claim than this claim as it stands without undoing all that is done and serving a new claim upon the commissioners.

But whether that be so or not, the only claim before us, unaltered and unrestricted, is this, that the respondent Mr Field shall have compensation for the taking of the land under the streets, which I apprehend the 186th section of the Act does not give him. And in addition to that, of a claim for way-leave under these streets, which likewise that section of the statute does not give him; and again for surface, underground, and other damage, loss, and inconvenience caused by and during the execution of the works. Now, I do not think he can possibly claim under any of these heads. I think the statute has not given him such a claim, and if the statute has given him any claim, upon which I will give no opinion, it must be a claim for the taking of the land under these small portions of the streets that have not yet been formed—a very different claim indeed from the present. It is made, no doubt, under three different heads, each one of which appears to be clearly objectionable under the statute, and for which three heads taken together he claims a slump sum of £1250. I am of opinion that we cannot allow that claim to go to a jury, because it is clearly unauthorised by the statute.

I cannot agree with the course that has been adopted by the Lord Ordinary in endeavouring to spell out of this claim some infinitesimal portion which in the course of the trial might be eliminated by the jury, so as to be free from all the objections belonging to the great bulk of the claim, and made subject to a verdict for which he might obtain a sum for that small, and as it appears to me, undiscoverable portion of his claim; I think that the Lord Ordinary was wrong, and that we must hold that the claim in this action must stand or fall as made. The question is, whether this claim as it stands can go to a jury? and I unhesitatingly say that it cannot. I am therefore for altering the interlocutor of the Lord Ordinary and decerning in favour of the complainers.

Lord Deas and Lord Shand concurred.

The Court pronounced the following interlocutor:—

"Recal the interlocutor reclaimed against: Sustain the reasons of suspension: Suspend the proceedings complained of: Declare the interdict formerly granted perpetual, and decern: Find the complainers entitled to expenses, and remit to the Auditor to tax the account thereof and report.

Counsel for Complainers—Lord Advocate (Watson)—J. G. Smith—Harper. Agent—J. Campbell Irons, S.S.C.

Counsel for Respondent (Reclaimer)—Dean of Faculty (Fraser)—J. C. Smith. Agent—William Paterson, solicitor.

Friday, November 15.

FIRST DIVISION.

[Bill Chamber, Lord Shand.

STEWART AND ANOTHER *v.* PRESBYTERY OF PAISLEY.

Church—Jurisdiction of Church Judicatories—Act 37 and 38 Vict. c. 82 (Church Patronage (Scotland) Act 1874)—Appointment of Minister—Jurisdiction over Minister's Appointment.

In a question between a presbytery and the members of a congregation of a church which belonged to that presbytery—*held* that the jurisdiction of the Civil Courts to determine whether the right of appointment of a minister had accrued to the presbytery *tanquam jure devoluto*, was not excluded by the provisions of the 3d section of the Church Patronage (Scotland) Act 1874, which enacted that the Courts of the Church were to have a right "to decide finally and conclusively upon the appointment, admission, and settlement in any church and parish of any person as minister thereof."

Circumstances in which *held* that the right of appointment of a minister to a parish had accrued to the presbytery *tanquam jure devoluto*.

Observations per Lord President (Inglis) upon the effect and operation of the Church Patronage (Scotland) Act 1874.

This was a note of suspension and interdict presented by John Stewart and Francis Halden, both members of the congregation of the Abbey Church and Parish, Paisley. They sought to have the Presbytery of Paisley interdicted from following out a resolution come to by them "of date 3d July 1878, whereby they resolved, in connection with the vacancy in the first charge of the said Abbey Church and Parish, Paisley, to exercise their alleged *jus devolutum*, and to appoint a minister to the said church and parish at their next ordinary meeting to be held on 4th September then next, or at some future meeting to be held on an early day, and from proceeding with the appointment of a minister to the first charge of the said church and parish, or taking any step towards or in the matter of the presentation, collation, or admission of such minister *tanquam jure devoluto*, and from interfering with the right of the congregation of the said church and parish to elect a minister to the said first charge, in terms of the Act of Parliament of 37 and 38 Vict. cap. 82, and the regulations of the General Assembly of the Church of Scotland following thereon."

The vacancy in the first charge of the Abbey Church, Paisley, in connection with which the question arose, had been created on 19th October 1877 by the translation of the minister to another charge. The Presbytery of Paisley had thereafter appointed the Rev. P. W. Mackenzie to be moderator of the Abbey kirk-session in connection with the vacancy, and the charge was duly declared vacant on 4th November 1877.

After various previous meetings of the congregation, the Rev. Mr Jamieson was, at a meeting held on 6th March 1878, elected to the vacant charge, but at a meeting of the Presby-

tery of Paisley held on 27th March following the moderator of the Presbytery stated that he received a letter from Mr Jamieson declining the call. The Presbytery accordingly refused to sustain the appointment of Mr Jamieson, and instructed the moderator of the kirk-session to intimate this deliverance to a meeting of the congregation, to be called as soon as convenient.

At a meeting of the congregation, held on 1st April this deliverance was intimated, and a new committee was appointed to select three out of a list of eight candidates for the vacancy, to be submitted to the congregation for election. This committee reported to an adjourned meeting of the congregation held on 15th April, to the effect that they had been unable to obtain the consent of three candidates that their names should be submitted to the meeting of congregation. The meeting then re-appointed the same committee to confer and co-operate with the Presbytery in the selection of a minister. The period of six months from the vacancy elapsed on 19th April 1878. The Presbytery subsequently at their stated meeting on 1st May resolved to "refer the whole case of the vacancy of the first charge of the Abbey to the General Assembly to decide whether the *jus devolutum* had taken place on the 19th April, or when." The reference was discussed in the General Assembly on 26th May and 3d June 1878, and on the latter date the Assembly found "that although an election of a minister to the said Abbey Church took place at a meeting of the congregation held on the 6th March 1878, no appointment within the meaning of the 7th clause of the Act abolishing Patronage was made by the congregation within the space of six months after the vacancy occurred; therefore remit to the Presbytery to proceed to fill up the vacancy of the first charge *tanquam jure devoluto.*"

The Presbytery having appointed a committee to make inquiries with a view to recommending a minister to the Presbytery for appointment, a minister was after communication with the congregational committee and others of the congregation who had acted independently, selected, and the presbytery appointed him on 4th September.

The 7th section of the Act 37 and 38 Vict. cap. 82, enacted, "that if on occasion of a vacancy in any parish no appointment of a minister shall be made by the congregation within the space of six months after the vacancy has occurred, the right of appointment shall accrue and belong for that time to the Presbytery of the bounds where such parish is, who may proceed to appoint a minister to the said parish *tanquam jure devoluto.*"

The complainers pleaded *inter alia*—"(1) The congregation having made a valid appointment of a duly qualified minister within the space of six months after the occurrence of the vacancy, the event contemplated in the 7th section of the Act 37 and 38 Vict., cap. 82, has not occurred. (4) The *jus devolutum* has not accrued to the Presbytery, in respect the congregation has not had six months available since the occurrence of the vacancy in which to make the appointment."

The respondents pleaded *inter alia* "(1) In respect that the Court of Session has no jurisdiction, the note ought to be refused. (2) By the Statute 37 and 38 Vict. cap. 52, the right to decide, finally and conclusively, upon the appointment of Mr Jamieson belonged to the General Assembly; and the General Assembly having decided that it was no appointment, the note ought to be refused. (5) No appointment having been made by the congregation within six months of the vacancy, and all parties in the congregation (including the complainers) having asked the Presbytery to make an appointment, the present application ought to be refused."

The Lord Ordinary on the Bills (SHAND) after considering the note and answers passed the note, refusing interim interdict, and the respondents reclaimed.

Argued for the respondents—It was expedient and in accordance with precedent that the question of jurisdiction should be tried in the Bill Chamber — *Campbell* v. *Presbytery of Kintyre*, February 21, 1843, 5 D. 657; *Lockhart* v. *Presbytery of Deer*, July 5, 1851, 13 D. 1296; *Paterson* v. *Presbytery of Dunbar*, March 9, 1861, 23 D. 720; *Wight* v. *Presbytery of Dunkeld*, June 29, 1870, 8 Macph. 921.

Two points were presented for the decision of the Court, (1) whether the Civil Court had jurisdiction in the matter at all; (2) if it had, whether in the circumstances the right of appointment had accrued to the Presbytery.

(1) It was the intention of the Legislature by the Church Patronage Act 1874 to give the Church Courts the same jurisdiction in the whole matter of the appointment of ministers that they previously had in matters of discipline and in spiritual matters. It made patronage and the right of appointment an ecclesiastical function not a civil privilege, and put it in the hands of the Church judicatories as much as ordination had been before. If the Courts of the Church had jurisdiction it was exclusive—Acts 1567, c. 7; 1579, c. 69; 1592, c. 116; 1690, c. 5; 5 Geo. I. c. 29, sec. 8. The nature of the jurisdiction committed to the Church Courts appeared in the case of *Wight* v. *Presbytery of Dunkeld* (quoted *supra*) where the Court were clearly of opinion that the Presbytery had adopted an informal procedure, and yet refused to interfere. The difference between Church Courts and judicatories of a dissenting body appeared in the distinction between that case and that of *M'Millan* v. *Free Church*, December 23, 1859, 22 D. 290. It had been represented that in the Auchterarder case (*Earl of Kinnoull* v. *Presbytery of Auchterarder*), March 5, 1838, 16 S. 661, and the Strathbogie case (*Cruickshank and Others* v. *Gordon and Others*), March 10, 1843, 5 D. 909, the Court of Session had usurped ecclesiastical jurisdiction, but the truth was that it had only exercised its jurisdiction to vindicate and determine patrimonial rights when these were affected either directly or *per ambages*. Spiritual rights it had never touched—it had never taken on itself to review what had been properly submitted to the Courts of the Church—and the appointment of ministers was now in all respects committed to the Church Courts.

(2.) The *jus devolutum* had accrued to the Presbytery, for the congregation had had full time to exercise their right and had failed to do so. They had never ascertained in the first place that Mr Jamieson was willing to accept, and that it was plainly their duty to do, in the case of a minister holding a charge—*Duff* v. *The Officers of State*, January 22, 1864, 2 Macph. 469. To say that the congregation was to have another period of six months would lead to gross abuse.

The complainers argued—*On the question of jurisdiction*—The right claimed by the Church Courts was the right of construing the statute and determining with whom the appointment lay; the question with whom did the appointment lie was quite different from that whether an appointment had been properly made. The latter must be answered by the Church Courts; the former could only be answered by the Civil Courts. The Court might deal with certain things ecclesiastical—*Hutton* v. *Harper* 3 R. (H. of L.) 9. From things spiritual and from matters of discipline it was excluded; to oust its jurisdiction in other matters very express enactment must be shown, and there was none such in the Church Patronage Act 1874.

On the merits—The congregation had done here all that section 3 of the Church Patronage Act 1874 empowered them to do. What was given to the congregations by that Act was something analogous to that given by the Act of 1690, c. 23, viz., a right of election, *jus advocationis*, not *jus patronatus*. *Cf. Cullen* v. *Sprott*, November 17, 1840, 3 D. 70. The Court was therefore dealing with the forfeiture of a right of election; but here there never was an appointment made; besides where matters were thus unsettled, *pendente lite*, there should be no prejudice suffered by lapse of time. There was not the same likelihood of abuse creeping into the exercise of a mere right of election where parties were directly interested in having the charge filled, and had no other interest, as in the case of a patron, who had much to gain, it might be, by keeping the charge open. There was no such duty attaching to the congregation as had attached to the patron of ascertaining whether the party proposed would accept, for they were not open to the same suspicion as a patron.

At advising—

Lord President—This is an application by two members of the congregation of the Abbey Parish of Paisley for interdict against the Presbytery appointing a minister to fill the vacancy in that parish *tanquam jure devoluto*.

The ground of the application is that the right of appointment still remains with the congregation, and has not devolved on the Presbytery under the provisions of the 7th section of the Act 37 and 38 Vict. c. 82. There is thus raised a question as to the construction of that section (taken in connection with other sections of the same Act) and its application to the circumstances of this case.

But the respondents plead *in limine* that the Court has no jurisdiction to determine that question, because the statute has, as they maintain, committed the determination of all such questions to the exclusive jurisdiction of the Church Courts.

It must be conceded that the third section of the Act has partly recognised and partly conferred on the Church Courts a "right to decide finally and conclusively" on certain matters, and it thus becomes necessary on the one hand to ascertain what are the nature and limits of this exclusive jurisdiction, and on the other hand to define precisely the question raised by the present proceedings.

The leading purpose of the statute is to transfer from patrons to congregations the right and duty of appointing ministers to vacant parishes. The Act of the 10th of Queen Anne is repealed, and the right of appointing ministers is conferred on congregations. But this right is essentially different in character from the former right of patronage, and therefore it would be quite inaccurate to say that the Act transfers the right of patronage from patrons to congregations. Patronage is, or was, an heritable estate feudalised by infeftment, the symbols of the investiture being quite distinct from those applicable to other kinds of heritable estate, such as lands or teinds or mills. The patron had by virtue of his infeftment valuable patrimonial rights besides the mere right and duty of presenting ministers to vacant parishes. The congregation has by force of the statute a right of election and appointment. But this is a statutory right, limited by the provision that it must be exercised within six months after the occurrence of the vacancy, failing which it devolves on the presbytery.

The other conditions of the right, and the manner in which it is to be exercised, are to be gathered from the 3d and 9th sections taken together. The 3d provides "that the right of electing and appointing ministers to vacant churches and parishes in Scotland is hereby declared to be vested in the congregations of such vacant churches and parishes respectively, subject to such regulations in regard to the mode of naming and proposing such ministers by means of a committee chosen by the congregaton, and of conducting the election and of making the appointment by the congregation as may from time to time be framed by the General Assembly of the Church of Scotland." The 9th section defines the congregation to be the "communicants and such other adherents of the church as the kirk-session under regulations to be framed by the General Assembly or commission thereby, as provided in the third section hereof, may determine to be members of the congregation for the purposes of the Act."

The "congregation" thus defined is a body possessing no quasi-corporate or collective right or function except that which is conferred by the statute. The "congregation" is obviously not equivalent to the "parishioners," a body previously well known to, and for many important purposes recognised by, the law.

The General Assembly are empowered to make regulations for determining who besides the communicants shall be members of this electoral body called the congregation, and for fixing and regulating the mode of naming and proposing candidates, and of conducting the election and making the appointment by the congregation.

The kirk-session also are required by the statute to take an active and prominent part in the proceedings preliminary to the appointment. They are entrusted with the responsible and somewhat delicate duty, subject to the General Assembly's regulations, of deciding who are to be added to the electoral roll as "adherents," and it is their duty also (independently of the statute) to keep and revise from time to time the roll of communicants — so that the duty of making up the register of the electors is entirely in their hands.

The regulations enacted by the General Assembly under the 3d and 9th sections of the statute have been subjected in the course of the argument to some criticism which seems to be either unfounded or irrelevant to the present question.

One point only is worthy of notice. The first regulation provides that when a vacancy comes to the knowledge of the Presbytery they shall "appoint out of their own members a moderator of the kirk-session of such parish." "At all meetings of the congregation held in connection with the vacancy the moderator of the kirk-session thus appointed" "shall preside, and the roll of the congregation, as hereinafter defined, shall be in his hands." It was suggested that the Presbytery had no authority, and the General Assembly could give them no authority, to put one of their own members at the head of the kirk-session as moderator, with power to preside in all meetings of the congregation. But to any one acquainted with the constitution of the Church of Scotland the objection has not even an appearance of plausibility.

The kirk-session is the administrative and executive representative of the congregation, and in all ordinary affairs the congregation acts only through the kirk-session. In the language of the Statute 1592, section 116—"Anent particular kirkis, gif they be lauchfully rewlit be sufficient ministers and sessioun, they have power and jurisdiction in their awin congregation in matters ecclesiastical." In other matters the kirk-session have powers and functions of various kinds, but in their own congregation, as distinguished from their action in matters parochial and affecting civil rights and civil affairs, they are the ordinary executive body. Nothing therefore can be more natural or more in harmony with the whole spirit of the statute than that the General Assembly should put into the hands of the kirk-session (the statutory body for making up the electoral roll) the general conduct of the election. One function, indeed, the statute has provided shall be performed not by the kirk-session, but by a congregational committee, viz., the naming and proposing of ministers. But this provision has been carefully carried into effect by the General Assembly's regulations. In all other respects the kirk-session, almost as a matter of course, must be looked to for superintendence in the action of the congregation proceeding to the election of a minister.

But if the kirk-session are to act, they must have a moderator. No Church Court can lawfully act without such a president. And it is as clear as the uninterrupted practice of nearly two hundred years can make it, that the moderator of a kirk-session must be a clergyman, and that any meeting of a kirk-session without such a moderator might be open to challenge. While the cure is full, the parish minister is *ex officio* moderator of the kirk-session; but when a vacancy occurs, the presbytery always supply the want of a moderator by appointing one of their number to act *pro tempore;* and no kirk-session would think of performing any important act, whether ecclesiastical or civil, without the presence of a clerical moderator.

So far, therefore, from the regulation in question being an act of usurpation on the part of the church, it is difficult to see how the conduct of the election could have been otherwise provided for consistently with well-known and recognised ecclesiastical practice.

The making up of the electoral roll, the mode of naming and proposing ministers, and the mode of conducting the election and making the appointment by the congregation, being thus provided for, and regulated partly by the statute and partly by the regulations of the General Assembly, framed under the authority of the statute, the third section proceeds further to provide "that with respect to the admission and settlement of ministers appointed in terms of this Act, nothing herein contained shall affect or prejudice the right of the said church, in the exercise of its undoubted powers, to try the qualifications of persons appointed to vacant parishes; and the courts of the said church are hereby declared to have the right to decide finally and conclusively upon the appointment, admission and settlement in any church or parish of any person as minister thereof."

The right to try the qualifications of persons appointed to vacant parishes, to decide finally on the sufficiency of their qualifications, and to admit or reject them accordingly, has always belonged to the church from the year 1592 to the present day, and that irrespective of the nature of the church government prevailing for the time, whether Presbyterian or Episcopal. But the right to decide finally and conclusively on the "appointment, admission, and settlement" is conferred for the first time, and must be held to include a final decision on all questions as to the exercise of their right by the congregation in each particular case, and on all questions as to the time, place, and manner in which the admission and settlement of the minister is to be carried to a conclusion. Further than this, the statute does not seem to have conferred any new or exclusive jurisdiction on the Courts of the Church.

The next inquiry must be, What is the question raised by this suspension and interdict, and does its determination fall within the exclusive jurisdiction now defined?

The complainers contend that notwithstanding the lapse of six months from the occurrence of this vacancy the congregation have not lost their right of election and appointment, while the respondents maintain on the other hand that the right of appointment has fallen to them *tanquam jure devoluto.* There is thus a competition of rights.

A good deal of confusion has been introduced into this argument by the use of the terms "civil" and "ecclesiastical" as applied to those rights. But it is sufficient to say that the right of the congregation is conferred and secured by the third section of this statute, and the right of the Presbytery by the seventh section. Being legal rights depending on statute, their enforcement or a challenge of their validity in any particular case can only be tried in the tribunal which is appointed to interpret and enforce the statutes of the realm, that is, the Supreme Civil Court, unless the jurisdiction and duty have been conferred and imposed on some other tribunal. If the Legislature had thought fit, they might have committed this jurisdiction to an inferior Civil Court, or the Legislature, being omnipotent, might in like manner have conferred this jurisdiction on the Courts of the Church, though an enactment conferring on these Courts power to adjudicate in a competition of statutory rights would have been so entire a novelty that it would have required very clear words in such a case to oust the ordinary tribunals.

Most certainly the words in the third section conferring exclusive jurisdiction on the Church

Courts can by no ingenuity of construction be so extensively applied, and there are no other provisions of the statute which can be appealed to for this purpose. When the Church Courts in the exercise of their exclusive jurisdiction had decided that the election and appointment of a minister had not been duly made, we are to accept that decision; but what the consequences of that decision are to be is a totally different matter. Whether in the circumstances the congregation are entitled to elect and appoint of new, or the right has fallen to the Presbytery, must depend on the construction and effect of the seventh section. But for that section the right might probably have remained with the congregation even after the lapse of six months, and it would make no difference to this question though the *jus devolutum* had been conferred on the Sheriff or the Lord Lieutenant of the county instead of the Presbytery; for in the exercise of this right the Presbytery, whether under this statute or under any of the previous statutes regarding patronage, are not acting on any judicial or even quasi-judicial capacity, but only as statutory trustees authorised and required, on consideration of public expediency, to exercise the right of appointment *pro hac vice*.

The matter of jurisdiction being thus disposed of, the question on the merits creates no difficulty.

The vacancy in the Abbey Parish of Paisley occurred on 19th October 1877. An appointment of a gentleman named Jamieson was made by the congregation on 6th March 1878, and it is not disputed that this appointment was regularly made under the statute and regulations. But Mr Jamieson declined to accept the appointment on the 19th March, in a letter addressed to the moderator of the Presbytery. The Presbytery thereupon, by minute dated 27th March, refused to sustain the appointment, and intimated their refusal to the congregation. This intimation was received by the congregation at a meeting called by the kirk-session on the 1st April. They had still, in any view, eighteen days before the expiry of the six months in which to make a new election and appointment. They appointed a new committee, because the members of the old committee declined to act, and they instructed this committee to select out of a leet then given to them the names of three persons to be reported to the congregation as persons willing to accept if appointed. The meeting adjourned to the 15th April. At the adjourned meeting, which was held within four days of the expiry of the six months, a motion was to proceed to the election, and another motion to delay. The latter motion was carried, and so the consideration of the whole matter was postponed *sine die*. The meeting thereafter resolved to "reappoint the committee appointed at last meeting, with instructions to co-operate and confer with the Presbytery, so far as it is found competent, and as their advice and assistance may be permitted, in selecting and securing a suitable minister to fill the vacancy in the first charge of the Abbey Church and parish." This meeting was not adjourned, and thus the whole action of the congregation came to an end, for from that time to the present no attempt has been made on the part of the congregation to proceed to a new election, although more than twelve months have elapsed since the occurrence of the vacancy.

Questions may undoubtedly arise presenting more or less difficulty, whether under special circumstances the lapse of six months from the vacancy will put an end to the right of the congregation. But in the present case the congregation having on the 15th April, within the six months, deliberately declined to proceed to exercise their right when they were quite in a position to do so, and having taken no action whatever since that time, it is impossible to doubt that the 7th section of the statute applies.

It would obviously be absurd to hold that an application for interdict against the Presbytery, presented by two members of a congregation consisting of many hundreds, presented nearly five months after the expiry of the six months, could have any effect in saving or reviving the right of the congregation.

When this application was presented in the Bill Chamber, my brother Lord Shand, acting in vacation, had obviously, looking to the nature and importance of the questions raised, no course open to him but to pass the note for the trial of these questions. But when the case was brought here by reclaiming note, it appeared to the Court and to the parties that it would if possible be highly desirable (for the purpose of having this vacant parish supplied with a minister without delay) that the case should be finally disposed of in the Bill Chamber.

The Court being of opinion (1) that the question raised by the suspension and interdict is within their jurisdiction, and (2) that the complainers have no case on the merits, have no hesitation in remitting to the Lord Ordinary on the Bills to refuse the note of suspension and interdict, with expenses.

Lord Deas, Lord Mure, and Lord Shand said that they had read the opinion just delivered, and concurred entirely therewith.

The Court accordingly remitted to the Lord Ordinary on the Bills to refuse the suspension and interdict, with expenses.

Counsel for the Complainers (Respondents)—Lord Advocate (Watson)—Pearson. Agents—Hamilton, Kinnear, & Beatson, W.S.

Counsel for the Respondents (Reclaimers)—Lee—Mackintosh. Agents—Menzies, Coventry, & Soote, W.S.

HIGH COURT OF JUSTICIARY.

Friday, November 15.

(Before a Full Bench.)

SALMOND AND OTHERS (DIRECTORS, &C., OF THE CITY OF GLASGOW BANK), PETITIONERS *v.* THE LORD ADVOCATE.

Justiciary Cases—Bail—Theft or Breach of Trust—Bailable Offence—Discretion of the Court—Act 1701, *cap.* 6.

The directors, manager, and secretary of the City of Glasgow Bank were committed to prison upon a petition charging them with