permission. He produced written permissions from both.

It appeared that the appellant along with his wife managed the farm, and that he and his family were the only persons resident upon it. His father-in-law Mr George Henderson, who was recognised by the respondent as tenant, resided at some distance. It was admitted that the right of killing rabbits was not reserved by the landlord, and could therefore be exercised by the tenant.

Argued for appellant—It had been decided that a tenant could not be convicted of a trespass upon his own farm. The principle of that decision applied to the present case. The appellant admittedly was the son-in-law of the tenant; he lived upon the farm and managed it for the tenant, and his position was not that of a manservant. The tenant was quite entitled to delegate his right to shoot rabbits.

Argued for respondent—Although appellant had a valid right to shoot rabbits, he might nevertheless be found guilty under a general conviction of having been found trespassing in the pursuit of game of any and whatever kind he might find. That was the nature of the present conviction. The permissions produced by appellant were dated after the offence libelled. A tenant could not make a general delegation of his authority to shoot rabbits to a third party. If a tenant did delegate his rights he must secure that the shooting should be done in a manner under his reponsibility.

At advising—

Lord Ardmillan—The mere presence of the accused upon the ground, if for an innocent purpose would not amount to a trespass. It lies therefore with the prosecutor to prove his charge and the criminal intention with which the accused was there. In this case, putting aside altogether the question whether or not the accused was the husband of the tenant, there is no doubt that he was at least the son-in-law of the old tenant, and that he and his wife were the only occupants of the farm-house (her father living elsewhere). We must hold upon the facts before us that the right to shoot rabbits upon the farm was not reserved to the landlord by the lease, and that therefore it was a right enjoyed by the tenant. Having such a right, it is clear that he was not bound to exercise it by himself alone, but that he could, under reasonable limits, delegate it to others; and if he gave it to his son-in-law, then it follows that the latter cannot be convicted of the present charge.

Lord Young—I am of the same opinion. There was, I think, here no act of trespass. The ordinary popular meaning of "trespass" is the entering upon land where one has no right to be. Now, there was clearly no trespass in that sense of the word—which I should have thought was the sense intended by the statute. But I am not disposed to go against the decisions. Were it not for them, I should have imagined that what was meant by the statute was simply the trespassing of persons on property in pursuit of game. The only other meaning which can be given to the word is that of a transgression—a trespass on or invasion of the right of another. Now, here also there was nothing of the kind. I assume that the tenant of the farm was the father-in-law of the accused; he was surely entitled to communicate to him this right which he possessed of shooting and keeping down the rabbits. Had the landlord reserved to himself the rabbits, there might have been a question as to whether or not his right had been invaded, but as there was no such reservation there could be no trespass upon his right. The accused had permission from the tenant. There is no reason to suggest that the permission was an afterthought. In the circumstances, nothing was more natural than that such a permission should have been given. In fact, in the absence of evidence to the contrary, I should have assumed that it had been given. I am therefore clearly of opinion that the conviction was a bad one, and must be set aside.

Lord Justice-Clerk—I entirely concur with your Lordships. The real question here is just this—Whether the accused, being the husband of the occupant of the farm, is liable to be convicted of a trespass when he kills the rabbits upon it? On two grounds I am of opinion that he is not. In the first place, the occupant of the farm had necessarily a right to kill the rabbits, and to prevent damage arising from their excessive numbers. In the second place, the tenant could surely delegate to his daughter's husband the right to do what from circumstances he was unable to do himself. I think, therefore, that we must answer this question in the affirmative.

The Court sustained the appeal, and found the appellant entitled to expenses.

Counsel for Appellant—Lang. Agent—D. Turner, S.L.

Counsel for Respondent—Mackintosh. Agents—Russel & Nicolson, W.S.

COURT OF SESSION.

Wednesday, March 1.

FIRST DIVISION.

[Lord Young.

WALKER AND ANOTHER *v.* THE PRESBYTERY OF ARBROATH &C.

Church — Churchyard — Presbytery — Jurisdiction — Churchyard, Designation of — Notice — Appeal — Competency.

A suspension and interdict was brought against a Presbytery and the heritors of a parish by a proprietor, a portion of whose ground had been designated for an addition to the churchyard. Want of notice of the proceedings was pleaded, and this was further alleged as a reason why no appeal had been taken to the Sheriff under the Ecclesiastical Buildings (Scotland) Act (31 and 32 Vict. c. 96).—*Held* (*reversing* the Lord Ordi-

nary's judgment, and *diss.* Lord Ardmillan) (1) that an appeal not having been timeously taken to the Sheriff, the proceedings of the Presbytery were final, unless it could be satisfactorily shown that there had been a serious violation of the ordinary rules of the administration of justice in all courts of competent jurisdiction, whereby inequity or injustice had resulted; and (2) that as regarded the facts, there was no ground for the allegation of insufficient notice or other circumstances to justify the interference of the Court.

Held that it was regular and competent for a Presbytery, after finding that a piece of ground was suitable and convenient to be designated as a churchyard, to proceed to designate or set apart that ground as belonging to the churchyard, to put a value upon it, and to appoint the proprietor and tenant to remove.

This was a suspension and interdict at the instance of James Walker of Ravensby, in the parish of Barry, Forfarshire, and James Dargie, tenant of Barry Mills and mill lands, part of the estate of Ravensby, complainers, against the Presbytery of Arbroath and the heritors of the parish of Barry, respondents, praying the Court to suspend the proceedings complained of, and to interdict the respondents from proceeding to carry out a designation or pretended designation as an addition to the churchyard of the parish of Barry of a portion of the lands of Ravensby belonging to the complainer James Walker, and in the occupation of the other complainer James Dargie, and also to interdict the respondents, the heritors of the parish of Barry, from inclosing the said proposed addition to the churchyard with a wall, and from entering upon and levelling or otherwise interfering with the said ground and with the complainers in the peaceable enjoyment and occupation thereof, and from entering into any contract for the execution of any work thereon.

At a meeting of the Presbytery of Arbroath, held on 6th April 1875, a petition, signed by certain of the heritors of the parish of Barry, was presented, which, after narrating that additional burying-ground was required for the parish churchyard, stated further, "that at a meeting of the heritors, held on the first of October 1874, it was unanimously agreed that a piece of ground immediately adjoining the churchyard on the north side is the most suitable and convenient for appropriating as an addition to it." The prayer of the petition asked the Presbytery "to appoint a visit to be made to the parish of Barry, and to direct this application and the proposed visit to be intimated to the heritors and all concerned from the pulpit, and upon the church-doors, in common form, and also by letter to the absent heritors or their agents. Thereafter to visit and inspect the said churchyard, and with the assistance of such persons as may be considered qualified for that purpose, to find that the churchyard is no longer sufficient in extent for the wants of the parish, and requires to be enlarged; to design and set apart so much of the foresaid or other suitable piece of ground as may be necessary for an addition to it; to ordain the persons in possession of the ground so designated to remove from it; to ascertain the value of the ground, and apportion and assess the same and other contingent expenses, &c., among the said heritors," &c. The Presbytery, after hearing this petition, resolved "to visit and inspect the churchyard of Barry on Thursday, the 6th day of May next, at one o'clock, p.m., with a view to fix upon a piece of ground suitable for designating as an addition to the churchyard, if they shall find the same to be necessary, and to designate the same; and directed, and hereby direct, the minister to intimate this petition and the time fixed for the visit from the pulpit and on the church-door, and also by advertisement in the local papers once during each of two successive weeks between the intimation from the pulpit and the day for which the visitation is called; further appointed and hereby appoint the minister to secure the attendance of a duly qualified and licensed land-valuator to aid them in the inspection and valuation of such portion of ground as may be considered suitable and necessary as an addition to the churchyard, with a view to apportion the expense of providing the same among the several heritors according to their just proportions; and adjourned and hereby adjourn further consideration of the petition till the said 6th day of May next."

The complainers, who were respectively proprietor and tenant of the piece of ground referred to on the north of the churchyard, averred that the above-mentioned meeting of the heritors on 1st October was not legally convened; that proper intimation had not been given, and that the statements in the petition were untrue. Further, that the meeting of Presbytery had not been intimated to them, and that the intimations ordered by the minute of Presbytery had not been made.

The notice affixed to the church-doors was in these terms:—"NOTICE—Intimation is hereby given to the heritors of this parish, and all concerned, that a petition has been presented to the Reverend the Presbytery of Arbroath craving them to design and set apart the piece of ground immediately adjoining the churchyard on the north, or other suitable piece of ground, for an addition to the same, and that the Presbytery are to visit and inspect the churchyard on Thursday, the 6th day of May next, at one o'clock afternoon, at which time the heritors and all others concerned, or persons duly authorised to act for them, are requested to attend." Both that notice and the intimation from the pulpit, the complainers averred, were defective, because the object of the visit was not specified, and there was no intimation in the local papers beyond two insertions in the *Dundee Advertiser* of an advertisement in the following terms:—

"*Parish of Barry.*

"A petition having been presented by a number of the heritors of this parish to the Presbytery of Arbroath, craving them to designate a piece of ground as an addition to the churchyard, intimation is hereby given that the Presbytery are to visit and inspect the churchyard on Thursday, the 6th prox., at one o'clock p.m., at which time the heritors and all others concerned are requested to attend.

"C. F. STEVENSON, *Minister of Barry.*"

Amongst other objections to that advertisement, it was stated that it did not specify the piece of ground proposed to be designated, and

the complainers averred that they had no intimation of the object of the meeting.

On 6th May 1875 the Presbytery of Arbroath met at Barry, and, along with a few of the heritors and a valuator, inspected the churchyard, and pronounced the following findings, *inter alia*:—"Find, *ad interim*, that the churchyard of Barry is not sufficient for the wants of the parish, and requires to be enlarged; further, that a portion of the two ridges of arable land lying immediately to the north of the churchyard, belonging respectively—the ridge contiguous to the churchyard to the estate of Ravensby, possessed by James Walker, Esq., and the ridge further north to the estate of Pitskelly, possessed by the Right Honourable the Earl of Dalhousie—is a suitable and proper and convenient piece of ground to be designated and appropriated as an enlargement of the present churchyard; The Presbytery further designate and set apart the portion of ground above defined and belonging to the several estates of Ravensby and Pitskelly as an addition to the churchyard of Barry; further, the Presbytery ordain the present tenants of said portions of land now designated and set apart for addition to the churchyard, and for access as aforesaid, to remove therefrom at the term of Martinmas next; further, the Presbytery remit to Mr James Proctor, licensed land surveyor, to measure separately and ascertain the dimensions of the several portions of land now designated and set apart for the purposes aforesaid—the final award of the valuator to be reported at a meeting of Presbytery on Monday, 17th May."

On the 17th May, again without intimation to the complainers, the Presbytery met, and a report was produced, whereupon, *inter alia*, findings were produced that the measurement of the ground belonging to the complainer Mr Walker was 3 roods 5 poles 20 yards and 7 feet, and the value of it £106, 0s. 7½d., and the value of the ground taken from Pitskelly £81, 6s. 3d. The Presbytery further found the heritors "bound to inclose said addition to the churchyard with a proper wall, and recommend them to erect a proper and convenient gateway for access to the same as shall to them seem most suitable and convenient and to remove the present north wall of the churchyard, and to level the ground where necessary, and generally to do whatever may be requisite to put the whole into proper condition for the use of the parishioners as a churchyard; and remit to the said heritors to take estimates of the expense, and authorise them to enter into contracts for the execution of the work, and to report the same to the Presbytery on Tuesday, the 7th day of September next, at their meeting in Arbroath, to enable them then to give final decerniture in the petition, and to allocate the whole expense upon the several heritors according to their just proportions; and adjourn further consideration of the petition till the said 7th day of September next, at 12 o'clock noon, and cite parties' petitioners to appear then and there for their interests." Mr Collier, the valuator, stated in his report that he had taken the unexhausted manures into account in arriving at his valuations.

On 22d July the clerk to the Presbytery wrote to the complainer Dargie, intimating that the Presbytery, "acting under statute as a civil court for the maintenance and enlargements of churchyards," had designated the above portion of ground as an addition to the churchyard, and had ordained him to remove at the following Martinmas. This letter was communicated to Mr Walker, and the complainers averred it was the first intimation either of them had of the actings of the Presbytery. A further meeting of the heritors was held on 7th July, when the clerk was instructed to advertise for and receive estimates for the carrying out of the proposed works.

The complainers averred, generally, that all the proceedings of the Presbytery were illegal, having been conducted without their consent and without intimation; that owing to want of notice they had been unable to submit the proceedings to the review of the Sheriff timeously, under the Act 31 and 32 Vict. cap. 96, sec. 3, and so to avail themselves of the provisions of that Act, and of "The Lands Clauses Consolidation (Scotland) Act 1845," and "The Lands Clauses Consolidation Acts Amendment Act 1860," and that therefore they were obliged to resort to their common law remedies.

Beyond the illegality of the proceedings, Mr Walker stated upon record that the ground proposed to be taken was unsuitable in every way for the purpose desired, and that the price offered was quite inadequate; that Dargie held a lease which did not expire till Whitsunday 1886, and that no provision was made for compensation to him for the loss of his ground, or in respect of unexhausted manure, or the loss of occupation.

The respondents in their statements averred that their clerk had on 19th April sent Mr Walker intimation of the presentation of the petition, substantially in the same terms as the notice affixed to the church-doors on the 18th; that Mr Walker was present in church when the intimation was made, and that he frequently called on the clerk and got access to the heritors' sederunt book; that the meeting of 17th May was specially intimated to Mr Walker in the following letter addressed to him by the clerk to the heritors:—"The Reverend the Presbytery of Arbroath will meet at Barry on Monday, the 17th inst., within the parish church at Barry, at 1.30 p.m., to take further steps towards making an addition to the churchyard at Barry, which meeting you are requested to attend." They further denied the complainers' other averments.

In answer to the statements of the respondents, Mr Walker denied that he had received the letter sent on 19th April, and averred that the other intimations were defective and intentionally vague.

It appeared from a print of documents produced that there had been meetings of the heritors previously to 1st October 1874, at which the question of the addition to the burying-ground had been considered, Mr Walker himself being present.

The complainers pleaded, *inter alia*—"(1) The whole proceedings of the Presbytery in connection with the said pretended designation of the ground in question having been irregular, informal, and illegal, the designation is inept and not binding on the complainers. (2) The said pretended designation and valuation of the ground in question are inept and not binding on the complainer James Walker, in respect that they were made in his absence and without intimation;

or, at all events, without any lawful or sufficient intimation to him."

The respondents pleaded—"(1) The judgments of the Presbytery referred to not having been appealed from are final, and implement thereof cannot competently be interdicted. (2) The proceedings of the heritors and the Presbytery above set forth having been regularly taken, the ground in question was thereby duly designated as a portion of the churchyard of Barry. (3) The complainer James Dargie has no title to complain of such designation. (4) The petition of the heritors, and deliverances of the Presbytery thereon, having been duly intimated, the complainer Mr Walker was bound to appeal against the deliverances of the Presbytery, if he objected thereto. (5) There being no grounds of objection to said designation, the petition falls to be dismissed."

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 26th November* 1875.—The Lord Ordinary having heard counsel, and considered the record and whole process—Suspends the proceedings complained of, continues the interdict, and declares the same perpetual, and decerns: Finds the respondents liable in expenses, and remits the account thereof to the Auditor to tax and to report.

"*Note.*—It is admitted that the complainers had no notice of the presentation of the petition of the heritors to the Presbytery on 6th April, of the meeting of Presbytery on that day, or of the proceedings thereat, other than the subsequent intimation from the pulpit and the advertisement referred to and quoted in statement 4. I assume that this was good notice of the resolution of Presbytery 'to visit and inspect the churchyard' on 6th May as a preliminary to designation, but it was, I think, no notice that the Presbytery would, at a meeting to be held immediately after the inspection, and on the same day, proceed to designation. This, however they did in the absence of the complainers, and, as I must hold, without notice to them. The interest of the complainant Mr Walker was obvious, for not only was he proprietor of the ground which the Presbytery designated, but as a heritor he was by 31 and 32 Vict. cap. 96, sec. 3, entitled to appeal to the Sheriff against the judgment of the Presbytery within twenty days of its date. It does not appear that he had any notice of the judgment of 6th May, or of the subsequent judgment of 17th May, prior to the letter of 22d July, quoted in statement 7. The proceedings of the Presbytery in ordering the removal from the ground and in valuing it may be subject to criticism and objection, but the want of notice to parties so nearly interested as the complainers, and particularly to the heritor, who was thus deprived of his statutory right to appeal, is in my opinion sufficient to warrant the suspension now asked."

The respondents reclaimed, and argued—The Ecclesiastical Buildings (Scotland) Act (31 and 32 Vict. cap. 96) put an end to the process of review of the proceedings of a Presbytery by the Court of Session or other court. Under that Act the case could be removed to the Sheriff, and it must be so removed within twenty days. That was not done here, and the findings of the Presbytery were therefore final. Intimation, except from the pulpit or on church-doors, to heritors was not necessary except in the case of their absence from the country. Courts now proceeded as before the Act of 31 and 32 Vict. c. 96, and there was therefore the usual notice of the first enrolment of a cause which enabled a heritor to be present before any step was taken. Those present at one diet fixed the next.

Authorities—Cook's Styles, 147; *Steel* v. *His Parishioners*, Jan. 31, 1712, M. 5131; *Mags. of Elgin* v. *Walker*, Nov. 17, 1841, 4 D. 25; Dunlop's Parochial Law, 128; *Greenock* v. *Shaw Stewart*, 1777, M. 8019, Kirkyard, Appx. i.; 2 Hailes 758; revd. 1779, 2 Paton, 486.

Argued for the complainers—The intimation of the meeting of 6th May from the pulpit and upon the church-doors was insufficient notice. A great deal more was done on 6th May than was previously intimated, and even then the proceedings were not made known to the complainers, nor was notice of what it was proposed to do on 17th May given. The Ecclesiastical Buildings Act (31 and 32 Vict. c. 96) incorporated the Lands Clauses Acts of 1845 and 1860, and by that Act, in a case like the present, heritors could only take by agreement with the proprietors.

Authorities—*Boswell* v. *Duke of Portland*, Dec. 9, 1834, 13 S. 148; *Porterfield* v. *Gardner*, Dec. 19, 1829, 8 S. 277.

At advising—

Lord President—The object of this suspension is to stop certain proceedings which have been taken by the Presbytery of Arbroath for the purpose of making an addition to the churchyard of the parish of Barry, and the Lord Ordinary has suspended the proceedings and granted interdict against further proceedings in the matter. His judgment gives effect to one of several objections which has been stated by the complainers, namely, that a certain deliverance of the Presbytery designating this ground as part of the churchyard, or as an addition to the churchyard, was not preceded by any proper notice to the complainers, who are the proprietor and tenant of the ground so proposed to be added to the churchyard. Of course in dealing with this reclaiming-note we have not considered, nor have we heard parties upon, any of the other objections which have been taken to these proceedings, and our judgment must be confined entirely to that which forms the ground of the Lord Ordinary's judgment. Now, as regards that matter, I am sorry to say I cannot agree with the Lord Ordinary.

The Presbytery in dealing with this matter are not regulated by the provisions of any statute, but are possessed of a jurisdiction which, although originally derived from statute, is matter entirely of common law as regards the mode of its exercise. It depends entirely upon practice and custom how these proceedings are to be carried out. It is, no doubt, of importance to observe that a recent statute has been passed to amend procedure in regard to ecclesiastical buildings and glebes in Scotland, including the matter of churchyards, but that statute neither confers jurisdiction on the Presbytery, nor deprives them of jurisdiction, nor does it either extend or limit their jurisdiction. It seems to me not merely to recognise the existing jurisdiction of the Presbytery, but to give a particular mode of appeal

or review of their proceedings in place of that which was formerly competent. The 3d section of the statute provides, that "if in the course of any proceeding before any Presbytery of the church relating to the building, re-building, repairing, adding to, or alteration of churches or manses, or to the designing or excambing of sites therefor, or to the designing or excambing of glebes, or additions to glebes, or to the designing or excambing of sites for or additions to churchyards, and the suitable maintenance thereof, including the building or repairing of churchyard walls, any heritor or minister of the parish shall be dissatisfied with the order, finding, judgment, interlocutor, or decree pronounced by such Presbytery, it shall be competent for such heritor or minister, within twenty days of the date of such order, finding, judgment, interlocutor, or decree, to stay such proceeding by appealing the whole cause, as hereinafter provided; and such appeal, on being intimated to the clerk of the Presbytery, shall have the effect of stopping the Presbytery from taking any further steps in connection with the said proceedings, provided always that if no such appeal is taken and duly intimated within the period foresaid, every such order, finding, judgment, interlocutor, or decree not appealed from as aforesaid shall be final, and not subject to review." And then there is a provision that supposing the original appellant falls from his appeal, any other party interested may take it up. There are provisions also as to the mode in which the appeal is to be followed out, by presenting a summary petition to the Sheriff of the county, and the deliverance of the Sheriff of the county upon that petition is to be final and conclusive, subject only to a right of appeal from him to the Lord Ordinary on Teinds, and the judgment of the Lord Ordinary on Teinds is not appealable. Now, it seems to me that that statute in the first place clearly recognises the competency of the Presbytery to deal with the matter here in dispute. It leaves the jurisdiction of the Presbytery just where it found it, but in place of there being any mode of reviewing the Presbytery's findings in this Court, as there formerly might have been, there is an appeal given to the Sheriff, and that is exclusive of all other review. Because, although the Lord Ordinary on Teinds is a member of the Court of Session, he is singled out as a person professing a peculiar function of his own for the purposes of this statute; and most certainly the Inner House cannot exercise those functions for him, nor can we in any way, so far as I can see, review the proceedings of the Presbytery in a matter of this kind.

But, no doubt, although we are precluded from reviewing the proceedings of the Presbytery either on matters of substance or matters of form, if it can be made out to our satisfaction that some serious violation of the ordinary rules of procedure in all courts of competent jurisdiction has been committed, whereby injustice or inequity has resulted, then we may be entitled to interpose for the purpose of setting the matter right, and making the inferior court, whatever it may be, whether civil or ecclesiastical, perform its functions according to the known rules and principles of law. But before we can so interfere we must be quite satisfied—not that the Presbytery have proceeded in a different mode from that in which the Sheriff or any other civil court would have proceeded, provided they have followed their own rules and practice—but that they have proceeded in some way which is inconsistent with the ordinary rules of the administration of justice in all courts, and have thereby committed some injustice. Now, I cannot see that there is anything of that kind before us as regards the objection which has been sustained by the Lord Ordinary; and it seems to me that his Lordship has too much left out of view, as I think the counsel for the complainer did also in the course of the argument, that we are not here to review the proceedings, but, only if sufficient cause be shown, to quash them, and set them aside as being illegal. And in exercising such a jurisdiction it creates a very considerable embarrassment, and limits very much our right of interference, that the inferior court is not acting under the directions of any particular statute, and therefore is not tied down to the use of any particular form, so that unless it can be shown that some practical injustice has been done by failure to follow out the obvious and proper course which every court of ordinary jurisdiction must follow in its proceedings, I do not think there is any room for our interference.

Now, how stands the matter of fact? It is said that the Presbytery proceeded to designate this ground as an addition to the churchyard without due notice to the complainer Mr Walker and his tenant. In considering whether any notice was given to Mr Walker in this respect, or whether he really was without notice of these proceedings, I do not think we are at all confined in our inquiry to the precise terms of the notice which reached his ear as a member of the congregation in church upon the particular day when the notice was read out from the pulpit. On the contrary, we are quite entitled to see how far Mr Walker is in good faith in objecting to the terms of that notice, and how far his own previous knowledge of the proceedings with regard to the addition to the churchyard did not enable him fully to understand what was the intended import and effect of that notice. Now, it appears from the minutes of the heritors which have been laid before us that the addition of that piece of ground, the property of Mr Walker, to the churchyard, was the subject of negotiation between Mr Walker and the heritors for some time previous to the presentation of the petition upon which the deliverance complained of was pronounced. The heritors, at a meeting on the 1st of October 1874, resolved to offer to Mr Walker for one acre of the field immediately adjoining the present burying-ground to the north of the existing churchyard, a certain sum of money, upon certain conditions, and the clerk of the heritors was desired to make a communication to Mr Walker upon the subject. We find from another meeting, of the 19th of November 1874, that Mr Walker's answer was received, and Mr Walker's answer adjected certain other conditions which were not satisfactory to the heritors; and accordingly the meeting unanimously declined to entertain Mr Walker's offer upon the terms therein stated. Then there is still further negotiation upon the subject and other minutes which shew that personal communications had taken place between Mr Walker and some of the heritors, or some one deputed to

represent them, and that in the end Mr Walker and the other heritors could not come to terms about the price of this ground and the conditions on which it was to be taken. That this piece of ground belonging to Mr Walker, immediately adjoining the churchyard upon the north, was the piece of ground that everybody looked to as forming the proper addition to the churchyard, there could be no manner of doubt.

Now, it is in these circumstances, when the heritors find that they cannot settle this matter among themselves, that a petition is presented by 15 of their number to the Presbytery of Arbroath. No doubt this is not a petition by the whole heritors, nor was it at all necessary that it should be so. It appears that there are 40 heritors in the parish, and the petition was signed by only 15. I do not think that makes any difference. But the prayer of that petition is that the Presbytery shall visit and inspect the churchyard, and with the assistance of such persons as may be considered qualified, find that it is no longer sufficient in extent for the wants of the parish, and design and set apart so much of the foresaid or other suitable piece of ground as may be necessary as an addition to it. Now, the foresaid piece of ground is just the piece of ground which had formed the subject of negotiation between the heritors and Mr Walker previously, viz., that field belonging to him immediately adjoining the churchyard on the north. This petition having come before the Presbytery on the 6th of April 1875, the Presbytery resolved to visit and inspect the churchyard on the 6th of May, with a view to fix upon a piece of ground suitable for designating as an addition to the churchyard, if they shall find the same to be necessary, and to designate the same; and directed the minister to intimate this petition, and the time fixed for the visit, from the pulpit and on the church door, and also by advertisement in the local newspapers. Following upon this minute there comes the notice which is complained of as insufficient, and which the Lord Ordinary has held to be insufficient as a notice to Mr Walker of the intention of the Presbytery to proceed to designate the ground as an addition to the churchyard. The notice is in these terms—(*reads*). It is maintained by the complainer that this is an insufficient notice, because it does not intimate that at that same meeting on the 6th of May the Presbytery will proceed to designate ground as an addition to the churchyard, but merely intimates an intention of the Presbytery to visit and inspect the churchyard. Now, if it were absolutely necessary that the Presbytery should divide the exercise of its functions into certain parts or stages,—if the Presbytery could not competently at one and the same meeting visit and inspect the churchyard and also designate ground as an addition to it, I should think there would be a good deal of force in that objection. But that has not been contended, nor could it be contended; because there is nothing, so far as I know, in the practice of the church courts to prevent the Presbytery from proceeding to exercise their functions to the whole extent in the course of one visit; and I do not see any reason why they should not do so under ordinary circumstances. Now, if it be competent to do that at one meeting, and if it be formally intimated to the heritor who is interested that the Presbytery are to proceed to visit the churchyard for the purpose of giving effect to the petition, the prayer of which is set forth in this notice,—for it is a petition described as craving the Presbytery to design and set apart the piece of ground immediately adjoining the churchyard on the north,—then I think it is a very strict construction indeed of such a notice as this to say that they have thereby pledged themselves that they will not proceed to do that at one meeting, but will confine themselves at their first meeting to a visit and inspection. Nor is there anything in the practice of presbyteries at all to justify such an expectation. We have been referred to the forms and styles of writs in church courts, which are well known and published and acted upon every day, and in analogous cases, where styles are provided, we certainly find a great deal of authority for holding that an intimation of this kind, conceived in general terms, and making reference to the prayer of the application which is before the presbytery, is quite sufficient notice to everybody concerned. It is quite clear that under a proceeding of this kind it is not necessary to have a formal citation of parties and an execution of citation upon them. Nobody can maintain that. Indeed everybody admits that an intimation from the pulpit and upon the church doors is sufficient. And surely, if that be so, it depends entirely for its authority upon the practice of the church courts; and if the practice of the church courts be also to give intimation generally in such terms as are found in this notice, that equally must receive respect from this Court, when we are considering whether the Presbytery have committed any such flagrant violation of the ordinary rules of proceeding in judicial tribunals that their proceedings must be set aside as altogether illegal. I am not able to say that this notice is in that sense an irregular and insufficient notice, or that the thing was here done behind the back of Mr Walker, while he really knew nothing about it, and that his land was taken (as it has been expressed) without his knowledge. I think there is very strong evidence in this case that Mr Walker knew perfectly well what was going on, and, at all events, whether there is such evidence otherwise or not, it appears to me that the terms of this notice were quite sufficient to make him answerable if he did not choose to come to meet the Presbytery in the churchyard, in terms of the intimation that he so received. It is said that in consequence of his not receiving sufficient notice, and not believing that the Presbytery were going to designate this ground on that particular day, he has lost his opportunity of appealing to the Sheriff. He got some further notice after this deliverance had been pronounced, by a letter dated the 11th of May, in which he was told, that "on Monday the 17th the Presbytery will meet within the parish church of Barry, to take further steps towards making an addition to the churchyard, which meeting you are requested to attend;" and if he had even complied with that request, and attended that meeting, either by himself or a representative, he would then have found what had been done on the 6th of May, and he would still have been in time to appeal to the Sheriff. But he does not choose to attend that meeting either, but lies by, apparently with the hope of finding some technical objection to the proceedings which have taken

place in his absence. Now, I cannot give any countenance to an attempt of this kind to set aside the proceedings of a competent court upon so vague and imperfect a ground as this seems to me to be; and therefore I am for recalling *in hoc statu* the interlocutor of the Lord Ordinary, and hearing what further objections there are to the proceedings of the Presbytery.

Lord Deas—The question here is, whether Mr Walker can be held to have got notice of what was intended to be done, and what was done, by the Presbytery at their meeting upon the ground in question upon the 6th of May. There is no room for doubt according to the practice in this country, as well as according to the fair construction of the comparatively recent statute, that the Presbytery had and have jurisdiction to do what they did, provided they did it in a regular and proper manner. The duty of providing additional ground, when it is required for a churchyard, lies in the first instance upon the heritors; but there is an undoubted power in the Presbytery, if the heritors do not fulfil that duty, to take steps to have it carried out. It is also quite clear that in this case there has been no breach of any provision in the recent statute, which makes certain regulations with a power of transferring the jurisdiction to the Sheriff. I entirely agree with your Lordship that the proceedings of the Presbytery are to be regarded in a different and much less strict and stringent light than the proceedings of an ordinary court of law. There is nothing required with reference to citation or intimation, and the rules applicable to summonses in this Court, where there must be citation by a messenger-at-arms or by a sheriff-officer, are altogether inapplicable to the proceedings of a Presbytery. They have no power to employ messengers-at-arms or sheriff-officers; they have an officer of their own, and they proceed in their own way, all that is required being that the thing shall be done fairly, and that the matter in which any individual heritor is concerned shall be fairly brought to his knowledge. If that has been done there is no room for question that the law has been fulfilled. Accordingly, the question here is whether that has been done. What the effect would have been if the allegation that the Presbytery intentionally made the notices and intimations vague, in order that Walker might not know what was being done, and might so be deprived of his right of appeal to the Sheriff, had been true, I do not know; but there is not a particle of evidence of the truth of that allegation, and there is not the slightest presumption that it is true. On the contrary, there is the strongest possible room for believing that it is not true. It is unintelligible what motive a body like the Presbytery, entrusted with the duty of providing additional ground for the churchyard, could have had for making their intimations intentionally vague in order that he might be deprived of his rights. It is not said that the members of Presbytery had any personal interest whatever in the matter. That averment, therefore, ought not to have been made. There was a long negotiation about the matter before these ultimate proceedings were adopted. There was a meeting at which Mr Walker was present, on 19th March 1874, of a committee appointed by the heritors, at which a unanimous opinion was expressed that the burying-ground should be enlarged. Mr Walker was present as one of the heritors who expresses that opinion and makes that resolution. A negotiation takes place between the committee of the heritors and Mr Walker for acquiring this very bit of ground, and he does not dispute his previous resolution and opinion that it was necessary to have that ground or some other, and he makes no objection to their having that ground on certain terms and conditions. These terms and conditions are rejected.

A number of heritors then presented the petition to the Presbytery of 6th April 1875, there having been a previous meeting of the heritors at which Mr Walker was not present, when an opinion of counsel was submitted, and the clerk was instructed to petition the Presbytery to designate the ground, and on that authority the petition of 6th April was presented. The main reason for noticing that previous meeting is, that it bears in the body of it that there were more than forty heritors in the parish, and consequently that the more specific intimation which otherwise would have been requisite was not required. The petition to the Presbytery was followed by advertisement in the newspapers. Intimation was likewise given from the pulpit. It is stated, and is not disputed, that Mr Walker was in church on 18th April when this intimation was made from the pulpit. I need not say that, being a heritor, Mr Walker had perfect access to all the minutes of meetings of the heritors, so that if he had any doubt about them he could easily have seen what was done.

Now, his whole case is founded upon this, that while it was distinctly stated, both in the newspapers and in the intimation from the pulpit and on the church door, that the object and intention was to designate and set apart this ground; when we come a little farther on all that it is said is to be done on 6th May is to visit and inspect the churchyard—and the whole question is, whether he was not bound to understand, and whether in point of fact he did not understand, that when it was stated that they were to designate the ground, they were to visit and inspect the churchyard for the purpose of designating the ground if the heritors who were summoned did not appear to object. I do not say there is any bad faith on the part of Mr Walker, as he says there was on the part of the Presbytery, but it is very extraordinary that after all the negotiation and all the notices he did not understand that that was to be a meeting upon the ground at which the Presbytery might fairly be expected and intended to go on to designate the ground if nobody appeared to object. It is not very usual for a body like a Presbytery to go back and forward in this sort of way,—to go and see the ground which they knew all about before, and about which the negotiation had taken place, and which everybody was familiar with as being the most convenient piece of ground for the purpose; the heritors had satisfied themselves about that, and it does not appear that the Presbytery could have any doubt about it; and it is quite clear that in point of law and practice Mr Walker was reasonably bound to understand that this proceeding might take place upon that day, and was not intentionally kept in the dark about it. He

could easily have made that clear to his own mind if there was any question about it; and on the whole matter I cannot have the least doubt that, according to all the law and practice applicable to proceedings of presbyteries in matters of this kind, the notice to him was quite sufficient, and if that be so there is an end of the question which we are now considering.

Lord Ardmillan—The leading facts from which this case has originated are very simple. It appears that an additional piece of ground was required for burial-ground in the parish of Barry. The complainer Mr Walker is proprietor of the lands of Ravensby in the parish and in the vicinity of the present burial-ground. It does not appear that he is the only proprietor of land so situated as to be available as an addition to the burial ground. The mode by which the land of an heritor can be lawfully taken for the purpose of adding it to burial grounds is by procedure in the Presbytery, in the course of which a judgment of designation—which means a presbyterial setting apart of the land required, —is pronounced by the Presbytery. I have no doubt of the jurisdiction of the Presbytery. This judgment of designation is an important step, directly affecting the interest of the heritor, and it is all the more important that by the Act 31 and 32 Vict., cap. 96, sec. 3, it is provided that if any heritor be dissatisfied with any order, finding, judgment, or decree of the Presbytery in procedure for such designation, it is competent for the heritor to appeal to the Sheriff within twenty days from the date of the judgment. The complainer Mr Walker alleges that his land has been illegally designated and illegally taken from him; and two questions are presented for determination in this Court—1*st*, Whether the complainer can be competently heard—whether he is entitled to challenge the proceedings now objected to, or is excluded from challenge because he did not appeal to the Sheriff; and 2*dly*, Whether, if the challenge is competent, the proceedings of the Presbytery have been legal, or have been so illegal and irregular as to call for the interposition of this Court to redress a wrong done to the complainer. The two questions have in argument been naturally and perhaps unavoidably mixed, but they are separately stated on record, and, I think, must be separately dealt with.

The Lord Ordinary has held the challenge competent, and being of opinion that the complainer is right on the merits, has accordingly granted interdict as craved. I think that the Lord Ordinary's opinion is right upon both points.

Mr Walker has had his land taken from him without his consent and in his absence. That is the leading and primary fact in this case, the point from which the consideration of the argument must start. The next fact is, that Mr Walker had declined to agree to an arrangement. He had declined to part with his lands on the terms proposed to him. He was not only not a consenting party; he was, and was known to be, by an opposing party; and the procedure for designation was adopted in order to effect by presbyterial authority what had not been accomplished by arrangement. To me it appears that Mr Walker was just in the position to render it especially becoming and right for the heritors who desired designation of his land, and for the Presbytery whose interposition was craved, to deal carefully and fairly and candidly by him, and to afford him every legitimate opportunity of stating his views and protecting his interests. I think it will appear in the sequel that they did not do so. They have taken his land certainly without his consent, and, as he alleges, without sufficient notice. The respondents say that the complainer is not entitled to plead the want of notice, because he did not appeal within the period of twenty days from the date of the judgment. They plead that his application is incompetent because he did not appeal. But looking to the nature of his objection, which is want of notice, this plea to exclude his stating it in this Court seems to me to be ill-founded in law, and manifestly so in equity. He says that he would have appealed if he had got notice. He says he got no notice either of the intention to designate on the 6th of May, when in his absence the judgment of designation was pronounced by the Presbytery, or of the fact that on the 6th of May such judgment of designation had been pronounced. Not having got notice of the intention to crave or decern designation, he was not present when the judgment was pronounced; and not having got notice that the judgment had been pronounced, he did not appeal. Now, the respondents plead that because he did not appeal he cannot competently maintain the objection of want of notice. They actually propose to shut out his complaint as incompetent on the ground that he did not appeal, although the want of notice prevented his appeal.

It is argued that even if he has got notice at all, he cannot be heard to complain of it, because he did not appeal. The want of notice prevented appeal. The want of appeal protects the judgment. This is a very singular plea on the part of the respondents. If it were well founded the result would be that the party who got no notice could get no redress; and that the respondents by withholding notice could create and secure the finality of their own judgment. I cannot understand this. If an heritor getting no notice or insufficient notice has for want of notice lost first his land and then his right to appeal, is he not to be permitted to seek in this Court redress against the double loss and the double wrong inflicted by those who ought to have dealt fairly by him and given him due notice?

To sustain the plea of finality and incompetency of complaint as urged in the first plea in law stated for the respondents, and on that ground to refuse this note, and hold the complainer excluded from stating his case, would, I think, not be just.

I therefore proceed to consider the complainer's case on its merits. Did the complainer get sufficient notice to support the taking of his land in his absence, and without his consent?

In my opinion, the question here involved seriously affects the rights of property. I think it clear that the land of a British subject, of whatever station, cannot be taken from him in his absence and without his consent unless he has had such notice of the intention to take his land under judicial authority as to imply his consent

from his absence or his silence. But the consent of an absent man, the owner of land, to be taken from him by judgment, cannot be lightly inferred. The implication of consent must be clear. In the present case I think that the implication is not clear, not sufficient, and not safe. The consent of Mr Walker to part with his land cannot be implied from his absence on the 6th of May, unless he had distinct notice that on that day a judgment of designation was to be craved and pronounced; and this is the more especially important because it was known that he was non-consenting, and that he had objections to state, and views to explain, on which he was entitled to be heard before judgment of designation was pronounced.

I do not intend to occupy time by again referring to the course of procedure in the Presbytery. We have it all before us, and it has been already explained. I am of opinion that the notice was altogether insufficient —indeed, I hold that there was no notice at all of the intention to proceed to pronounce a judgment of designation on the 6th of May. There was notice of the existence, though not of the exact terms, of a petition by certain heritors craving the Presbytery to appoint a visit to the parish of Barry, thereafter to visit and inspect the churchyard, and after taking such assistance as might be required to find that the churchyard is no longer sufficient, and then to design and set apart so much ground immediately adjoining the churchyard as might be necessary for an addition, and to ordain the tenants to remove, and to ascertain the value of the ground and assess the heritors for the same. On the 6th of April 1875 the Presbytery, having considered the petition, resolved to visit and inspect the churchyard on the 6th of May, with a view to fix upon a piece of ground suitable for designating as an addition to the churchyard, if they shall find the same necessary, and to designate the same. They then proceeded to direct intimation of the petition, and the time fixed for the visit, from the pulpit, on the church door, and by advertisement. It is important to observe that what was directed to be intimated was the petition, the visit for inspection, and the time fixed for the visit, and no intimation was given of any intention to crave, or of any intention to pronounce, on the 6th of May, a judgment of designation of Mr Walker's land. It is not pretended that any notice was given of an intention to proceed on the 6th of May to the formal or final designation of the complainer's ground. Yet that designation was the only really important matter. On the 6th May 1875 the Presbytery, with certain heritors present, but in the absence of Mr Walker, proceeded to designate, and then and there pronounced judgment of designation. They inquired if the order for intimation of the petition and of the time of the visit had been implemented, and they were told that that had been done. They were not told, and they could not have been truly told, that any notice had been given of the intention then and there to pronounce judgment of designation. Mr Walker was not present, and was not cited to hear judgment, and it was known that he did not consent, yet in his absence, and with no other notice than that of the existence of the petition, and of the ntention to visit and inspect, the respondents proceeded to take his land. So far as I have been able to ascertain, this procedure was not according to the rules and practice of the church courts. I do not say that a separate letter of intimation to the complainer was necessary, that being required only in the case of a non-resident heritor. But the procedure is in separate steps. We have, first, the consideration of the petition, then the visit and inspection, the finding of insufficiency and of the suitableness of the proposed addition, and then, most important of all, the judgment of designation—a step conclusive against the heritor if he does not appeal. Of that last and most important step no notice whatever was given. The minute bears that the Presbytery further designate and set apart the portion of ground above defined, &c.; and further, the Presbytery ordain the tenants of the land to remove at the next term of Martinmas.

In my humble opinion this judgment of designation, by which they laid hold on the pursuer's land without his consent, and notwithstanding his declared objection and known opposition which they had previously ascertained, was altogether irregular and illegal. In such a case the suggestion of the private knowledge of Mr Walker as a substitute for the proof of notice seems to me out of the question; but besides, the private knowledge is not proved, and the respondents demand a decision in their favour without proof. The conjecture or suspicion that he may have known can be no ground for judgment. It is said that Mr Walker should have been more alive to his interests, and the maxim *vigilantibus non dormientibus jura subveniunt* has been appealed to. But surely they who by their conduct have disarmed me and thrown me into a slumber cannot by this maxim maintain the wrong they did when I was asleep. To use the maxim for defence of such a wrong would be a perversion and an abuse of it. I look upon the right which a man has to his land as deserving and requiring the protection of a court of justice against deprivation contrary to his will or without his consent. Where he has refused that consent, and where all contract or arrangement is necessarily excluded, it is only on the very clearest and strongest grounds of law, and on the most regular and orderly procedure, that he can be deprived of his land. That must indeed be a powerful reason which stands at the door of a court of justice and bids away a subject of this realm complaining of such a wrong. I can see no such reason here. I can see no ground on which we can dismiss this complaint of Mr Walker, who alleges that he has been deprived of his land without his consent, in his absence, and without fair notice. The letter of 11th May was written after the designation, and does not state the fact of prior designation.

Nor is this all; within twenty days from the 6th of May Mr Walker had a right of appeal from the judgment of the Presbytery. The fact of the judgment created his interest to appeal; the terms of the judgment were the subject of appeal; the date of the judgment limited the appeal. But he got no notice of the fact that judgment of designation had been pronounced, and no notice of the terms of the judgment or of the date of it. Therefore he did not and could not, within the time permitted, take his appeal.

He says he presented an appeal, but it was too late. And now, having taken his land in his absence by failing to give notice of the intention to designate, and having cut him out of his appeal by failing to give the subsequent notice of the facts and the judgment of designation, the respondents meet his demand for redress in this Court by pleading that the complaint is incompetent because he did not appeal. That plea seems to me to have no support in legal principle or authority, and to be signally at variance with justice.

It would be unbecoming in me to say that this is a clear case, because I am aware that I have the misfortune to differ from your Lordships. I have not formed my opinion hastily—I have reconsidered the view which I formed at the debate, and out of my great respect for your Lordships I have endeavoured to reach the conclusion which is satisfactory to you. But I am quite unable to do so. Important principle, legal and constitutional, appears to me to be involved in the questions before us. We are not indeed reviewing, nor can we review, the judgment of the Presbytery; but that judgment relates to part of a landed estate, and we are called on to exercise the clear powers of this Court by interposing to redress a wrong, and to quash as illegal and unjust a deliverance which seriously affects the land rights in Scotland of one of Her Majesty's subjects. To that effect and extent I think we have jurisdiction. It would be unfortunate if we had not.

If this case is decided against Mr Walker on the ground set forth in the first plea in law for the respondents, then his land is gone—taken from him without redress—and against such taking the land of other men is insecure. If this case is decided in favour of Mr Walker, as I think it should, no wrong will have been inflicted, no injustice done, scarcely any inconvenience caused; the result would only be that the Presbytery must resume consideration of the matter and proceed more regularly and more fairly next time.

I think the judgment of the Lord Ordinary right.

Lord Mure—The question which we have to decide, in the view I take of it, is whether this Court has any jurisdiction to entertain the complaint which has been made to us in this note of suspension, because nothing can be more express than the provisions of the Statute 31 and 32 Vict. c. 96, quoted on record, to the effect that there is no jurisdiction in this Court to entertain questions of this description. The jurisdiction there is given to the Sheriff in all matters regulating the fixing and designating of churchyards or glebes, or matters of that sort before the Presbytery, and a court of review is provided by the statute, every other mode of review being expressly shut out. The jurisdiction of the Presbytery to deal with these matters is quite recognised in the statute. In these circumstances, then, the question which we have to consider is, whether there is anything in the proceedings in this case which has been done in violation of the statute referred to, or of the ordinary rules of procedure of Presbyteries, which can warrant us in saying that the whole matter is so utterly irregular and incompetent that we must step in as the Supreme Court, and quash the whole proceedings, for I apprehend it to be perfectly settled law that where there are such clauses as these in the statute in question, this Court cannot touch the proceedings of the Presbytery unless there has been either some violation of the statutory procedure, or some such flagrant departure from the ordinary rules of procedure in the Presbytery as will lead us to hold the illegality so great that the proceedings must be quashed and put an end to. Now, the only ground that we have to deal with here on which this complaint is rested is want of notice to the complainer of what was intended to be done on the petition of the heritors. I understand that there are other objections to the procedure, although these were not argued before us. The Lord Ordinary has dealt simply with that one question, and the point for consideration is whether there is anything in these proceedings so irregular as to entitle us to interfere.

Now, I do not mean to detain your Lordships by going over the details of the case again. I concur with your Lordship in the chair and Lord Deas that nothing has been laid before us which satisfies me that we can venture to interfere with these proceedings. It may be unfortunate that this gentleman did not take his appeal under the statute to the Sheriff, but he is only entitled to ask us to quash these proceedings and give him redress if there have been irregularities of the nature to which I have referred. Now, the plea in law which the complainers mainly rest upon is this, that the "pretended designation and valuation of the ground in question are inept and not binding on the complainer, in respect that they were made in his absence and without intimation; or, at all events, without any lawful or sufficient intimation to him." In dealing with this case we cannot shut out of view the fact that it is plain to demonstration that for months before these proceedings this gentleman was perfectly aware that this particular bit of ground was wanted by the rest of the heritors with a view to add it to the churchyard. Proceedings had been going on for a considerable portion of 1874. At one time the complainer had consented to the ground being taken on certain terms, but ultimately they could not agree about it, and the negotiations fell through. A meeting was held on 18th March 1875, which bears to have been duly called by intimation from the pulpit and advertisement in the newspapers in the usual way, and which therefore this gentleman was summoned to attend, for the consideration of the question whether they should present a petition to the Presbytery with a view to have this piece of ground set apart for the churchyard. The minute bears that the whole heritors were called in the usual way. A petition was afterwards presented in the usual form. It was intimated from the pulpit, and it is admitted by the complainer that he was present and heard the intimation made, and that in a parish which consists of such a number of heritors, according to the usual practice and procedure of presbyteries, no other intimation is required than intimation from the pulpit and on the church doors, advertisements in the newspapers, and the sending of letters to absent heritors, which I understand from books of practice means non-resident heritors. Intimation is accordingly made from the pulpit.

The notice on the church door was in these terms:—[*reads*]. Now, there is no limitation there that I see about what the Presbytery are going to do on that day. It is an intimation that they are to visit and inspect the churchyard — evidently with a view to the designation and setting apart of the piece of ground, because it sets forth that the petition has been presented to them to set apart a piece of ground; and from the pulpit this gentleman hears it intimated that that petition has been presented, and that they are to visit and inspect the churchyard with a view to that. I see no limitation in that intimation from the pulpit that they were to confine themselves to visiting and inspecting on that particular day. It is to visit and inspect with a view to designating and setting apart. That is the fair reading of the intimation. And similar notices are put in the public newspapers. In these circumstances, this gentleman —being quite aware of the object of the petition, having heard that intimation from the pulpit, with a request that the heritors shall attend or send persons duly authorised to act for them— does not go to the meeting. The Presbytery make their inspection, and there is no opposition apparently, and they proceed to designate the ground. But some further proceedings are necessary before the final steps in the matter, and they appoint a valuator to report on the value of the ground, and a meeting is called for 17th May, and parties cited. On 6th May, therefore, the meeting is adjourned till the 17th, and parties are to be called in the usual way to that meeting. The intention of the Presbytery to meet on 17th May is admitted by the complainer to have been intimated to him on 11th May in the following terms:—[*reads*]. I think it is impossible to read these words without seeing that this gentleman was put distinctly on his guard that under a petition presented to the Presbytery in the usual form the Presbytery were to take further steps than those which had been intimated prior to 6th May, with a view to the addition to the churchyard. But he does not go. Why, we do not see. Now, all this is done in the usual mode of giving notice by the presbyteries of proceedings before them, as I understand the style-book; and it is said, under the second plea-in-law, that being in absence and without any notice, it is illegal. I cannot so view it. If critical objections of this description had been taken before the Court of Appeal appointed by this statute I think it is doubtful whether any of them could have been entertained; but we are here dealing with persons who have followed the usual form of proceedings by intimation from the pulpit and on the church doors, and advertisement in the newspapers, and who, in this particular case, have been so careful as to send a special notice to the complainer of the meeting on 17th May; and if he had chosen to go to that meeting as requested he would have seen exactly the position of matters, and could have taken his appeal against everything which had been done upon the 6th of May, so that it is simply in consequence of his willful absence from the meeting on 17th May, to which he was duly and legally cited, that he has been put into the difficulty in which he now says he has been placed.

I therefore concur in opinion with your Lordship and Lord Deas, that we cannot interfere in this case on the grounds stated in the second plea in law.

The following interlocutor was pronounced:—

"The Lords having heard Counsel on the reclaiming note for the Presbytery of Arbroath and the Earl of Dalhousie (respondents), against Lord Young's interlocutor of 26th Nov. 1857, Recal the said interlocutor *in hoc statu*; repel the second plea in law for the complainers, and decern; and appoint parties to be heard on their remaining pleas, Reserving in the meantime all questions of expenses."

The complainers were afterwards heard upon their further objections, and argued—Designation was only an *imprimatur* by the Presbytery; the heritors were not entitled to operate upon or interfere with the ground before they had it in their hands. No provision had been made for compensation to the tenant.

Authorities, in addition to those already cited —Duncan's Parochial Law (2d edition) 619.

The respondents argued—There was no stated authority for the mode of designating churchyards, but undoubted consuetudinary practice, which had been followed here. The Presbytery's decree was inoperative, and for executorial authority they would have to apply to a civil court. As regarded compensation, they were willing to give it to the tenant, but it was not the practice of the Church to take subordinate interests, *e.g.*, those of bondholders, superiors, &c., into account.

At advising—

Lord President—The complainer Mr Walker, and his tenant James Dargie, now contend that the proceedings of the Presbytery at two meetings on the 6th and 17th May 1875 are irregular. We have already held that the objection which Mr Walker took, that he had not sufficient notice of the intention of the Presbytery to designate the ground belonging to him for an addition to the churchyard, is ill founded; and we have also already intimated our opinion, that seeing the proceedings of the Presbytery in a matter of this kind are final unless an appeal is taken to the Sheriff, we cannot interfere with those proceedings in the way of review, but only set them aside in the event of its being made out to our satisfaction that there is an excess of jurisdiction, or something equivalent to it. Now, keeping that in view, I am really quite unable to see any irregularity in the proceedings either at the one meeting or at the other. The deliverances of the Presbytery, and the whole proceedings, as embodied in the minutes, appear to me to be in strict conformity to the order of practice of a Presbytery in such cases. They are in accordance with the style given in the ordinary styles of the church courts, not indeed that there is any special style applicable to this particular matter of designating ground for an addition to the churchyard, but there are styles for designating ground for other ecclesiastical property, such as a glebe or the site of a church, and these are styles just applicable *mutatis mutandis* to a case of this kind; and when we find that the proceedings before us are quite in accordance with such styles, it is a

serious matter for us to say that there is here an excess of jurisdiction, or such a departure from the ordinary and universally recognised rules of procedure in all courts that we can interfere to set them aside. But apart from that altogether, it rather appears to me that the Presbytery have done nothing more than was absolutely necessary in order to work out their own jurisdiction. The ground being set apart for the purpose of forming an addition to the churchyard, it follows of necessity that both the owner and his tenant, if it is on lease, must be dispossessed, and it follows further that the ground must be taken possession of by the heritors of the parish and converted into a burying-ground; and these seem to me to be the only things that have been done by the Presbytery. No doubt one part of the first minute is an order upon the tenant to remove. Well, that seems to me to be quite right. It was said that this was an assumption of jurisdiction which was beyond the powers of the Presbytery, because they had no jurisdiction to remove a tenant; but all that they have done is to appoint this man to remove. They cannot put that decree into execution, and in that sense it is not a decree at all. It can only be enforced by application to a court of civil jurisdiction; and if any plea occurs to enable the tenant to resist the enforcement of the decree, he can still maintain it, though I do not perceive that any such plea would avail him.

Again, it is said that in valuing with a view to re-imburse the owner for his loss, the tenant's compensation has not been duly attended to. Now, it certainly has not been left out of view, because in the second minute it clearly appears that the valuator embraced in his estimate of the value of the land the unexhausted manures on the ground, and that looks very like part of the tenant's compensation. But the plain answer to all that appears to me to be this, that as this proceeding has not yet come to an end before the Presbytery, it is quite open to the tenant still to ask the Presbytery to reconsider his claim for compensation. The matter is not ended by any means; there remains a good deal to be done, and there is nothing to prevent the Presbytery from reconsidering that matter if the tenant can satisfy them that there is some portion of his claim to compensation that has not been fully considered; and so, upon the whole matter, it appears to me that there is nothing to find fault with in these proceedings of the Presbytery.

Lord Deas—I am very much of the same opinion with your Lordship. It was contended that the deliverance of the Presbytery should stop after the finding that this was a suitable and convenient piece of ground to be designated as a churchyard, and that they should not have gone on to designate or set apart that ground as belonging to the churchyard, or to put a value upon it. Now, I rather think we have substantially determined that already by our former judgment; but whether we have or not, I certainly am of opinion that it would have been a very odd deliverance if they had stopped after the finding that it was a suitable and convenient place to be designated without going on to designate it, and without going on to fix its value—and to find that both landlord and tenant must remove from it. It is said that the Presbytery could not do that because they have no power to remove anybody. Well, that is true in one sense, but not true in another. It is true in the sense that they have not civil jurisdiction such as a Judge has, and consequently there is this difference between what they did and what the Sheriff would have done if it had gone to him—the Sheriff, being one of the Judges of the land, could not only designate the ground and find that the tenant must remove from it, but could have gone on to compel the removal, and perhaps to compel payment of the value. But that simply arises from this, that the Sheriff has *executorial* power and the Presbytery have not; but, with this exception, the case before the Presbytery is in the same position as if it had been before the Sheriff. They had all the powers of the Sheriff so far as their findings were concerned, and they simply wanted the executorial power of the judge, which we have found in another case not long ago (*The Presbytery of Lews* v. *Fraser*, May 16, 1874, 1 R. 888) they were entitled to get upon applying for it. If they apply for it, they get the aid of the regular force of the law as a matter of course.

Then, as to the plea that they have not fixed the tenant's compensation, it is plain enough that that had not been left out of view, because the tenant is found entitled to the value of the unexhausted manures, which indicates that in the valuation made by a man of skill and adopted by the Presbytery the tenant's compensation was included, and that his claim for that compensation would lie against the landlord, who has got compensation both for the tenant and for himself. I do not see, however, that that is decided. I cannot see that in the proceedings which have taken place in this matter the Presbytery of Arbroath have gone beyond the immemorial practice of Presbyteries, or in any respect whatever beyond their powers.

Lord Ardmillan—It has been now decided that the notice given was sufficient, and that the judgment of the Presbytery designating the addition to the churchyard was, in so far as regards that objection, legal and effectual, and binding on the complainer. I had the misfortune to differ from your Lordships on the question whether there had or had not been sufficient notice. But of course I now hold that the notice was quite sufficient, and that the complainer is bound by the judgment. It appears to me that the case, as now presented, is attended with no difficulty. We must view the proceedings as affecting the complainer in the same manner and to the same effect as if he had been personally present at the meetings of the 6th of May and the 17th of May 1875. That has been decided.

Assuming, as I do now, that the proceedings of the 6th and 17th May were taken after sufficient notice to the complainer (my own opinion having been that the notice was not sufficient, but the judgment of the Court being that the notice was sufficient), I am not able to perceive any good objection to these proceedings. They are quite distinct; they form a series of proceedings customary and well understood in the church courts in such designations, and if the notice was sufficient there is no departure from any of

the requirements of the statute, and therefore no ground for the interposition of the Court to quash the proceedings.

If the complainer's present argument on the nature of the proceedings is sound, his previous objection of want of notice had little force. I thought his previous objection strong, because the complainer was effectually deprived of his land, and his tenant was decerned to remove from possession. But if all that the Presbytery did was to express their opinion, or record a finding that the complainer's ground was suitable, then the objection of want of notice is deprived of nearly all its force. Had that been all the Presbytery did I scarcely think I would have ventured to differ from your Lordships on the question of notice. But now, viewing the proceedings as taken after sufficient notice, and as equally binding on the complainer as if he had been himself present, I think there are no grounds for interference by this Court with the judgment of the Presbytery since, on the merits we cannot review it.

I do not, however, think that the tenant is altogether precluded from making a claim for compensation. To some extent the landlord's claim, to which the valuation relates, may be held as covering the claim of the tenant, or a claim on behalf of the tenant, but there may be special claims of compensation still open to the tenant, and I do not think that he can be precluded from urging them. Indeed, I understood the counsel for the respondents to say that any such claims on the part of the tenant would be fairly considered.

Lord Mure—The questions here raised present themselves to my mind very much in the same way as the larger question which we formerly disposed of. This Court has no jurisdiction to deal with cases of this description unless it be shown that there is some gross violation of the statutory or common law rules. Otherwise this Court has no right to review in any respect the proceedings of the Presbytery. The two points here raised are gross irregularity and going beyond their power in the order on the tenant to remove. Now, what the Presbytery did here was to ordain the tenant to remove. They could not take an operative course to turn him out as the civil courts could do; but the order to remove is just the usual order pronounced according to the styles of the church courts given in Dr Cook's book in all questions of designating manses or glebes. Now, if there was any impropriety or unfairness in that it was a matter to be disposed of by the Sheriff on appeal. What we are asked to do is to review the judgment of the Presbytery in ordaining the tenant to remove; but that is a matter for appeal to the Sheriff.

As regards the compensation question, that is still more questionable. It is just whether or not the Presbytery, in valuing the landlord's interest in the ground, valued properly the interest of the tenant. But my view of that matter is that it is a question on the merits, and that we cannot form, or at all events act upon, any opinion as to whether the Presbytery did right or wrong on that question, because we have no jurisdiction.

The Court pronounced the following interlocutor:—

"The Lords having resumed consideration of the cause, and heard counsel, in terms of the appointment in the interlocutor of 18th February last, Repel the reasons of suspension: Refuse the interdict, and decern: Find the complainers liable in expenses, and remit to the Auditor to tax the account thereof and report."

Counsel for Complainers—Guthrie Smith—Balfour. Agents—Drummond & Reid, W.S.

Counsel for Respondents—Dean of Faculty (Watson)—Gloag. Agents—Mackenzie & Kermack, W.S.

Thursday, March 2.

SECOND DIVISION.

[Lord Rutherfurd Clark.

WILSON *v.* MANN.

Landlord and Tenant—Lease—Singular Succession.

A, who was a yearly tenant of a farm, and also factor upon the estate of B, had no written lease, and applied to B for permission to carry out a regular cropping rotation—which was granted by letter. Shortly afterwards B died, and his estate was held by trustees, who, in a letter addressed to A, fixed the date at which his lease should be held to terminate. The amount of rent paid by A had been regularly entered by him in a rental book which he kept as factor upon the estate, and these entries were docqueted by B as correct up to the date of his death. The trustees having afterwards advertised the estate for sale, stated in their advertisement the duration of A's lease and the rent paid by him. In an action of declarator at the instance of A against a purchaser who sought to have him removed—*held* that the letters, entries in rental book, and advertisement, taken together, constituted a lease in A's favour which was good against a singular successor.

This was an action at the instance of Robert Wilson, tenant of the farm of Forehouse, in the parish of Kilbarchan and county of Renfrew, against Thomas Mann, proprietor of the estate of Glentyan, in the same parish and county, in which he sought to have it found and declared that in virtue of letters signed by the late Captain James Stirling, then proprietor of the estate of Glentyan, in or about the months of October and November 1871, and of a letter by Messrs Dundas & Wilson, Clerks to the Signet, factors and agents for the trustees of Captain James Stirling, then deceased, dated 23d December 1873, a valid and effectual lease of the lands and farm of Forehouse, part of the estate of Glentyan, was granted in favour of the pursuer for the term of eight years from and after the term of Whitsunday 1872, and that the rent payable therefor was £223 sterling per annum, and that in virtue thereof he was entitled to the undis-