[15*th August* 1832.]

ADAM LUKE and others, Appellants.—*Dr. Lushington —Wright.* No. 18.

THE MAGISTRATES OF EDINBURGH and Rev. JOHN HUNTER, Respondents.—*Lord Advocate (Jeffrey)—Simpson.*

Church. — Held (affirming the decree of the Court of Session) that the town council of Edinburgh, as patrons, were entitled to appoint an assistant and a successor to a minister who was disabled by age from performing the duties of the office, the minister giving his consent to the appointment.

Process—Although a party found on a fact in his summons, yet if he do not do so in his condescendence he cannot afterwards avail himself of it.

Appeal.—Opinion intimated, that, where the pleadings in the Court below entitle a party to insist on an objection, the House of Lords are not barred from deciding the appeal upon that objection, though it may not have been pressed in the Court below, and though it form no part of the consideration of that Court in pronouncing the interlocutor appealed from.

1ST DIVISION.
Ld. Moncreiff.

THE Rev. Dr. Simpson and Dr. Brunton were incumbents of the church and parish of Tron, in Edinburgh, which is a collegiate charge, but of which the Town Council are the patrons. In April 1829 Dr. Simpson, who was at this time eighty-five years of age, owing to decline of health, wrote, with the concurrence of Dr. Brunton, to the Lord Provost, requesting to have a minister associated with him as assistant and suc-

No. 18.

15th August 1832.

LUKE v. MAGISTRATES OF EDINBURGH.

cessor; and the Town Council, by a majority of nineteen to twelve, resolved to appoint Mr. Hunter assistant and successor, against which determination a protest was entered.

Mr. Hunter was presented, and his presentation was sustained by the presbytery and affirmed by the synod, and afterwards by the general assembly, to which it had been appealed.

In the meanwhile the appellants, as dissenting members of the town council and elders of the kirk session, raised an action of reduction of the acts of the council, and presentation against the other members of the town council, Dr. Simpson and Mr. Hunter.

During the discussion of the reduction Dr. Simpson died, and thereupon a separate action was raised of reduction of the presentation, and a declarator of the right to present to the incumbency, as having become vacant by Dr. Simpson's death. This action was conjoined with the first, and when the conjoined actions came before the Lord Ordinary, his Lordship sustained the defences, and assoilzied, with expenses, and issued the following note, in which the facts are fully detailed:—

"The Lord Ordinary has considered this case "with care, because it has been treated as a case of "importance. It is undoubtedly a case of great im- "portance in some views of it; but he should not do "justice if he did not state that it is a case in which "he has never entertained the slightest doubt.

"The material facts are simple: Dr. Simpson, at the "age of eighty-five, intimated to the town council "that he had no hope of being able to continue to

" discharge the duties as minister of the Tron Church " of Edinburgh, and that he was desirous, if the town " council approved of it, of having an ordained " minister of experience appointed assistant and suc- " cessor to him. The proposal lay a week on the table " of the council, and was then approved of. Dr. Brun- " ton, the collegiate minister of the same church, ex- " pressly consented. On the 13th May 1829 the " council resolved to present Mr. John Hunter, a " person in all points qualified; and no step having " been taken to prevent this, a presentation was given " to him on the 10th June 1829. That presentation " was regularly sustained by the presbytery, without " any objection having been stated by any private " party. Then a question on the ecclesiastical merits " of the case arose among the members of the court " themselves, and was terminated by a final judgment " of the general assembly 1830, holding the pre- " sentation to be good, but, as an action of reduction " had been raised on the eve of the sitting of the as- " sembly, superseding the induction till the issue of " that process, according to the uniform practice since " the case of Lanark.

" Mr. Hunter's induction was prevented solely by " the proceedings in the church courts, to which the " pursuers were no parties; and if he had been in- " ducted there must have been an end of the matter.

" The first reduction was not brought till after the " presentation had been sustained by the presbytery, " and their sentence had been affirmed by the synod. " There seems, therefore, to be much ground for the " plea, that the pursuers had no right afterwards to " insist in any reduction, the act 1567, c. 7. being

No. 18.

15th August 1832.

LUKE v. MAGISTRATES OF EDINBURGH.

" explicit as to the effect of the judgment of the " church courts, and no civil impediment having been " previously attempted. But the Lord Ordinary does " not rest his opinion on this, though he has yet heard " no good answer to it.

" The main question is, had the town council, the " undoubted patrons, power, on the application of " Dr. Simpson, to grant the presentation to Mr. Hun- " ter? There is no difficulty in form. The particular " objections stated appear to be groundless, and were " scarcely insisted on at the bar; and the presentation " is in the usual form in such cases. The question is, " have the patrons power to make the presentation to " the effect of warranting the presbytery to ordain or " admit Mr. Hunter as minister, assistant, and succes- " sor in the parish.

" The case has been argued to the Lord Ordinary " on a denial of the legality of this in any parish. He " is humbly of opinion that the plea is untenable as " matter of law, and irrelevant and groundless in any " other view.

" In order to take a right view of this question it is " necessary to attend to the genius and constitution of " the church of Scotland. It cannot justly be tried by " any reference to the rules or the proprieties appli- " cable to establishments of a different nature, or by " analogies drawn from offices of a different character. " The fundamental principle of the Scottish church is " that every man admitted into ecclesiastical orders, " every man ordained as a minister, must be ordained " as actually the minister of some parish or of a " chapel district precisely fixed. There is no such " thing in the church of Scotland as ministerium

" vagum, either practically or theoretically; no such
" thing as plurality of benefices; no such thing as a
" minister ordained without a cura animarum, to which
" he is appointed for his life.

" From this principle, fixed at the reformation, diffi-
" culties have naturally arisen when ministers fall into
" great age or infirmity. These difficulties are les-
" sened by the practice of allowing candidates for the
" ministry to preach after being licensed by the pres-
" bytery. But these are not and cannot be ordained
" ministers, enabled to administer the sacraments, and
" to discharge other duties dependent on ordination;
" and still, therefore, in many special cases a different
" remedy was required. That remedy was found, at
" an early period, in the plain, simple, and very sen-
" sible expedient of the presentation and induction of
" a fit person into the condition of a minister of the
" parish for his life as assistant and successor to the
" existing incumbent. The person so appointed be-
" comes immediately an ordained minister of the
" church, subject to all the obligations implied in
" the character. He is received as a member of the
" presbytery and synod, entitled to vote whenever
" the principal is absent, and eligible as a member of
" the general assembly. These things are beyond all
" doubt, and are sanctioned by at least a century of
" undisputed practice.

" It is manifest, therefore, that the institution of
" assistants and successors in the church of Scotland,
" introduced from a necessity inherent in the very
" constitution of the church, and for the advantage of
" the people, has no resemblance or affinity to grants
" of offices in reversion, and is essentially different even

No. 18.

15th August 1832.

LUKE v. MAGISTRATES OF EDINBURGH.

" from the appointment of assistants and successors in any other case. And it must be kept firmly in remembrance, that it is attended with the most important securities against abuse. The consent of the existing minister, at least if he is capable of consent, is indispensible. The patron of course must consent; but when these two are agreed, the consent of the presbytery, and, if called for, of the synod and general assembly, must be obtained. The whole question of reasonable necessity, expedience, and propriety undoubtedly belongs to these courts; and if they think the measure improper, or an abuse of the patron's right, they certainly have power to put a negative on the proposal. And practically the statement of the pursuers, as to the small number of such appointments, compared with the number of livings and vacancies, while the legality of them has been recognized for a century, demonstrates that these checks have been effectual, that the practice has been kept under due control, and that there is no evil or abuse involved in it.

" It is admitted on the record that there is a series of examples to the number of forty-three, well authenticated, of assistants and successors so appointed, from 1742 to the present time. There is reason to think that the practice was introduced much earlier. See note in Connell on Parishes, p. 515. These examples run over the whole church and country. They comprehend royal boroughs as well as country parishes:—Glasgow, Dumfries, Montrose, Cupar, Ayr; and one of the last instances, though in a country parish, was by the presentation

" of the town council of Edinburgh. In not one of
" all the cases was the legality of the appointment, as
" matter of civil right, disputed. The Lord Ordinary
" holds this alone to be decisive of the general question
" —an admitted and unchallenged practice over the
" whole church during ninety years. It might have
" been more extensive if any serious abuse had been
" practicable; but if the control is efficient, the
" extent of the practice is of course limited by the
" necessity.

" But there is much more in the case. In the first
" place, the legality of such appointment has been
" recognised by the church courts. The assistants and
" successors have not only been duly ordained and
" inducted, but they have been recognised as members
" of all the church courts, exercising the most impor-
" tant rights, both ecclesiastical and civil. They have
" been incorporated in the constitution of the church,
" and public acts to which they are parties have been
" recognised in all the civil courts. In the next place,
" they have been expressly acknowledged as holding a
" legal status, both by the Court of Session and by the
" Court of Teinds. See Connell on Parishes, pp. 517-18.
" Case of Cadder; Muir v. Dunlop, 9th December
" 1791; and Campbell v. Stirling, 4th March 1813.
" And see the case of Melrose, Connell on Tithes,
" vol. i. p. 455, where a process of augmentation having
" been brought by the principal minister, and the
" augmentation having been refused to him, the Court,
" on a petition by the assistant and successor, and with
" the consent of the heritors, awarded an augmentation
" to him out of the teinds. He could not indeed have
" raised the process, because he is only conditionally

No. 18.

15th August 1832.

LUKE v. MAGISTRATES OF EDINBURGH.

" vested in the benefice, as decided in Shaw v. Heritors " of Robertson, 29th January 1806. But his cha- " racter was clearly recognised as a lawful status, " otherwise no consent of the heritors would have war- " ranted the proceeding.

" In the third place, these assistants and successors " have been recognised in various British statutes. " They are so in the acts establishing the Widows Fund, " 17th Geo. II. (1744) cap. 11. sec. 11., 22d Geo. II. " cap. 21., and 19th Geo. 3. cap. 2. sec. 9. Their " status as churchmen is, therefore, sanctioned by sta- " tutes in full force ever since 1744. They are to be " deemed and taken to be ministers to all the purposes " of the acts. But the later statute of 48th Geo. III. " cap. 50., relative to grants of offices in reversion, is " still more important, as containing an express excep- " tion from its provisions, which it is assumed might " otherwise have been taken to apply to the case, 'that " 'nothing in this act shall extend, or be construed to " 'extend, &c., to prohibit the appointment of assis- " 'tants and successors to the parochial clergy of " 'Scotland.'

" It seems to the Lord Ordinary to be quite impos- " sible, in the face of these facts, and without a single " authority or decision on the point, to maintain " that such appointments, when duly proceeded in, are " illegal. The passages in Erskine and other authors " which are quoted, only announce the undoubted " general truth, that no patron can present to the " expectancy of a benefice. This plainly does not " contemplate the special case of the immediate induc- " tion of an assistant and successor into the whole " duties of the parish on a declared necessity by the

" proper authority. That is not a presentation to an " expectancy, but to an immediate cure, and at any " rate it is a special case fully established by a long " usage.

" Neither do the cases referred to by the pursuers " appear to have any material application to the ques- " tion. The only one to which it seems necessary to " advert is that of Arnott, &c. v. Flints, &c., as de- " cided by the House of Lords 26th May 1809. " Though that case was much relied on by the pur- " suers it humbly appears to the Lord Ordinary that " it can afford them no aid; for, 1st, it was the case " of a professor in a university. That is altogether " different from the case of a minister of the church; " it has not in it the important quality, that without " ordination the full duties of the place cannot be " performed. Neither has it the same sanctions; and " each university, being independent of all the rest, " may be only affected by practice within itself. 2d, " the very case of assistants and successors in the " ministry is expressly acknowledged as beyond dis- " pute lawful by both the parties in that cause. 3d, " it was the case of a professorship, where the other " professors were the patrons, and where consequently " there could be no jurisdiction to control an abuse. " 4th, the King being the visitor of all colleges, it " might be competent to the King's Courts to control " the exercise of the right of patronage in such a case, " and more especially to determine whether it was " warranted by the terms of the endowment, which " was one of the points put in issue. 5th, it was " plainly a case of the grant of an expectancy; for the " very terms of the appointment showed that it was

No. 18.

15th August 1832.

LUKE v. MAGISTRATES OF EDINBURGH.

" not intended or expected that Dr. Flint, junior, should " immediately, or at any given time while his father " lived, enter on the duties of the office. And 6th, it " was, in its circumstances, liable to other very serious " objections. But while these considerations plainly " place the decision, the particular grounds of which " are nowhere reported, on a footing which entirely " removes it from the principles of this case, it is to be " remembered that it was only in the previous session " of parliament (1808) that the statute 48th Geo. III. " was passed, in which all grants of offices in reversion " were prohibited, with the express exception of the " appointments of assistants and successors to the pa- " rochial clergy of Scotland, while no such exception " was made of similar appointments to professorships.

" If the general plea of the pursuers against the " legality of such presentations cannot be sustained, it " seems to be clear that there is no specialty which can " avail them. The town council of Edinburgh have " the same powers as other patrons; and, the question " being one which relates to the church at large, it " can be of no consequence whether the practice has " been followed or has been frequent in Edinburgh or " not. What has been law for Glasgow, Ayr, &c., and " generally over Scotland, must be law also with regard " to the powers of the patrons of Edinburgh in this " matter. They have power to present upon actual " vacancies by death, &c., and they have power to " present assistants and successors, when the cases " which render this necessary or expedient arise. And " the Lord Ordinary can see no evil or danger in this. " For, the question of expediency being subject to " the control of the presbytery, when the case does

" occur, the council for the time is just as competent
" to present a fit person for the benefit of the public
" as any council which succeeds them can be presumed
" to be. If they do not take due pains, that is their
" fault, and in a question of law is not to be presumed.
" They are to exercise the power (as Dr. Simpson
" expressly asked them to do) precisely as they would
" if there was a vacancy by death.

" As to the statement of this being a collegiate
" church, Dr. Brunton being fully competent to the
" whole duties, &c., the Lord Ordinary thinks them
" altogether irrelevant in this Court. They were very
" fit to be stated to the presbytery, if the pursuers
" thought them of importance; and, though the pur-
" suers did not state them, it has been stated by the
" defender that they were fully canvassed in all the
" church courts. As the church or parish has two
" ministers by law, it must be presumed that two in
" full orders are necessary, and this may very well be,
" from the nature of the population, though the parish
" be not large. Dr. Brunton is also a professor in the
" University; but though he had not been so, he had
" a right to an efficient colleague, and Dr. Simpson
" was eighty-five years of age.

" The church courts, therefore, having confirmed
" the appointment, and ordered the induction, the
" Lord Ordinary is of opinion that all questions of par-
" ticular expediency are excluded, and that the case
" must stand on the same footing as if it had arisen on
" the last presentation of an assistant and successor
" given by the town council of Edinburgh, or on
" such a presentation by any other patron, which had
" been sustained by the presbytery."

No. 18.

15th August 1832.

LUKE v. MAGISTRATES OF EDINBURGH.

Luke and others reclaimed, but the Court unanimously adhered* ; and the present appeal was brought.

Appellants.—1. The appointment was not validly made, because there was no legally constituted meeting of the council, the deacons not having been duly summoned to attend. 2. Supposing there was a legal meeting, still the town council, as patrons of the parishes of the city of Edinburgh, are only authorized to present upon an office or benefice becoming vacant, because until that event happens any step taken by an existing town council to appoint a successor becomes an assumption of power not vested in them, but remaining with the community to be brought into operation through the medium of the council existing when the vacancy arises; besides, an appointment to a benefice by anticipation is illegal, inexpedient, and prejudicial to the interests of the church and of the community.†

Respondents.—1. There are no facts stated in the record relevant to raise the objection to the validity of the meeting of the council, and it was not pleaded in the Court below. It is therefore incompetent, and besides is not well founded. 2. By the law and practice of Scotland an assistant and successor may be named by the patron when the circumstances of the parish require it, although the benefice be not vacant; and in this matter there is no distinction in principle, and none has

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* 10 Sh. & D. 307.

† *Appellant's Authorities.*—Arnott, 26 May 1809 (Appeal Papers, Adv. Lib.); 1 Ersk. 5, 11; Stuart, 24 Jan. 1677 (9899); Connell (Parishes), 514; L. Garbet, 15th Dec. 1693 (13115).

ever been made in practice, between individuals and corporations who possess the right of patronage.*

No. 18.

15th *August* 1832.

LUKE v. MAGISTRATES OF EDINBURGH.

LORD CHANCELLOR.—My Lords, in this case of Luke and Hunter two questions were raised at your Lordships bar, one of which only appears to have undergone full discussion in the Court below. The first question, and that which was not discussed in the Court below, relates to the legality of the meeting of the town council of Edinburgh, at which the appointment in question took place. To the legality of that meeting objections have been taken at your Lordships bar upon two grounds; in the first place, that the proper members of the council were not present, namely, the deacons; but chiefly upon the ground that the proper summons was not given to all those deacons to the council; for it appears to me, if that summons had been regularly and legally given, which it is denied had been given, their absence would not have rendered the meeting illegal, and that consequently that objection would fail. But it was said, that inasmuch as there was a deficient summons of these deacons the meeting of the town council was not legally called and constituted. I was inclined to think there was a great deal which deserved consideration in this objection, which certainly had not been taken, or if taken, was almost immediately abandoned in the Court below. There appears upon the face of the Lord Ordinary's most elaborate and learned interlocutor enough to

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* *Respondent's Authorities.* — 17 G. II. c. 11. § 11; 22 G. II. c. 21; 19 G. III. c. 2. § 9; 19 G. III. c. 20; 48 G. III. c. 50. Connell (Parishes), 514; Dunlop, 9 Dec. 1791 (7470); Campbell, 4th March 1813. (F. C.)

No. 18.

15th August 1832.

LUKE v. MAGISTRATES OF EDINBURGH.

satisfy your Lordships that it had not been insisted upon; and it seems to be agreed upon all hands, that if it was not formally abandoned it was substantially abandoned in the course of the argument there. That it formed no part of the consideration of their Lordships in pronouncing the interlocutor appealed from, is clear. No trace is to be found of it in the reported case, or in the interlocutor itself, nor in the fuller note with which I have been furnished. Nevertheless, if I had been satisfied that the pleadings in the Court below entitled the party to insist upon that objection, and that the objection, if competent to be insisted upon, was valid, I should not have considered myself precluded from advising your Lordships to decide, and I should not have considered that your Lordships were precluded from deciding the question upon that ground, and upon no other. Nothing can be more important in every thing relating to the proceedings of corporate bodies than those regulations which govern the constitution of their meetings. If there is any one part of their regulations which is more especially important than another it is that part which refers to the governing and the calling of those meetings; for if a certain part of the corporate body has a right to attend when any business is transacted, and if there is laid down by the rules of the corporation, either by the original charter or by the bye laws, a mode of summoning those who have such right to attend, and if that mode of summoning is not pursued, and strictly pursued, it is manifest that the right of those corporators to attend is of no avail; for behind their backs, and by surprise, a corporate act may be done which it was the intention of the provision in the charter or the bye laws to

prevent being done without their being present. Consequently, in all cases of this kind, in all the statutory provisions made from time to time, whether in local or in general acts of Parliament, the greatest attention has been given that the corporators shall duly have their summons, as the means of effectually securing to them their rights; so that, if summoned, their absence is their own fault, and they have no right to complain of any thing being transacted behind their backs. I therefore looked very narrowly into this part of the case, to see if there was a defect in the summons of these people to attend at the meeting at which this appointment of an assistant and successor took place. The validity of the objection depends, as far as this record enables your Lordships to judge, upon the decreet arbitral of James the Sixth, and still more on the decreet arbitral of Lord Islay, many years afterwards, in the year 1730. There might be some question raised whether or not the first decreet was to be taken into consideration, where any thing was left doubtful upon the face of the latter; but at any rate, and without raising that question, it is clear that if you take the decreet arbitral of Lord Islay to be the governing charter, it is there laid down, "that the extraordi-
" nary deacons have a right and ought to be adjoined
" with the ordinary council, at least ought to be
" legally called for that end." By this I understand the mere right of being "adjoined with the ordinary
" council;" and that the words "for that end" refer to the preceding part and not to the succeeding part of the clause, "when they are to proceed to the election
" of provost, bailies, dean of guild, or treasurer, or
" give benefices or other offices within the borough," or

No. 18.

15th August 1832.

LUKE v. MAGISTRATES OF EDINBURGH.

do almost any other act. They are entitled to be present, or at least to be legally called in order to be present, and adjoin the ordinary council; and the question then is, what, under this decreet arbitral, is to be held a legal call of the extraordinary deacons at the giving of benefices? Some light might have been thrown upon the case by the decreet arbitral of James the Sixth, if we suppose that the decreet of Lord Islay, and not that of the monarch, was the governing charter. But the best and steadiest light to be thrown upon this subject is to be found in the uniform usage of the corporation for a century, from the latter of these instruments. If usage was to be taken into consideration, and if the question was raised competently upon the pleadings, the point would be, whether or not what was done upon the present occasion amounted to a legal call of the deacons. But that usage is excluded from the consideration of your Lordships by issue having been taken upon it, and no admission upon the record that the usage is as pleaded by one of the parties, and the issue not having been tried. It is stated by the defenders (the respondents), "that the practice of the "town of Edinburgh has been for the Lord Provost to "appoint the council and extraordinary deacons to "meet every Wednesday for the dispatch of business; "and this is the only notice which is given for ordi-"nary meetings, whatever may be the nature of the "business: That the general summons issued at the "beginning of the year is in the following terms:—

"'The Lord Provost appoints the magistrates and "'council, and extraordinary deacons, to meet every "'Wednesday at twelve o'clock, without any warning, "'for the despatch of business, unless they get inti-

" ' mation that there is to be no meeting in any par-
" ' ticular week or weeks; '" and then the respondents add, " an intimation or warning to the above effect is " always given after the election of magistrates, and is " entered in the annual record, and no other warning " is ever given to these parties to attend." Here, therefore, is a distinct averment, in point of fact, on the part of the respondents, that the usage is perfectly conformable to what is admitted to be the fact in the present case; and it is so distinctly averred, that if it had been admitted on the other side there would have been no mistake as to that important fact. But, unfortunately, that is not admitted, but denied; for the pursuers in their answer admit, " that after the annual " election the council and deacons are directed to meet " every Wednesday, but it is denied that this is the " only notice that is given, or that the practice is as " here set forth;" and they say " in whatever form it " may be done, due intimation is always made when " any extraordinary business is expected to be brought " forward." Therefore, in the first place, there is no admission of the usage, and in the next place, there is an issue taken upon the fact of the usage; and there being no admission, and that issue not being tried, your Lordships are left in this case, as you are in too many of a similar kind that come from Scotland, extremely short of facts, where facts are necessary to dispose of the question. Now, my Lords, that being so, we are to exclude the usage from our consideration, as if it were not to be found within the four corners of this statement, and we are therefore to go upon the decreet arbitral of King James, and the decreet arbitral of Lord Islay, and upon those we are to satisfy ourselves in the

No. 18.

15th August 1832.

LUKE v. MAGISTRATES OF EDINBURGH.

best way we can as to the construction of the word "legally called," and as to what amounts to a legal call of the deacons. I do not think that the facts of this case are sufficient, and I do not think that the instruments themselves are sufficient, to enable me to see very clearly what is a legal calling within the meaning of these provisions. It is very possible, morally speaking, they might show that the general calling is sufficient; but if I come to that moral conviction, it is because I have a strong belief that they would have been able to prove what they aver if they had gone to an issue and had tried it. I feel no confidence sufficient in the construction to say whether the general calling was sufficient, or whether a special summons for the purpose of that specific election was not necessary to make it valid within the meaning and the language of the decreet arbitral. It is exceedingly possible, if the question had been made to turn upon it in the Court below, and they had directed an issue, which they would have done, that the result of the inquiry into the fact would have been that the usage was such as to enable us to consider that a general summons was enough, and that a particular notice was not necessary. But now comes the question, and a material one it is, whether, admitting that the construction of these instruments, particularly the decreet arbitral of Lord Islay, is that a special summons was necessary, and that the summons given was not sufficient, your Lordships have a right upon the pleadings to decide this case upon the ground? or in other words, are the pleadings in such a state as to give the parties a right here, or to have given them a right, if they had chosen to have availed themselves of it, in the Court below, to raise the objection? And

upon the best consideration I am clearly of opinion that the state of the pleadings does not give them that right,—that they have not raised the objection upon the pleadings in such a competent shape as to give them a right to insist upon it, for the reasons I shall presently state to your Lordships. This objection ought to have been taken by the pursuers in their condescendence; it is not sufficient that they raise the question in their summons. Where the parties do not agree to let the matter rest upon the summons and the defences, they are to let it rest upon the condescendence and the answers; and I take it, if a party insert in the summons a fact which he wholly drops in the condescendence, he must be taken, as the parties have not agreed to abide by the summons and the defences, to have abandoned or departed from that statement which he has dropped between the summons and the condescendence. Now, do your Lordships find that objection stated within the four corners of the condescendence? Clearly not. The sixth article is said to contain it under the words "inasmuch as the whole deacons of "crafts were not present, and the council was not full "at the meeting of the 13th of May,—Baillie Small "and Deacon Cleghorn not being present, and the "council not being made full by proxies." That is not an objection upon the ground of an undue summons and defect of warning under Lord Islay's decreet arbitral, or a want of legal calling, but it is an objection framed upon the decreet arbitral of James VI. If it had been pleaded that they were not only not present, the Council not being full, but they had not been duly warned, then there must have been an admission of this fact by the respondents, or there must have been a

No. 18.

15th August 1832.

LUKE v. MAGISTRATES OF EDINBURGH.

denial of it; and that would have raised the issue of fact. Then comes the respondents statement of facts, in which, in articles 9th and 10th, and in article 12th, they set forth the practice, and in which it is differently set forth from that stated by the pursuers. They admit part, and deny the rest; but the admission does not go to that part of the pursuers objection as to the want of summons; this part, therefore, does not cure the defect which belongs to the condescendence. But then, it is said, that defect is supplied by the pleas in law of the pursuers; and the 5th plea in law is, "the "appointment of Mr. Hunter was not made at a "meeting of council lawfully called and constituted." It is said that this is the averment which we were in quest of in the condescendence, and that this is the fact that the condescendence had omitted. My Lords, I take that not to be the office of a plea in law. I take the plea in law to be a note for the convenience of the Court, and, as it is stated distinctly in the 8th and 9th sections of the 6th of the late King, cap. 120, that the record may be adjusted with a due regard to matters in law; but it is manifest from the course of the proceedings, and the manner in which it is dealt with, that the plea in law is not intended to be a parcel of the condescendence. The office of a plea in law is this: the facts having been dealt with in the condescendence and answers to raise the argument of law, the one party may say, this conclusion of law in my favour arises from the facts I have stated, and the other party may deny that conclusion of law, or raise another in his own favour, either from any facts that his adversary has stated, or from the facts he himself has stated; but it is clear that the plea in law is confined to the con-

clusion of law from facts stated, and that it cannot be taken to supply what has been left out of the condescendence. Indeed, a conclusive reason why a plea in law cannot be held to supply a defect in the condescendence upon the state of facts is this, that it would then be too late for the other party to meet it, by denying it, or raising any other allegation of fact. It would amount to an exclusion of his negation of the fact. Now, this being the state of these pleadings, my opinion is, that this objection comes too late, and that it is unnecessary to decide whether, if the objection had been taken competently, it would have been available; and therefore, as far as regards the first branch of the case, the decision must be in favour of the respondents.

This brings me to the other branch of the case; and as I agree in the judgment to which the Court below came it will not be necessary for me to trouble your Lordships at any great length. The question is one of very great importance, but, as it appears to me, one of much less difficulty. That question is, can a patron validly appoint an assistant and successor to a clergyman whom he has already placed in the Scotch kirk while that clergyman continues in that church and has not rendered it vacant by his resignation? I regard with the greatest possible respect the authority of that most learned and excellent Judge from whose interlocutor in the Court below this appeal has been brought,—I mean Lord Moncreiff,—one of the most learned individuals who adorn that bench, or who ever adorned that bar, and peculiarly qualified to decide this question, from the whole habits of his life; and I entirely agree with the Learned Chief Judge of the Court

No. 18.

15th August 1832.

LUKE v. MAGISTRATES OF EDINBURGH.

below, in all that he so feelingly and so eloquently and justly says of the hereditary claims to the respect of that Court possessed by the son of one of the most learned and venerable fathers of the Scotch church. Nevertheless, my Lords, with all the respect it is possible to entertain for his authority, and though entirely agreeing in his opinion upon the matter of law, with perhaps a single point excepted, which I see one or two of the Learned Judges have referred to as to a point that does not affect the decision of this case, I cannot take the same view that Lord Moncreiff appears to have done as to the practice of appointing an assistant and successor being wholly unattended with risk. He says, "practically, this statement of the "pursuers, as to the small number of such appoint-"ments, compared with the number of livings and "vacancies, while the legality of them has been recog-"nised for a century, demonstrates that these checks "have been effectual, that the practice has been kept "under due control, and that there is no evil or abuse "involved in it." That, in point of fact, there may have been no abuse, is very possible; but that there is no evil involved in it, by which I understand no tendency to abuse, as contradistinguished from any abuse, I am not prepared to say; and Lord Moncreiff appears, by an oversight, to have a little understated the amount to which it exists in the Scotch church. He seems to consider that the number of forty-three are all the instances of those appointments that have existed during a long course of years, from 1742 to the present time; whereas the fact is, that there are forty-three cases of the kind actually existing at this moment. Now, that will not be a very large proportion of the

whole livings in Scotland, but it is a proportion not inconsiderable; it is four per cent. upon the number of clergymen in Scotland. Then, my Lords, he states "that it is attended with most important securities "against abuse;" and that there are securities, and important securities, there can be no doubt. He says, "it is introduced from a necessity inherent in the "very constitution of the church, and for the advan- "tage of the people. It has no resemblance or affinity "to grants of offices in reversion, and is essentially "different even from the appointment of assistants and "successors in any other case;" and your Lordships will see one or two observations that go considerably further, as I feel myself warranted in saying, in favour of the practice in question. That these appointments stand upon a very different footing from other appointments in reversion, I am ready to admit; but that none of the objections are applicable to them that are applicable to ordinary cases of reversions, I take leave respectfully to question. If you wait till the living is vacant, and then appoint, you have a security, as far as you can have a security, that the person best qualified and entitled by his merits will have it; but if an arrangement is entered into, by which the present incumbent does not resign, but continues to receive the emoluments, though not to do the duty, it is self-evident that a door is opened to abuse; and one of the abuses which is most likely to creep in, is the carrying down that preferment in the family of the actual incumbent. It is always a matter of arrangement, that is admitted on all hands, how much emolument shall be awarded to the assistant. One individua will take it upon lower terms than another, and accordingly an

No. 18.

15th *August* 1832.

LUKE v. MAGISTRATES OF EDINBURGH.

arrangement will be made, more with reference, in many cases, to the terms on which a man will take it, than to his qualifications for the office; and accordingly, your Lordships find of the forty-three cases existing at the present moment of assistants and successors, there are about twenty who are the sons of the present incumbents. It may very often happen that the best person to succeed is the son of the incumbent; it may very often happen that he is the best qualified as an individual, and that his very connexion as son makes him better qualified, and that his connexion with the parish gives him a right to say that he is of all men the best fitted for it; it may so happen. But it may also happen, from the arrangement between the incumbent and the assistant, if not most strictly watched over by the ecclesiastical courts, that the office would be given to a party, not so much because he is fit for the office, as because the office is convenient for him. That is an evil likely to arise in such cases; and though there are checks here that do not exist in the case of other reversionary appointments, and though one diversity broadly marks the two cases as distinguished from each other, yet, to a certain degree, they are liable to the same objections that have long since been known to exist, as well almost by the law of the land as by the practice of the Courts, to such reversionary appointments. It cannot be denied that that diversity is broadly marked, and much of the question of law turns upon it; for the person who is appointed is not only to be the successor as to the emoluments, but he is in actual possession as regards the duties; he has all the functions of the incumbent himself; he can perform all the functions in the church, administer the

sacrament, and perform the ordinary clerical duties; he has an appeal to the ecclesiastical courts, and is subject entirely to their jurisdiction; he is recognised by them as the clerical person in the church; he may be elected a presbyter; he may be a representative in the synod and in the general assembly; and in every respect whatever, as regards his clerical functions, he is in the same situation as the incumbent; but it is as an assistant and successor he is chosen. He is regularly admitted and ordained as an assistant and successor, and he continues the acting incumbent without any new ordination, by force of his ordination when he took the office of assistant and successor; he is in all respects, except as regards the emoluments, in the situation of a person who has the office de presenti, and not of a person who has it in futuro; he is in the situation of a person who has the office in possession, and not of a person who has it in reversion; but the grant of the emoluments is, strictly speaking, a reversionary grant, and to those he has no present right, except by force of the agreement between the parties, and that is sanctioned by the approbation of the patron, and by the approbation also of the ecclesiastical court. Now, this opens the argument as to the nature of these appointments. It is clear that you cannot in Scotland, any more than in England, appoint to an expectancy in the church; but then it is contended, and I think justly contended, that this is not truly to be considered an expectancy,—that it is an office in possession as regards the ecclesiastical functions,—that there may be taken to be a partial resignation of the incumbent,—that the incumbent makes a vacancy, but makes that vacancy upon the condition that he shall be immedi-

No. 18.

15th August 1832.

LUKE v. MAGISTRATES OF EDINBURGH.

ately re-appointed, and that the office shall be held in commission for him; and then, that instead of there being one incumbent exclusively to perform the duty, and entitled to the emoluments, there shall be two incumbents,—that there shall be one entitled to perform the duties, and one only, (namely, the successor,) but two to receive the emoluments. That is one distinction that seems to come within the dictum cited from Erskine as to ecclesiastical appointments. Then the question is, Can it be denied that theScotch law recognises this office? I apprehend it certainly cannot; for where shall we resort to meet with the Scotch law upon this matter, except to the uniform practice of upwards of a century, to the authority of the text writers, to the decisions of the courts, and to the enactments of the legislature? I will not say that the question ever has been raised; it certainly has not. I cannot, therefore, say that it has been disposed of by decision, for it certainly has not by decision; but that the practice has been recognised again and again by decisions, and that there is no decision that denies it, is perfectly clear. Your Lordships, for instance, will find, in the case of Dunlop and Muir, two persons contending for the situation of assistant and successor; and the Court, upon a scrutiny of votes, as we should say in another case, determined in favour of one of the contending parties. In another case, namely that of Campbell and Stirling, one of the questions raised was, whether the preses had a casting vote? That question was not disposed of, because, upon a scrutiny of votes on one side, it was found that a sufficient number of those were disqualified votes, to make it immaterial whether there was a casting vote or not; and the Court

decided in favour of that claimant. Now, can it be said that the Court had the least doubt upon the legality of the appointment of an assistant and successor? Had the Court entertained the least doubt or thought that it would be a question, whether by the constitution of the Scotch church that the office of assistant and successor was recognised, would they have decided as they did? If the Court had denied the existence of the office,—if the Court had held the office to be illegal,—if the Court had not admitted the office to be legal, they never could have entered into the discussion of those questions which could only arise in the case upon the assumption that they had a legal office to deal with. The same may be said on the authority, and still more strongly, of one or two other cases, in which the Court actually awarded a portion of the augmentation of the stipend to the assistant and successor. In the Melrose case there appears to have been, from the report in Sir John Connell's book, a conflict between the incumbent himself and the assistant and successor. The minister brought a process for having his stipend augmented. Upon this process an appearance was made for the assistant; and he stated, that the whole of the clerical duties were performed by him, and craved that the Court would award to him the whole or a part of the augmentation which the minister would have been entitled to insist for had he had no assistant. Doubts were entertained with respect to the competency of the assistant's claim, as well they might; because he is only a reversioner as to the emoluments, and in possession only as to the practical part of the office; but a written consent of the whole of the heritors having been produced, the Court aug-

No. 18.

15th August 1832.

LUKE v. MAGISTRATES OF EDINBURGH.

mented the stipend, and appointed the whole augmentation to be paid to the assistant. The heritors consented; but they had no right to consent, unless the assistant had a right to be there. And in another case, where the curator of the minister, who was a lunatic, joined with the assistant and successor in a process of augmentation, the Court granted the augmentation, and at the same time appointed a certain proportion of the stipend to be paid to the assistant and successor. This was in the year 1830; and I will only ask your Lordships one question. It is said by the appellant, these are no recognitions, that they are no authorities to attend to, and that there may be no such things as successors and assistants recognised in the Scotch law, — that the Scotch law may know nothing of them, and that it may be wholly an illegal proceeding. It is said this may be so, notwithstanding all these decisions, in which the legal existence of this office is recognised; but I will put this question, and the same observation applies to the acts recognising assistants and successors, and particularly the 48 Geo. III., which abolishes, after a year and six months, the power of granting offices in reversion, but saves the power of appointing assistants and successors in the Scotch church. Now I ask this question—If there had been found the same dealing, either in clauses of statutes, with the offices of bishops, or deans, or archdeacons,— or if the Courts had taken upon themselves to decide between two competitors for the office of dean or archdeacon, and had said, you the pursuer have a majority of votes,—or if the act of Parliament dealing with offices had saved the right of bishops, deans, or archdeacons in the Scotch church, would it not have been thought

that presbytery was shaken to its foundation? Would it not have raised an alarm all over that part of his Majesty's dominions where presbytery, happily for that country, holds its sway? I say happily, because it is a religion rooted in the hearts of the people, and in which they have, in spiritual and moral concerns, uniformly flourished. Would it not have raised in the minds of the people of that country an alarm which no contrary decision of the Courts contradicting what had been said in that case would have allayed,—which nothing but an act of the legislature could have allayed, had such an alarm been excited by the dicta in courts, or clauses in acts of Parliament? Nay more, would it not have been well founded,—would it not have been just to hold that the courts or the Parliament actually recognised the legal existence, and by recognising their legal existence, sanctioned the lawful authority of bishops, deans, and archdeacons in the church of Scotland? It is too obvious to require a moment's further illustration. These decisions, and the language in the statutes, coupled with the uniform practice that has prevailed for the last ninety years, can leave no manner of doubt upon any reasonable man's mind, that the office of assistant and successor is recognised by the law and the practice, that the power of filling up this office ought to be most sparingly exercised, and that it is impossible to guard too rigorously against the abuse of it; and that with such practice every means should be taken, especially by corporate bodies, and most especially by those in whom is vested the high office of advising the Crown, in respect to the bestowing of church preferment, that every precaution ought to be taken to prevent even the possibility of those abuses

No. 18.

15th August 1832.

LUKE v. MAGISTRATES OF EDINBURGH.

creeping in, to which a door is opened by the existence of the office. I need hardly say (and after the remark I have made, indicating a slight difference between myself and the Learned Judge below, who has cast so much light upon the subject, after having made that observation which the importance of the case extorted from me as indicating a slight difference,) it is unnecessary to add more than that I am sure those precautions will continue that have so successfully been hitherto adopted, and that no abuse will ever in future be allowed to creep in, as far as human prudence and wisdom can give security. Upon the whole circumstances of this case I am of opinion that your Lordships ought to affirm the interlocutors complained of; and under the circumstances, I shall also recommend to your Lordships to allow the respondents the costs of this appeal, not exceeding 200*l.*

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutors therein complained of be and the same are hereby affimed: And it is further ordered, That the appellants do pay or cause to be paid to the said respondents the sum of 200*l.* for their costs in respect of the said appeal.

SPOTTISWOODE and ROBERTSON—RICHARDSON and CONNELL, Solicitors.