare to be their meaning, must be binding upon all other courts. Now, with the greatest possible deference to the opinions in which I understand this notion to be countenanced, I must say that it appears to me to be no more than a new, and I think a more inadmissible, form of the pretension to which I have already spoken. But I can find no trace of authority for it, either in our statute or institutional law; and what of itself I hold to be decisive, that it has quite as little support from practice, or rather is as completely excluded by it, as that which we have just been considering. Indeed, most of the imaginary cases which I have already stated to test the existence of such a pretension, referred to supposed violations of known and most important *statutes;* but there can be no difficulty in multiplying examples.

There are many statutes, as we all know, fixing the jurisdiction of the Courts of Justiciary and Exchequer, and very minutely regulating the procedure of those courts—in violation of which it would undoubtedly be in itself illegal for them to proceed, and which are truly to be regarded as limits and conditions of their respective rights of jurisdiction. But if, by gross blunder, or even from worse motives, these statutory provisions should be transgressed by either of those supreme courts, will it be said that this Court could interfere to correct the blunder, or declare the nullity? or to interdict or ordain what they ought to do in obedience to the statute—the matters affected by their erroneous judgments having reference only to crimes and punishments in the one case, and fiscal duties or delinquencies in the other? But to come to particular cases.

By one statute, for example, a prisoner brought to trial before the Court of Justiciary is entitled to an *inducia* of fifteen days after receiving his indictment; and, by another, is entitled to be discharged if not brought up for trial within sixty days after making intimation to the prosecutor. Now, suppose the Court of Justiciary were to overrule his objection that he had only had fourteen days, or that he was not arraigned till after the expiration of the sixtieth day, and should proceed to trial and conviction under such a deliverance, and this upon some absurd way of calculating the periods in question—could this Court interfere to redress the injury, by reducing the sentence? or even by finding, in a declarator, what the supreme criminal court should, in all time coming, hold to be the true meaning of these statutes?

In the same way, there are innumerable statutes for the protection of the revenue, and for settling the forms of proceeding in the Court of Exchequer, in prosecutions and actions of debt under these statutes. But if a doubt arises as to their construction, was it ever heard of that it belonged to any other court than the Court of Exchequer itself, to settle what that construction should be? And if in any particular case a party should be aggrieved by what he alleged, and upon apparently clear grounds, to be a palpably erroneous construction, could he ask *this Court* to reverse the judgment of the Exchequer, or even pursue a declarator as to what, in all future cases, the Barons should be obliged to adopt as the true construction?

There can be but one answer, I think, to any of these questions; and, indeed, where no civil interest of a party is directly concerned, or no *such* civil interest as we might have adjudicated on in the first instance, and where no question is raised (or left) as to the extent of our own jurisdiction, I take it to be clear that we can take no cognizance of the supposed errors or excesses of other supreme Courts, acting within their own province—*ratione subjectæ materiæ*—whether the alleged error was in the misconstruction of a statute, or the misapplication of a rule or principle of common law. And so far from holding that we have any peculiar power of fixing authoritatively the construction of all possible statutes, I should almost venture to lay it down as a measure admitting of no practical exception, that statutes enacted exclusively for the guidance of particular supreme Courts, are in no respect within the cognizance of any other Courts; that

statutes about crimes and punishments are to be interpreted only in Justiciary, and statutes about the revenue in Exchequer; while statutes about ordinary civil rights should be exclusively judged of by us, and those touching spiritual things and persons in the courts of the Church.[1] I say this, however, on the supposition that the limited application of each of these sets of statutes is clear; and that no construction of them in the courts to which they are particularly addressed, would affect the proper or original jurisdiction of other courts. I am aware, too, that there may be questions of difficulty upon these last points. But to the effect of showing that there neither is nor can be, in this Court, any such absolute and *universal* power to fix the construction of *all statutes* whatsoever, I think I have said enough; and this is the only point to which I would be understood as now addressing myself. And with reference to this, I must conclude by saying, that where it is admitted that no original jurisdiction of this Court is affected, and no civil or patrimonial interest of the subject brought into question, but where *the only objection* is, that in a proceeding purely criminal, or purely ecclesiastical, the statutes which should govern such proceedings have been disregarded or misunderstood, I cannot take it to be doubtful that *our* jurisdiction, or our right to expound the statute or to redress the wrong, is utterly and entirely excluded: And, therefore, seeing that I find all these elements in the case now before us, I must hold that we have no right to meddle with it; and that the wrong, if there has been a wrong, must be left to the same high and *ultimate* remedy which could alone be sought, or applied, if a similar wrong were committed by the High Court of Justiciary, or by the House of Lords itself, in disposing of an appeal from the Court of Session or Exchequer.

Before leaving this subject, however, I scarcely think it necessary to observe, that the suspenders never can be allowed to escape from the consequences of what has been said as to supreme courts in general, or to let in the control of this Court in regard to the Church, on any distinction between the constitution of its courts, or their special unfitness, (from the great number and constant changes of their members,) to be entrusted with the final adjudication of the grave matters that may come before them. From all this ground of pleading, it appears to me that they are absolutely excluded by the necessary admission, that, within the province which is conceded to them, *they actually have* such final and uncontrollable authority; and that *the only ground* on which our right to interfere with them is now rested, is the allegation that they have trespassed beyond that province, and exceeded their legal powers. I have already endeavoured to show, (I fear too much at length,) that unless they have also encroached upon *our* province, and unduly interfered with civil interests, *that* would be no legal warrant for our interference. But even upon the suspenders' view of the matter, I take it to be manifest that the *popular* objection now alluded to, that the constitution of their courts is not calculated to bespeak much respect for them, and makes it particularly desirable that they should be subject to control, is palpably and entirely *irrelevant*. If they confessedly have an uncontrollable jurisdiction within a certain province, it will never help to fix the limits of that province to contend that they ought to have had no such jurisdiction at all. And really, if it be admitted that they may finally, and without redress, reject a presentee for insufficient literature, who offers to prove before us that he has more learning than half his examinators; or to suspend or depose a brother for immorality, upon proof of levities that, to our lay judgments, might appear to merit no such sanction, or on evidence on which we might think that no conviction of the slightest delinquency could be sustained—it seems idle to speak of the urgent necessity there is for our interference, to prevent the General Assembly from passing a law, (after two years' deliberation,) by which an additional minister might be admitted to take care of the souls, and exercise spiritual discipline, in a part of the parish of Stewarton.

And now, my Lords, before finally concluding on this main question of jurisdiction, I must take leave to say, with reference to some allusions that have been made to certain recent decisions of this Court, in which opinions are supposed to have been delivered contrary to the views I have been endeavouring to support, that when this consultation of the whole Court was ordered, I certainly did understand that any point previously decided by the majority only of a single Division, was to be held open for our reconsideration;

[1] While revising these notes of my opinion, I have been referred to a passage in Lord Stair, which seems to afford a precise confirmation of the doctrine above stated. It is in the 28th section of the first title of the fourth book of that great lawyer's Institutions; where he says that "it is implied in the office of the Lords of Session, that they should interpret *all Acts of Parliament without which they must be incapable to determine all civil causes; which interpretations, however*," he adds, "*have no other effect, but in* relation to the said causes; *without prejudice to other judicatories to interpret the same, as* THEY *are convinced.*"

and that we were not to be precluded from deciding on the merits of it, by any thing less than a judgment equally solemn and authoritative with that which we are now to pronounce; and I scarcely imagine that any of your Lordships have a different view of that matter. At the same time, I fully admit that we are bound by every thing touching these questions that can be held to have been actually decided by the Court of last resort, in the case of Auchterarder. The law as there laid down we must now receive as settled; and certainly are not entitled to revive the doubts and difficulties which divided us at its first discussion. But, as I read that judgment, I think it clear that it leaves the whole question of jurisdiction, as I have now stated it, perfectly open and untouched; that it proceeded entirely on the ground that the *Veto* law was a direct invasion *of the civil right of patronage;* and that the Presbytery, by rejecting the presentee without taking him on trials, and before being required to enter on the *spiritual act of ordination*, or any other *religious* proceeding, had excluded themselves from the ground of pleading on which I have been for so long insisting; and consequently that it could have no application to a case like the present, where, I conceive, it has been made out that no civil right whatever was affected, and where the whole proceeding complained of was exclusively spiritual and ecclesiastical. [Here his Lordship referred to several passages in the judgments of Lords Brougham and Cottenham, (particularly at pages 285, 6, and 7, and 329, 30, of Shaw and M'Lean,) in the Auchterarder case; from which he said it was plain that they had anxiously avoided committing themselves on the points now under consideration, though there were *obiter dicta* in parts of those judgments that might indicate how one of their Lordships was then inclined to view them.]

I may also be permitted to observe, in taking farewell of this vexed question of jurisdiction, that I cannot bring myself to share in the apprehensions which it appeared to me that some of the Judges had conceived, as to the disorders which might be produced if the Church courts were to be found independent of our control, so long as they confined themselves to matters spiritual and ecclesiastical; even though they should be palpably exceeding their legal authority, or disregarding express statutory provisions. It certainly does appear to me, that the excesses of this sort which have been represented as *possible*, are so exceedingly unlikely, and indeed inconceivable, as to be substantially chimerical. But if there really was no other remedy but our interference, and if the disallowance of our jurisdiction of control were to insure actual effect and impunity to every spiritual usurpation on which the Church might be disposed to venture, I should certainly think this a very perilous and undesirable condition of things. But the remedy appears to me equally obvious and effectual, and at once suggests itself in the shape of an authoritative Act of the Legislature. If the encroachment was made under a mistaken or unfair construction of a general statute, the plain course would be to repeal, or explain it in terms that could not be mistaken; or, if it consisted in an audacious disregard of clear statutory injunctions, there could surely be no difficulty in securing their future observance by sanctions that could not be neglected. If the Legislature should come to think that the Church ought to be prevented from appointing *quoad sacra* ministers, or in any other way adding to the members of its Presbyteries, nothing, I should think, would be easier than to enact that no minister should hereafter concur in such an appointment; that all past appointments should be annulled; and that whoever contravened these provisions, should *eo ipso* forfeit his whole rights and *status* as a minister of the Established Church; that his parish should be instantly declared vacant, and the patron called upon to present to the benefice. There could obviously be no standing out against such a provision as this; and instead of the distressing spectacle of an interminable series of conscientious contumacies, rebukes, imprisonments, and actions of damages, under the sanction of a Court whose jurisdiction it is known will always be disputed, the whole matter would be finally and effectually settled, by a power which could not be resisted, and an authority which admitted not of question.

I have now said all that I feel called on to say as to the great question of jurisdiction; and it will be seen that I have ventured, and indeed found it necessary, to meet it, on the supposition or assumption that there was, or might have been, in this case, a mistake or excess on the part of the Church, in the exercise of the power committed to it by the legislature. Even on that supposition, I have come to the conclusion that the jurisdiction or interference of this Court would be excluded. But if there was no such excess, and if all that was done was fairly within the legal authority of those who did it, then of course our jurisdiction would be excluded, even if all for which I have now been contending should be rejected as erroneous. My own opinion, as I have already intimated, is, that there has truly been no such excess; and that on this ground also, the suspension should be refused as incompetent. I think so, on the just construction of the statutes by which

the Church undeniably received the jurisdiction and authority it possesses; cleared and confirmed as I take that construction to be, by the *antecedent* usage, to which I think these statutes gave distinct warrant and sanction; and by the *subsequent* usage, by which their more general enactments have since been explicated and applied. But on this part of the subject, which necessarily leads into citation and detail, I now forbear to enter; and justify myself by saying, that I adopt generally the views and explanations so fully set forth in the opinion of Lord Moncreiff, with the pertinent and most important additional remarks now made by Lord Fullerton. Declining, therefore, all historical investigation or particular controversy, I shall confine myself to a few general and detached observations on points which still seem to admit of a little further elucidation.

And in the *first* place, I quite agree with Lord Fullerton in thinking that what the Church has here done is not properly to be considered as an act of *jurisdiction*, in the narrow or technical sense in which that word is usually taken; as denoting the judicial determination of matters litigated between adverse parties. But I am not of opinion that the statutory power of the Church to perform the act, can, on this account, be subject to any additional objection. In the first place, I hold that there are words enough besides, in the general statutes—such as those giving full power to do all things requisite for the good government of the Church, and to put order to all matters ecclesiastical, &c.—to cover and warrant all that has here been attempted; and secondly, I am satisfied that the word jurisdiction itself was not used in these statutes, in the narrow and limited sense to which I have alluded; but in its larger, and perhaps more correct sense, of the power *to make*, as well as to announce the laws or arrangements by which its prosperity and good order might be best promoted. To speak of the *jurisdiction* of the Church "as standing or consisting in preaching of the word, correction of manners, or administering of the sacraments," is to speak unintelligibly in any other sense; and the meaning I take very plainly to be, that it should have power (*jus dicere*) to make and announce such laws as it might think necessary for the attainment of these objects; and, *inter alia*, to settle by what manner of persons, and to what congregations, the word should be preached, and the sacraments administered.

In the *next* place, I must observe that I agree with Lord Moncreiff that the only just measure we can now take of the powers really given, and intended to be given, by these and other general words in the statutes, is to be found in the powers *actually and openly exercised by* the Church, at and before the time when validity and legality was distinctly given to them by these and other words, in these important enactments. It is never to be forgotten, and indeed is at the bottom of the whole questions, both as to the particular proceeding now under consideration, and as to the true character and constitution of our establishment generally, that there is nowhere a proper erection or creation of the Church by original grant or charter; but merely a recognition, ratification, and adoption of certain things, and arrangements, which it had previously adopted of its own authority. Now, when I find that before the Act 1567, there had been already no fewer than Fifteen General Assemblies of the Reformed Church; and these constituted, not of a knot of zealous or ambitious churchmen, but, in a far greater proportion, of laymen of the highest rank and station in the country: noblemen of the greatest name and connexion, commissioners of shires and great burghs, and men holding offices of trust and dignity under the crown, I cannot but think that, when these General Assemblies and their acts were afterwards solemnly ratified and approved of in Parliament, nothing else could in fact have been intended but to establish the fitness and legality of all the more important powers they had previously exercised, and to sanction their exercise in all time to come: And when I find, further, that not only in every one of these meetings ministers are charged with the cure of souls, not within the bounds only of the ancient parishes respectively, but over great districts of country, (which is precisely the converse of what is now complained of;) but that in three at least of these early assemblies, commission is expressly granted to certain persons "to plant Kirks and Ministers," as well as readers and visiters, over extensive tracts, frequently comprehending more than one entire county, I seem to find, without going further, sufficient statutory authority for all that has now been done by the respondents; as well as for all that was done of an analogous character in the long intermediate period; whether, in the appointment of colleague ministers, and second and third charges; the entire creation and new-modelling of presbyteries and synods; the institution of chapels of ease, or the annexation of districts, *quoad sacra*, to other than their original churches. All these things were done confessedly subsequent to the statutes, and in the intervals of these enactments; and done on the sole authority of the Church courts themselves openly; and without challenge or surmise of illegality for a period of near 300 years.

And, in reference to all these proceedings, and indeed to the whole historical view of

the question, I must be permitted to add, that there could not, in my opinion, be a greater mistake than to represent any body or section of the Reformers, who had overthrown the ancient Church partly out of resentment and dislike to its spiritual tyranny, and ambitious pretensions, as actuated at this early period by any jealousy or apprehension of the new Church adopting its spirit or following its example. For many years the whole Protestant body of the nation was in cordial alliance with the Church, and anxious for the extension of its power and authority in all matters spiritual. The enemies it then had to struggle with, and the only enemies, in council, in conference, or in parliament, were, in the first stage, the *Popish* adherents of the court, and the hankerers after the departed hierarchy and all its lucrative and ambitious abuses; and after the accession of James, his abettors in his schemes for the restoration of *Prelacy*, and the establishment of arbitrary power. The Church was wholly with the champions of liberty in these times, and the friends of liberty entirely with the Church. The idea of a priestly domination of presbyters had not, in that early day, dawned on the imagination of any one concerned in the conflict—of the one inclining or the other: Nor, however such a spirit may be thought to have indicated itself in the stormy period of 1638, can any part of the supposed parsimony of the first great statutory grants to the Church, be ascribed to such a cause, without the greatest ignorance or strangest perversion of historical facts? In my opinion, however, the grants were neither grudgingly conceded, or parsimoniously measured; and with regard to this particular matter, of a power to appoint pastors to particular flocks, or to establish ministers in particular districts, *quoad sacra*, it is my firm conviction that, if the Church had then seen cause to advance such a claim, it would have met with no opposition, at least from any adherent of the Reformation; and I say this upon the plain ground, that no party could have had any intelligible motive or interest to oppose it. The only point upon which any of the leading men of the Reformers were ever opposed to the claims of the Church, was that of its temporal endowments: And it is undoubtedly but too true, that after they had got the teinds and lands of the suppressed Church gifted out to them, they were shamefully reluctant to part with them, even to the extent of the most moderate provisions for the preachers of their own communion; and the feuds and heart-burnings to which this gave rise, are unhappily but too conspicuous on the face of our records. But to these men it is evident that the proposal of committing a populous district to the care of a *quoad sacra* minister, must have been not only unexceptionable, but in the highest degree acceptable. Since such an appointment implied that a Church and an endowment had been provided by voluntary subscription; and consequently that no compulsory assessment on their teinds was soon to be apprehended in that quarter.

I feel confident, therefore, that no opposition would have been made to the demand for a specific grant of such a power, if that had been held necessary to its exercise; and in the various instances in which it was actually exercised, there appears accordingly to be no trace of such an opposition. That these instances are but few in number, especially in early times, may, I think, be easily accounted for by the slightest consideration of the state of the country, and the ecclesiastical body, at these periods. For a very long time after 1592, the supply of qualified ministers was always inadequate to the wants of the people; and instead of being able to appoint additional ministers in large and populous parishes, it was long found impossible to find one to officiate in each such parish. The time was yet far off, and scarcely anticipated by the most sanguine, when the diffusion of education should supply a *redundance* of qualified labourers for the vineyard; and the increase of wealth among the well-affected, the means of building additional churches, and providing for those who were to minister at their altars. Till such a time came, it is obvious that the first resort would be to the churches already built; and the first appointment of men who would have a legal right to be maintained from the teinds of the ancient livings; and this I take to be palpably, and beyond all doubt, the true and sufficient cause why the Church at all times directed its efforts chiefly to obtain a settlement and endowment in the old churches and parishes; and for a long time confined them almost exclusively to that object. And I am fully persuaded that it was this, and this only, which gave it the aspect, and in truth and substance the constitution, of a parochial church; and not in any degree the notion that it was bound down to the limits of the ancient parishes, or wanted power to appoint ministers for such other districts as seemed to require a separate exercise of discipline and pastoral care.

But though, from the circumstances now referred to, the instances of those appointments have necessarily been few, I think they have been quite enough to fix their legality, and the true construction of the statutes under which they were made; and, in truth, that they are as numerous as, I think, could have been reasonably expected, although the power to make them had been engrossed in express terms in the statute-book. They

were all made openly, and all without challenge; and when I find that the whole current of authority, from the days of Sir James Stewart down to Bankton, and Erskine—Sir John Connel, (assisted, as is generally understood, by his venerable father-in-law,) and Presidents Blair and Hope in our own day, are all more or less directly in favour of the existence of this particular power; while the general doctrine, of the absolute independence of the Church courts in matters ecclesiastical, and the incompetency of this Court to interfere with them, except as to *civil* consequences, is distinctly recognized by Stair, Kames, Lord Prestongrange, and Mr Crosbie, and in the arguments and decisions of this Court itself in the cases of Auchtermuchty, Lanark, and Dunse—especially as reported by Lord Monboddo—I must be permitted to say, that *the novelty* is, beyond all dispute, on the side of those who have recently challenged its legality, and not of those who are still inclined to uphold it: And, indeed, when I further consider the unanimous and unchallenged votes by which the law admitting the chapel ministers and those of the parliamentary churches to the full privileges of the establishment, in 1833 and 1834, and the decision actually pronounced, upon the assumption of this legality, by this Court in 1836, (though afterwards departed from,) I can entertain no doubt that the clear recognition of this power in the statute of Will. IV., as to voluntarily endowed churches, was not introduced inadvertently or without due consideration; but upon a clear and, I cannot but think, a most reasonable conviction in those who prepared it, that by the law, as then understood, these appointments were beyond doubt within the lawful power and competency of the Church. I cannot, therefore, part quite so lightly as some of your Lordships seem inclined to do with this distinct recognition of the power now questioned, in a recent statute of the realm; and though, I know not what doubts, and I know not what fears, have since fallen upon us, I feel myself constrained to say, that I shall hold as long as I can by the law which I learned in my youth, and have yet seen no reason to abandon in my old age.

The institution of chapels of ease, and the consequent appointment of additional ministers not only to preach and teach, but to administer sealing ordinances to congregations substantially local, though not geographically defined, which has been exercised without question by the Church courts alone for upwards of a hundred years, is obviously a proceeding so nearly identical with that now brought under challenge, that it seems difficult to suppose that the same general words in the statutes which legalized the one should not also be warrant enough for the other. The only distinctions insisted on are the more exact circumscription of the annexed districts, and the grant of kirk-sessions, and right to sit in Church courts. But I can see nothing either in the statutes or in the reason of the thing which should render either of these illegal. The definition of a precise district (it can be of no consequence whether or not it is called a parish) for the mere purpose of ascertaining the congregation over whose souls the cure is to be established, has really nothing in common with the sin of removing ancient landmarks, or disturbing the old geographical divisions of the country. It is an arrangement purely spiritual, and for spiritual purposes only; and, as was well observed by Lord Fullerton, is substantially adopted wherever a particular part or district of one parish is annexed *quoad sacra* to another—an operation *identical*, as to its effects on the inhabitants, or any interference with their convenience, with that performed by the annexation of a larger district to an entirely new church. Yet this operation has been repeatedly performed by the Church courts alone, and has been recognized in the decisions of this Court, as done effectually, and without liability to challenge.

As to the grant of kirk-sessions, and seats in the presbyteries, though I was prepared to have said something, I concur so entirely in what has fallen from Lord Fullerton, and is stated in the opinion of Lord Moncreiff, that I shall merely refer to their opinions for *the reasons* for which, independent of the authorities to which I have alluded, I conceive that it is liable to no objection.

And I have but a word to add on the subject of chapels of ease. These establishments, as they had stood from 1730, and as they were finally regulated in 1798, have been made the subjects of great and, I cannot but think, not very consistent praise, by those who are most opposed to their recent conversion into what are called *quoad sacra* parishes; and it seems to be taken for granted, that nothing but a thorough conviction of the Church's *want of power* so to advance them in the scale of our religious establishment, could have prevented them from being so advanced, either on their first institution, or at least on occasion of their better ordering at the date last mentioned. Now, my own strong conviction is, that it was not any notion of a want of power, but an actual want of will, on the part of the leading churchmen of these times, that truly kept them so long in that subordinate and far less efficient condition. There was a certain

jealousy, and love of power and superiority, which, while the demand for more effective ministrations was less felt, indisposed most of those who had the highest places and the chief power in the Church, to share it with those who, in point of fact, had already an equal share not only in the labours, but in the most holy of their common ministrations. When the population increased, however, and the want of a local discipline made itself more painfully felt, and, I may add, when a more evangelical spirit was awakened in the Church by the agency of eminent individuals, some of whom are yet alive, and all of whom we may well remember, this remnant of worldly jealousy or ambition, gradually gave place to a juster sense of the principle of Presbyterian equality; and the efficient ministers of local congregations were most properly advanced to stations and privileges which, without touching the civil rights of any one individual, made their labours more effective for edification, and added infinitely to the daily comfort of their congregations. Even in 1798, however, these causes were not in full operation; and it was, as I believe, to their want of development, or dormancy at the time, and not to any doubts as to its own power, that the Church then neglected, for I cannot find that it *refused*, to take the step on which it ventured, after long public deliberation, and without a hint of objection, in 1834. The suspenders, and those who support them, seem to assume as certain that the Church, in 1798, had the same wishes on this subject on which it afterwards acted in 1834; and that nothing but a consciousness of its want of power could have prevented it from consummating this part of its ambitious schemes at that earlier period. I have not been able, while preparing for this advising, to find any account of the discussions which actually took place on this subject in the Assembly, in that or the two preceding years. But I have formerly looked into them; and have a strong impression that there is nothing in them which can in any way countenance or bear out that suggestion; on the contrary, my conviction is, that there was not a word said either of the desirableness of such a change as was afterwards effected, or of want of power in the Church to carry it into execution.

I thought to have said something on the effects of the Commission of Teinds, and the proceedings of the Church in regard to it. But I have already trespassed too long on your patience; and shall only say, therefore, that I concur entirely in Lord Fullerton's observations upon the subject.

With regard to Lord Meadowbank's special objections to the admissibility of the individual who has been appointed to this charge, from supposed want of proper ordination or omission to take the oaths to Government, and other personal disqualifications—as they would not help us to determine the great general question on which we are now expected to give our opinions, I am rather well pleased to be excused from entering into any discussion of them, by the consideration that, according to my view of the case, they are matters only fit for the courts ecclesiastical; and are therefore irrelevant in a question as to *our* right to interfere, or even as to the powers of the Church to erect a parish *quoad sacra:* And I presume to take the same exception of *irrelevancy* to those very striking and eloquent representations of the Lord Justice-Clerk, as to the anomalies, inconveniencies, and unseemly difficulties into which he thinks the Church may be led by continuing to act upon the power it has now assumed.

These may form strong, as I admit that they do form startling, impeachments of the prudence or circumspection with which appointments of this sort should be gone about, or even raise doubts as to the possibility of multiplying them, without risk of evil. I cannot say, however, that I think these are so likely, or so great, as they are there represented. But the questions being, whether the Church has power to make them? and whether we have power to unmake, or prevent them? and being satisfied that the appointments themselves are purely spiritual, and therefore not within our cognizance at all, even if illegally, as well as unwisely made; and also, that they are made legally and within the statutory powers of the Church, I dismiss the argument *ab inconvenienti*, as entirely *irrelevant;* and come, on the whole matter, to the conclusion, that the suspension should be refused as incompetent, and the interdict removed.

THE COURT pronounced the following interlocutor:—

"*Edinburgh, 20th January* 1843.—The Lords, on report of Lord Cuninghame, having heard counsel for the parties, and resumed consideration of the record cases and whole process. In respect of the opinion of the majority of all the Judges, suspend the proceedings complained of, and declares the interdicts perpetual as already granted, and decern."

WM. PATRICK, W.S.—WM. YOUNG, W.S.—Agents.

APPENDIX

PROCEDURE referred to in the foot-note, *supra*, p. 10.

THE revised case for the respondents contained the following passages:—

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

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

At the conclusion of the oral argument, the Lord President called the attention of the Court to these passages, that it might be considered whether they should not be ordered to be expunged as disrespectful to the Court. The matter was allowed to stand over, to afford the respondents an opportunity of making an explanation if they thought fit to do so.

On 2d July 1842, the following minute was given in:—

"RUTHERFURD for the respondents stated, with reference to the passages on pages 2d and 3d of the case for the respondents, to which the Lord Justice-General * had called the attention of parties and the Court, that the respondents shall deplore, if, in making appearance, to state those pleas which they deem themselves entitled and obliged to maintain, they shall have inadvertently, and altogether against intention, used language that may to any one seem inconsistent with the respect which they unfeignedly feel, and are most anxious to express, towards this Court as the supreme civil tribunal of the country.

"The respondents, while they will yield unhesitating obedience to the judgment of

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* His Lordship is also the LORD PRESIDENT of the Court of Session.

this Court in all matters civil, are, as constituting one of the inferior judicatories of the Church, bound, not more by their ordination vows than by the statute law of the land, to yield obedience, in all matters ecclesiastical, to the superior Church judicatories; and failure on their part to yield obedience to their ecclesiastical superiors in matters ecclesiastical, would justly subject them to the heaviest penalties and censures, extending to deprivation of their ecclesiastical character and functions.

"On the part of the Church and its superior judicatories, and especially the General Assembly, it is maintained—and the respondents do not hesitate to say they think rightly maintained—that the law and constitution of the country, as declared in the statute-book by numerous Acts of Parliament, vests in the Church and its judicatories, exclusively and without appeal, the sole and entire jurisdiction in matters ecclesiastical, and that no jurisdiction whatever in matters ecclesiastical resides in the Court of Session, or in any other tribunal of this country.

"The Church and its superior judicatories, especially the General Assembly, maintain as a necessary part of the jurisdiction thus vested in them by statute, and as essential to the explication of that jurisdiction, the right to determine in any matter coming before it, but so far as regards ecclesiastical consequences only, whether such matter is ecclesiastical or not—not presuming to interfere with the right of the civil courts to determine as to all civil consequences, whether any matter stated to be ecclesiastical shall be held to be civil.

"The respondents, as an inferior Church judicatory, subjected in ecclesiastical matters to their ecclesiastical superiors, are bound, in pleading before any civil court—even the supreme civil tribunal of the country—to state every plea which shall preserve entire, and to allow of no plea which shall prejudice, impair, or in the slightest degree compromise, any right maintained by their ecclesiastical superiors, more especially where such is believed to be founded upon the constitution and statute-law of the land.

"The respondents in this case, deeming the matter in question, so far as their humble judgment went, to be entirely ecclesiastical, made appearance, not certainly with the view of acknowledging that your Lordships had any jurisdiction in matters ecclesiastical, which statute-law, as they humbly read it, absolutely denies to this Court; but with the view of stating those considerations which they trusted might be available before your Lordships, as they were satisfactory to themselves, in showing that the matters in question were exclusively ecclesiastical, and therefore, as such, by the constitution and statute-law of the country, withdrawn from your Lordships' cognizance.

"They could not, consistently with the duty which, under statute, they owe to their ecclesiastical superiors, nor without compromising the rights which statute has declared to be in the Church and its judicatories, appear before your Lordships, as they did, under the influence of the respect which they feel for the civil courts of the country, without humbly, but firmly, declining the jurisdiction of this Court in the matter—holding it to be ecclesiastical, and not civil—and without stating, as the condition on which they prayed to be heard, that nothing which they said or maintained should in any degree derogate from the sole and exclusive power which statute-law had vested in the Church in matters ecclesiastical, and from the right which the Church maintains in explication of its statutory jurisdiction, in itself exclusive and supreme, to determine in any matter which came before it, but to ecclesiastical effects and consequences only, whether such matters were ecclesiastical, in which view only they claim jurisdiction.

"They were the more anxious and the more bound to be explicit in their statements upon this point, because any error in their pleading might have possibly compromised higher and more important interests, and because great misapprehension had prevailed with respect to the object and purpose for which, out of respect to the Court and laws of the country, appearance had been made in other cases by judicatories of the Church.

"The object, then, of the respondents was, in the first place, to state their plea of declinature of jurisdiction; and, in the next place, to state that, though declining the jurisdiction, they made appearance in the hope of satisfying your Lordships, by such arguments as they might be able respectfully to urge, that the case was beyond your jurisdiction, but that such appearance should not be held to imply that your Lordships' decision should bind the Church judicatories as to ecclesiastical effects and consequences, or limit the Church in the exercise of the powers which they humbly maintain to have been conferred upon them in matters ecclesiastical, and with reference to ecclesiastical consequences only; or relieve the respondents of the obligation to obedience, which, under statute-law, as well as their vows of ordination, they owe, in matters ecclesiastical, to their ecclesiastical superiors.

"In the sense now explained only, the words referred to from the chair were used, and the respondents trusted they had been so understood: and, so understood, they venture to consider them such as they may address without offence to the Court on the one hand, and as they are, on the other hand, bound to use in duty to their superiors."

And on the 15th July 1842, the following minute was given in:—

"RUTHERFURD for the respondents begged leave to refer to the minute printed on their behalf on the 2d instant; and, in the view of preventing any possible misconstruction of their sentiments, and of obviating what he was now apprehensive might have seemed unsatisfactory in the explanation there given, he trusted he might be allowed to repeat their sincere regret that, in two paragraphs upon pages 2d and 3d of their case, expressions had been inadvertently and most unintentionally used, which might be thought inconsistent with the respect for their Lordships which they truly felt and should ever be anxious to avow, and were such, therefore, as they acknowledged should not have been addressed to the Court.

"He humbly requested their Lordships' permission to withdraw these paragraphs from the record, and prayed their Lordships to hold the minute of the 2d instant as containing the statement which alone it had been their intention to submit to the Court."

THE COURT pronounced the following interlocutor:—"15th July 1842.—The Lords having heard the minutes offered on the part of the respondents, the Rev. Presbytery of Irvine; allow the same to be received, and to form part of the record in the cause, and allow the passages in the case for the respondents, mentioned in the last of the said minutes, to be withdrawn and cancelled."

DECLARATORY ENACTMENT as to CHAPELS of EASE.

Edinburgh, 31*st May* 1834. *Sess.* 10.

THE General Assembly of the Church of Scotland, without a vote, approve of the report of their Committee, and did, and hereby do, enact and declare, that all ministers already inducted and settled, or who shall hereafter be inducted or settled as ministers of chapels of ease, presently erected and established, or which shall be hereafter erected and established, in terms of the Act anent chapels of ease, of 1798, or prior thereto, by authority of the General Assembly, or by the Presbyteries of the bounds, are and shall be constituent members of the Presbyteries and Synods within whose bounds the said chapels are, or shall be, respectively situate, and eligible to sit in the General Assembly; and shall enjoy every privilege as fully and freely, and with equal powers with parish ministers of this Church; hereby enjoining and requiring all Presbyteries, Synods, Church courts, and judicatories, within whose bounds the said chapels are or shall be situate, to receive and enrol the said ministers as members thereof, and put them in all respects on a footing of presbyterian equality with the parish ministers of this Church; giving, granting, and committing to the said ministers the like powers, and authority, and privileges now pertaining to ministers of this Church, within their respective bounds: And further, the General Assembly did, and hereby do, remit to the Presbyteries within whose bounds the said chapels now established are situate, to allot and assign to each of the said chapels a territorial district, and to erect such districts into separate parishes *quoad sacra*, and to disjoin the same *quoad sacra* from the parishes whereof they at present form parts; and also to take the necessary measures for selecting and ordaining, according to the rules of the Church, for each of the said districts so to be erected, a body of elders who, with the said ministers respectively, may exercise sessional jurisdiction within the same: And the Assembly instruct Presbyteries to be cautious not to assign a more populous district than it seems possible to attend to: Provided always that it shall be understood, that the chapels to be erected into parishes shall first have been constituted according to the laws of this Church, for which purpose it will be open to chapels to apply, if not so constituted already.

ACT anent Reunion with Seceders.

Edinburgh, 25th May 1839. *Sess.* 11.

The General Assembly, on the report of the committee for classing returns to overtures, having found that the overture anent reunion with Seceders has received the approbation of a majority of the Presbyteries of the Church, did, and hereby do, enact the said overture into a standing law of the Church, as follows :—

Whereas proposals have been made by the Associate Synod for a reunion with the Church of Scotland, and a considerable number of overtures have been sent, at the same time, to the General Assembly, from the Synods and Presbyteries of the Church, favourable to that object; and it has been ascertained by a committee of the General Assembly, that the course of study required, for a long time past, of students in divinity in connexion with said synod, is quite satisfactory, and that their ministers and elders do firmly adhere to the Westminster Confession of Faith, the Larger and Shorter Catechisms, and other standards of our Church; and whereas the members of the Associate Synod do heartily concur with us in holding the great principle of an Ecclesiastical Establishment, and the duty of acknowledging God in our national as well as our individual capacity; and we, on the other hand, do heartily concur with the members of the Associate Synod in confessing the great obligations under which we lie to our forefathers in the year 1638, and several years of that century immediately following, and the duty, in particular circumstances, of uniting together in public solemn engagement in defence of the Church, and its doctrine, discipline, and form of worship and government; and whereas our brethren of the Associate Synod have declared their willingness, in the event of a reunion, to submit to all the laws and judicatories of this Church, reserving only to themselves the right which the members of the Established Church enjoy, of endeavouring to correct in a lawful manner what may appear to them to be faulty in its constitution and government.

The General Assembly, with the consent of the Presbyteries of this Church, enact and ordain that all the ministers of the Associate Synod, and their congregations in Scotland, desirous of being admitted into connexion and full communion with the Church of Scotland, be received accordingly, and that the following rules be strictly observed by the Presbyteries of this Church relative to this subject :—

1. Ministers of the Associate Synod and their congregations shall be received into connexion with the Presbyteries in whose bounds their churches are situate, on their laying before the said Presbyteries respectively a representation or memorial, subscribed in name of the kirk-sessions of said congregations, by their moderator or other person appointed by them; and if there be managers of said congregations, by the preses of said managers, or other person in their name and by their authority, as also by the preses of a meeting of the members of the congregation, setting forth the desire of said ministers and congregations to be received into connexion with the Church of Scotland. On such representation or memorial being presented, the Presbytery shall, subject to the condition after specified, receive and admit the memorialists; and in the event of the Presbytery's refusing to do so, it shall be competent to the memorialists to appeal to the General Assembly.

2. On the reception of a minister and congregation of the Associate Synod into connexion with a Presbytery of this Church, the managers of said congregation, or the kirk-session and deacons, if managers, shall forthwith take the steps necessary for procuring a constitution for the newly-admitted church, and having a territorial district assigned thereto.

3. Every minister of the Associate Synod, at his admission as a member of Presbytery, and every ruling elder of said Synod, before taking his seat as a member of Presbytery or Synod, or General Assembly, shall subscribe the Westminster Confession of Faith, and the Formula of the Church of Scotland, and shall enjoy all the rights and privileges of ordained ministers and elders of the Church of Scotland.

4. The integrity of the kirk-sessions and existing congregations of the Associate Synod admitted into the Church of Scotland, and the right of said kirk-sessions to grant sealing ordinances to the present members of their said congregations, though not residing within the bounds of the parish which may be allotted to them, shall be distinctly and practicaliy recognized by the other kirk-sessions and the Presbyteries of this Church, provided always that this provision shall in no respect apply to non-residents who are not, at the date of this Act, members of the existing congregations as aforesaid.

5. Presbyteries shall not, at or after the admission of ministers of the Associate Synod

and their congregations into connexion with the Church of Scotland, require any provision to be made for the said ministers by the managers of said congregations different from existing arrangements; but the laws now in force in this Church, or hereafter to be enacted, shall be observed with regard to all future intrants.

6. The licentiates or probationers of the Associate Synod shall be received and treated as other probationers within the bounds of the Presbytery, on their making application to the Presbytery to that effect, and on their subscribing the Westminster Confession of Faith, and Formula of the Church of Scotland, and shall be held equally capable with them of receiving a presentation, or of being elected and called to a vacant congregation within the bounds of this Church.

7. The students of divinity of the Associate Synod, at the time of the passing of this Act, shall, on producing certificates of their having finished their theological course under the professor of the Associate Synod, be taken on trials for license by the Presbytery of the bounds. Those of the existing students of said Synod who have commenced, but have not finished their theological studies, shall complete their curriculum with him, or in the divinity halls of the Scottish universities; and their sessions of regular attendance on the lectures of the professor of theology of the Associate Synod shall be counted as sessions of regular attendance in the divinity hall.

8. Ministers and their congregations, out of Scotland, belonging to the Associate Synod, and expressing their desire of being recognized by the Church of Scotland, as connected with her, shall be held as standing in the same relative position as ministers and congregations in England, Ireland, and the colonies, whose connexion with this Church has been acknowledged.

