[Heard 13*th March*. Judgment 17*th April*, 1845.]

The Rev. Dr. Robert Gordon, Collector of the Fund for a Provision for the Widows and Children of Ministers of the Church, and of the Heads, Principals, and Masters in the Universities of Scotland, *Appellant*.

The Right Honble. Thomas Robert Earl of Kinnoul, *Respondent*.

Kirk.—Vacant Stipend.—Widows' Fund.—The stipend which accrued during the vacancy of a benefice, by reason of the Church Courts, in obedience to a law passed by the Church, refusing to put the presentee of the Patron upon his trials, *found* to belong to the Widows' Fund, under the provisions of the 54 Geo. III., Cap. 169, and not to the Patron.

On the 31st of August, 1834, the parish church of Auchterarder became vacant by the death of the then incumbent.

At a meeting of the Presbytery of Auchterarder, held on the 14th of October, 1834, Robert Young, a Licentiate of the Church of Scotland, tendered a presentation by the respondent, the patron of the parish, and required them to take him upon his trials. The Presbytery appointed the presentation to lie on the table till their next meeting.

At the next meeting, which was held on the 27th of October, 1834, all the documents necessary to support the presentation having been produced, the Presbytery so far sustained the presentation as to appoint the 2nd of December for moderating in a call. On the 2nd of December a majority of the male heads of families, on a roll inspected by the Presbytery, having dissented to the call and settlement of Young, on an opportunity afforded them by the Presbytery, in conformity with the Act of the General Assembly, called the "Veto Act," but contrary to a protest on the part of Young, the Presbytery adjourned conside-

ration of the proceedings until their meeting on the 16th December following.

On the 16th December the Presbytery found that a majority of the persons on the roll still dissented. And an appeal to the Synod having been taken against their proceedings they sisted procedure until the issue of the appeal.

On the 21st April, 1835, the Synod dismissed the appeal, and remitted to the Presbytery to proceed. An appeal was then taken to the General Assembly, which was also dismissed on the 30th of May, 1835.

On the 7th July, 1835, the Presbytery rejected Young as presentee, and directed notice of the rejection to be given to him and the respondent, the patron.

On the 5th October, 1835, the respondent and Young brought an action against the Presbytery and the appellant, to have it found that the Presbytery ought to have taken Young upon trial, and to have inducted him if found duly qualified; that if they should still refuse to proceed towards his induction, it should be found that Young had right to the stipend and other temporalities of the parish for crop aud year 1835 and in time coming, and that the Presbytery and the appellant should be decerned not to molest him in the enjoyment of these temporalities; or, alternatively, that the respondent, the patron, had right to receive the temporalities, and to possess and use them without interruption or molestation from the Presbytery or the appellant. These conclusions were followed by a consequential one against the heritors for payment of the stipend localled upon them.

The Court of Session, on the 10th of March, 1838, found that the Presbytery had acted illegally and in violation of their duty, in refusing to take Young upon trial. That decree was carried by appeal to the House of Lords, and was affirmed on the 11th of July, 1842.—Vide vol. i. p. 662. On the return of the cause to the Court of Session to have the judgment applied, the Lord Ordinary found that the Presbytery were bound to take

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Young upon trial, and to receive and admit him as minister if found duly qualified. The Presbytery, however, acting on the instructions of the superior Church Courts, refused still to take Young upon trial; but at the same time, did not attempt to fill the benefice with an incumbent of their own nomination, so that it continued vacant.

The respondent, the patron, then insisted upon the remaining conclusions of the action; and on the 21st of November, 1839, the Lord Ordinary gave decree in his favour for the whole emoluments of the parish, other than the stipend, as to which he ordered printed cases by the parties to be reported to the Court. Neither Young nor the Presbytery took any part in this discussion, which was maintained solely between the appellant and the respondent.

The pleas in law which were stated by the appellant in regard to the conclusion involved in this discussion, were:

"1. The presentee of a parish has no right to the civil fruits "of the benefice, until he has been collated by the proper Eccle- "siastical Court.

"2. Where delay occurs in collating to a benefice, vacant "stipend arises, which, by the 54th Geo. III., c. 169, it is pro- "vided, shall be paid to the Ministers' Widows' Fund as coming "in place of the patron to whom such stipend formerly was "payable, under the obligation to apply it to pious purposes. It "makes no difference, in point of law, as regards the right of the "Widows' Fund to vacant stipend, from what cause the delay "in the settlement of the presentee arises."

The plea for the respondent was in these terms:

"The statute 54th Geo. III. c. 169, does not give the defen- "der, as Collector of the Widows' Fund, any right to the stipend "concluded for in this action; that statute, neither in its enact- "ment, nor in its spirit, having any application to the case of a "direct interference by the Church Court with the vested rights "of a patron and presentee, as condescended on in this case."

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Upon advising the cases for the parties, the Court ordered additional cases, "upon the point, whether the Trustees for the "Ministers' Widows' fund can legally claim the stipend of "vacant charges, in case it appear that these remain vacant by "the illegal proceedings of the Church."

The cases upon this question were laid before the Judges of the other Division, and the Lord Ordinary, for their opinions, which were delivered at length: vide 5 *B. M.* & *D.* 15. Thereafter, on the 19th of July, 1842, the Court pronounced an interlocutor, repelling the defences for the appellant, and decerning in favour of the respondent. The appeal was against this interlocutor.

The Lord Advocate and *Mr. Kelly* for the appellant.—By the 54 Geo. III., cap. 169, whenever a parish becomes vacant by death, translation, resignation, or deprivation of the incumbent, and thereby vacant stipend arises, the stipend, in so far as it had, previously to the statute, been applicable by the patron to pious uses, is to be thenceforth paid to those holding the office of the appellant. If, then, the vacancy in the present case arose from the death of the incumbent, and the stipend would, previously to the statute, have been applicable to pious purposes, the right of the appellant must be unquestionable.

It is not denied that the vacancy, in its inception, arose from the death of the incumbent. But it is said, the tendering of the presentation and the acceptance of it by the Presbytery, in some way put a period to the vacancy occasioned by the death, and originated a new one. The benefice was not the less vacant that the presentation had been accepted. The presentee is not even ordained until he is inducted; and after he is inducted, his title does not draw back by relation to his presentation. It is difficult, therefore, to see how the vacancy was at any time other than one occasioned by the death of the incumbent; or how it could be so without destroying the title of the respondent.

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A distinction is attempted to be drawn between "vacant "benefice" and "vacant stipend;" the one as existing until the presentee is inducted, and the other ceasing so soon as a nominee is presented; and upon such distinction the respondent maintains, that in the present case, though the benefice remained vacant by the refusal of the Presbytery to take Young upon trial, the stipend ceased to be vacant immediately upon the presentation and refusal; but there is no authority for this distinction, which, on the contrary, is negatived by all the institutional writers, who speak of the stipend as being vacant on the refusal of the Presbytery to admit the patron's presentee. *Stair* II. 8, 35, and IV. 24, 7. *Ersk.* I. 5, 13, and 16. *Bank.* II. 8, 103. *Connel on Parishes*, 535. And in this they are supported by the decided cases, Cochrane *v.* Stoddart, *Mor.* 9951. Dick *v.* Carmichael, *Mor.* 9954. Indeed, if the presentation prevent vacancy as to the stipend, as the presentation must in every case be within the six months vacant stipend under the 54th Geo. III. could never arise, except where the patron refuses to present at all. And if the presentation did fill the benefice, how then could the patron claim the stipend when he is only entitled to it, because of the benefice being vacant?

The Act 1592, c. 117, gives the patron right to retain the fruits of the benefice, in case the Presbytery should refuse to admit a qualified presentee. But, by the common law, the fruits so retained could not be applied to his own purposes, and various statutes regulated the mode of their application.

The first was the Act 1644, c. 47, which directs that the stipends or benefices of kirks vaiking "by decease," &c. "or by "any other ways," should during the vacancy be employed by the patron in pious uses. This Act was repealed at the restoration, but so far as the patron was concerned, its provisions were re-enacted by the Act 1661, c. 52, whereby the stipends or benefices of kirks, "vacant by decease, deposition, suspension, "transportation, or any other ways," were given to the deposed

or suspended ministers for the space of seven years. And the Act 1685 gives the stipends and benefices of kirks, that shall vaik for seven years, to the use of the Universities.

The Act 1685, c. 18, directs the vacant stipends of all churches to be employed by the patron on pious uses, and the Act 1690, while it destroyed patronage, reserved the patron's right to employ the vacant stipends on pious uses within the parish.

Whatever, therefore, might have been the patron's rights under the general terms of the Act 1592, or at common law, it is certain that under these subsequent statutes, he was obliged to apply the vacant stipend to pious uses, and uses which were made such by statute, but even prior to the Act 1592, he could not have retained it for his own use, such an act, *Forbes* says, p. 49, would have been "a kind of sacrilege."

The stipend then, of a vacant benefice previous to the Act 54 Geo. III., belonged to the patron under an obligation upon him to apply it in pious uses, no matter from what cause the vacancy arose, and by the plain and obvious terms of that statute, all that he had was thenceforth given to the Widows' fund.

It is said, however, that the vacancy was occasioned by the illegal act of the Presbytery, and that the vacant stipend should not go to increase a fund which the churchmen had an interest to increase. To make this objection available, the two bodies must be the same, which they are not. The one is the Inferior Church Court, consisting of the Clergy and Lay Elders, acting in obedience to the Superior Courts, and the other a mixed body composed of the Clergy and Lay Professors of Universities. The body, therefore, by which the delay was occasioned is very different from that which the appellant represents, and one for whose acts the latter can in no way be responsible.

Whatever may be the character of the conduct followed by the Presbytery, that can never take away the title of the appellant

or give to the respondent a title which he has not otherwise under the statutes.

Mr. Turner and *Mr. Anderson* for the respondent.—To bring this case within the 54 Geo. III., three things must concur; a vacancy by the death, translation, or deprivation of the incumbent, vacant stipend thereby, and the vacant stipend which has so arisen, must be such as has been before applied by the patron to pious uses. The only question is upon the two last of these, for undoubtedly the vacancy arose by the death of the incumbent.

Prior to the introduction of Presbytery, in 1592, the Church had as little to do in collation as it now has in presentation, the presentation filled the benefice, and it required the statute of that year to give the Church controul over the exercise of the right of presentation by the proceedings in collation. After presentation sustained by the Presbytery, the act of the patron is complete, and so far as regards him, the benefice is full; that was expressly found in Gordon *v.* Gillon, 1 *W.* and *Sh.* 295, where it was held that a summons was duly executed against a presentee, whose presentation had been sustained, although he had not been inducted. The patron cannot present another, and the Presbytery cannot exercise their *jus devolutum.*

In the Auchtermuchty case, Moncrieff *v.* Maxtone, *Mor.* 9909, the Presbytery had not only refused the patron's presentee, but had inducted another, and yet the finding was that the patron was entitled to the stipend "as in the case of a vacancy," and a similar judgment was given in Cochrane *v.* Stodart, *Mor.* 9951.

In Dick *v.* Carmichael, *Mor.* 9954, the fruits of the benefice were given to the patron, on the authority of the Act 1592, on which the case was rested.

The Act 54 Geo. III. proceeded on a voluntary cession of their rights by the Crown and the patrons; it must therefore be

construed as a sort of contract, and the right claimed by the appellant, if it exist, must be found within the very words. At the date of its passing the Church Veto Act had no existence, no right could arise from any contemplation of its exercise. The only vacancy contemplated was by death, translation or resignation; but here, although the vacancy originated by the death of the incumbent, after presentation, when the veto came into operation, vacant stipend ceased to arise from the death, and was occasioned by force of the veto. So far as regarded the patron, the church was full by his presentation sustained by the Presbytery. After that the vacancy as to the stipend continued by the act of the Presbytery refusing to proceed in the induction. This was a state of circumstances which could not have been contemplated by the Legislature at passing the 54th Geo. III., and that Act cannot, therefore, be so construed as to embrace it. All that the Legislature had in view, was the stipend arising during the ordinary process for supplying the vacancy.

No doubt cases of rejection by Presbyteries of the patron's presentee had occurred prior to the statute of Geo. III., but in none of these did the rejection arise from a refusal by the Presbytery to obey the law, and in this view it is material to observe, that while the earlier statutes provide for vacancy by means enumerated, they use the comprehensive terms "and any other ways," but these words are omitted in the statute of Geo. III., as if it had been the object of the Legislature to confine the operation of that Act to the cases specially enumerated.

But even if the vacancy in the present case be held to have arisen by death, the question remains, whether the stipend is such as heretofore has been applicable to pious uses. Originally at common law, the patron had a right to the absolute property of the vacant stipend, and it was only by force of the statute that that right was changed to one merely of administration for pious uses; but these statutes applied only to vacancy arising by ordinary means.

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If it arose by the illegal act of the Presbytery, or of the Bishop while episcopacy was the form of worship, that was an entirely different case, the fruits of the benefice then belonged to the patron absolutely, that distinction was taken by the Acts 1592, c. 117; and by 1612, c. 1, both of which regard the benefice as full *quoad hoc*, after the presentation of a qualified person. And none of the Acts, 1661, c. 52; 1672, c. 20; or 1685, c. 18, interfere with this distinction, or the right of the patron arising from it. That the Act 1690, c. 23, did not embrace the case of refusal of the patron's presentee, is evident from this, that it abolished patronage or the right to present. The Statute 10 Anne, c. 12, which restored patronage, while it provided for the ordinary case of vacant stipend, left untouched, that of the patron having duly presented, and the Presbytery rejecting the presentation.

In this state of the law the Act of Geo. III. did no more than give to the Widows' fund, the stipend which the patron was bound to apply to pious uses, and left untouched that which by the Act 1592, he was entitled to in absolute property. There is nothing in *Stair* II. 8, 35, which, if the whole passage be taken together, is opposed to this account of the law. *Ersk.* I. 5, 16, is speaking of the settlement of another in opposition to the patron's presentee from an erroneous view by the Presbytery of the rights of parties competing, not of a refusal by the Presbytery to perform their duty.

By the judgment of this House in the previous branch of this cause, it was found that the refusal to induct the respondent's presentee was an illegal act. The appellant receives his appointment from the Church, and is responsible, and makes his annual report to it. The Church cannot, therefore, be allowed to benefit by its own tortious act, which in other words would be to encourage a repetition of its illegal conduct.

LORD COTTENHAM.—The question between the parties depends

upon the construction to be put upon some few statutes, which construction is to be ascertained by the terms of the statutes themselves, or by decisions which have been made with respect to the meaning of such terms. In my opinion there is no difficulty in the case from the decisions having put a wrong or doubtful construction upon the terms used. Had I to decide upon the statutes themselves, I should have put precisely the same construction upon them which I find has been adopted. There is, therefore, no room for hesitation as to the course which this House ought to follow.

If we trace the enactments from the earliest to the latest, it appears to me that the conclusion is most clear. The 54 Geo. III., c. 169, enacts, "That when any parish church becomes "vacant by the death, translation, resignation, or deprivation of an "incumbent holding the pastoral cure and benefice of such parish, "and that vacant stipend thereby arises; such vacant stipend "in so far as it has heretofore been applicable by the patrons to "pious purposes, shall thenceforth be levied and paid to the "general collector."

If, therefore, the stipend in question be a vacant stipend, which but for this Act the patron must have applied to pious purposes, he cannot have any claim as against the Widows' fund. The Act 10 Anne, c. 12, does not affect the question. The Act 1690, c. 23, though it deprived patrons of their right of presentation, reserved to them the right to vacant stipends; the words are, "But prejudice to the patrons of their right to apply the vacant "stipends on pious uses within their respective parishes, except "where the patron is popish, in which case he is to employ the "the same on pious uses by the advice and appointment of the "Presbytery, and in case the patron shall fail in applying the "vacant stipends for the uses aforesaid, that he shall lose his "right of administration of the vacant stipend, for that and the "next vacancy, and the same shall be disposed on by the Pres-"bytery to the uses aforesaid." Throughout treating the right

to vacant stipends, and the duty of applying them to pious uses as co-extensive.

The Act of 1685, c. 118, intituled, "An Act concerning "vacant stipends," declares that the vacant stipends of all "churches in time coming shall be employed on pious uses, and "provides that the minister's manse shall be maintained during "the vacancy out of the first and readiest of the vacant stipends." This Act limits the question to this. Is the stipend which arises during the time a parish is vacant, owing to an improper refusal of the Presbytery to institute a presentee, a vacant stipend within the meaning of the Act; for if so, the enactment is positive that it is applicable to and shall be applied to pious uses. The Act 54 Geo. 3, is positive that it shall be paid to the Widows' fund. There is nothing in this Act to limit the period of the vacancy during which the vacant stipend is to be applied. The minister's manse is to be maintained out of it, during the time of the vacancy, and not during a part of it only, and to be left to decay during the rest. But if there was no limit as to the duration of the vacancy referred to in this Act, there clearly was none in the Act of 1672, c. 20, entitled, "An "Act for employing vacant stipends for the Universities," which provides, "that the stipends and benefits of kirks that shall vaik "for the space of seven years, shall be employed for the use of "the universities and colleges."

The Act of 1661, c. 52, which appropriated all stipends or benefices of kirks which were vacant, or which should vaik to the support of deposed ministers for seven years, recited, "that "by divers acts it is found that stipends and benefices of vacant "kirks, or which thereafter should vaik by decease, deposition, "suspension, transportation of ministers, disunion of kirks, or "in any other way, should, during the vacancy thereof, be "employed in pious uses." And it directed a certain application of the stipend during a vacancy from whatever cause it might have arisen, and during whatever time it might continue.

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I have before observed, if the stipend which arises during the time a parish is vacant, owing to an improper refusal by the Presbytery to admit a presentee, be within the meaning of the Act, "a vacant stipend," that it was clear that the patron was bound to apply it in pious uses, and that the Widows' fund is now entitled to it. But the Act 1592, c. 117, supplies this supposition in terms, for it enacts, "that in case the Presbytery "refuses to admit any qualified minister presented to them by "the patron, it shall be lawful for the patron to retain the haile "fruits of the benefice in his ain hands." The vacant stipend in question, is the very vacant stipend dealt with by this Act of 1592, and is included at least in the term "vacant stipends," as used in all the subsequent Acts, all of which exclude the right of the patron to retain it for his own use, and the last of which gives it to the Widows' fund. Whether the patron retaining the vacant stipend was, at common law or under the Act of 1592, bound to apply the vacant stipend to pious purposes, I do not inquire; it is sufficient that the Act proves that the stipend arising as in this case during the time a parish was vacant, owing to an improper refusal of the Presbytery to do what it was incumbent upon them to do towards the admission of a presentee, was a vacant stipend within the meaning of those Acts which, but for the last of them, 54 George III., would have been applicable by the patron to pious purposes. Whether the vacancy exist owing to the refusal of the Presbytery to admit a qualified person, or to take him upon trial to ascertain whether he be qualified or not, cannot be material. In both cases the patron has performed his duty, and the Presbytery have failed in theirs.

Have the authorities in the law of Scotland doubted this to be the unambiguous construction of the statutes? Quite the contrary. Forbes, in his Treatise on Tithes, 49, says, if the Church refused to admit a qualified member presented by the patron, he might retain the fruits of the benefice in his hands,

but adds, that he could only apply them to pious uses. So Lord Stair, II. 8, 35, says, "During the vacancy, without the patron's "default but by the Presbytery refusing to admit a qualified "preacher, the patron had power to detain the whole fruits of the "benefice in his own hands, as is clear by the Act 1592, c. 117." And after referring to some subsequent Acts, he says, "Patrons "were excluded from the fruits of the vacancy, which were "applied to pious uses." And afterwards in IV. 24, 7, he says, "Now the patron has only the application of vacant stipends to "pious uses." *Erskine*, 1, 5, 13 and 16, puts the case of the Presbytery refusing the presentee of the patron and admitting another, and says that in such case the patron may retain the stipend, but that he can only retain as a trustee, on the footing of the present law.

It is useless to advert to other authorities which recognize the same doctrine, but the finding of the Court in Cochrane of Culross *v.* Stoddart, *Mor.* 9951, is important with reference to an argument urged by the appellant. In that case, there being a contest as to the right of patronage, the Presbytery rejected the person presented by the patron, in whom the right was afterwards found to reside, and admitted the presentee of the other claimant; and the Court found that the patron, having presented in due time a qualified Minister whom the Presbytery ought to have admitted, he had right to the fruits of the benefice notwithstanding the settlement of the other presentee, and that aye and until the vacancy should be legally supplied. The cases of Auchtermuchty, *Mor.* 9909, Moncrieff *v.* Maxtone, and Cochrane *v.* Stoddart, *Mor.* 9951; and of Lanark, *Mor.* 9954, Dick *v.* Carmichael, establish the same principle. The vacancy is treated as continuing not determined either by the rightful completed act of the patron, or the wrongful rejection and omission of the Presbytery. It was within the terms of the Act 1592, c. 17, the case of the Presbytery refusing to admit a qualified minister presented to them by the patron. The right of the patron cannot be affected, increased,

or diminished, by the greater or lesser degree of misconduct of the Presbytery. The Act of 1592 makes no such distinction, and yet the respondent rests much of his case upon these two points. First, "That upon the patron doing all that it was "incumbent upon him to do, namely, presenting a qualified per- "son, the vacancy ceased; and, secondly, That the refusal of the "Presbytery, notwithstanding the judgment of this House, gave "a new right to the patron although it did not to his presentee, "and destroyed the claim of the Widows' fund by determining "the vacancy of the stipend, although the parish continued "vacant." The answer to them is to be found in the observations already made. These positions are not only not recognised by the acts and the authorities but are in substance negatived by them. If they were recognised it would be difficult to conceive how any vacant stipend could arise, for the first six months it does not arise, and if the patron present within that period the vacancy, according to the agreement, determines, although the presentee be not admitted, and if the patron do not present in due time he cannot claim the vacant stipend. And, again, if the improper refusal of the Presbytery to admit determines the vacancy within the meaning of the term, as used in the 54th George III. c. 169, such determination must take place within the first six months, that is, before it had commenced.

One other point was put forward by the respondent in the printed papers, though little if at all relied upon at the Bar, but to which some of the learned Judges seemed to attach some weight, namely, a personal exception to the respondent, founded upon a supposed identity between the parties interested in the Widows' fund and the Presbytery, disqualifying the former from taking any advantage from the misconduct of the latter. The first answer to this is, that there is no ground whatever for such alleged identity, and if there had been, in the absence of any allegation, or proof, or probability, that the Presbytery had rejected Mr. Young in order to create a vacant stipend for the

benefit of the Widows' fund, the answer would have been that the statutes have given to the Widows' fund a right, which, by the Act 1592, is to arise from the improper act of Presbyteries, and that, in the absence of fraud, Courts of Justice are bound to give effect to this as to any other right. I therefore move that the interlocutor be reversed, and that the defendant be assoilzied from the conclusion of the action.

LORD BROUGHAM.—My Lords, I entirely agree with my noble and learned friend. And I really must say, with all respect for the Court below, (and I believe we all here agree upon that subject,) that it has never happened to us to see a case come before us which was more clear, more free from all doubt, more free from all difficulty as to the way in which it ought to be decided; so it was from the beginning and so it seems to us at the last. My Lords, the question is, as stated by my noble and learned friend, simply this, whether the terms of the Act of the 54th George III., passed in 1814, applies to a vacancy constituted and continued as the present vacancy was constituted and continued, that is to say, whether this is a case in which the vacant stipend belongs to the patron, to be by him applied to pious uses within the parish, for if so, both under the former and the latter Act, the Act of 1814, the payment of that stipend incontestibly belongs to the Widows' fund.

My Lords, I shall first get rid at once of the argument, which I must say astonished me almost more than anything I ever heard in the profession of the law, namely, the argument set up with respect to the personal exception. I think to term that absurd is not giving it an epithet beyond its value. In the first place there is no person here to be barred, because they are not the same parties. The General Assembly by a majority did a certain thing, that does not bar the Church even. But the parties interested in this fund are not the Church who have done the thing, even supposing the Church could be barred for what

they had done judicially, but the parties here are parties claiming to be entitled to the vacant stipend on behalf of the Widows' fund. How are the Professors of the University to be dealt with in the way of *personalis exceptionis?* That is quite sufficient to sweep away at once, without saying more, this most extraordinary doctrine set up of personal exception, which, I am happy to find, was really not much relied upon in the latter stages of the cause.

Now we come to the point in the case. Can any one doubt that this was a vacancy, and can any one draw the line between a vacancy constituted in one way and a vacancy constituted in another way? Your Lordships will find by the very words of the Statutes, from the earlier Acts down to the late Acts, I refer more particularly to the Act of 1661, Chapter 52, that the vacancy in question, which entitles the patron to the vacant stipend, is not confined to vacancies, (as some of the learned persons in the Court below appear to have argued,) occasioned by death, resignation, deprivation, or transportation, but it says, or occasioned in any other manner of way, the Act is general. The Act of 1661 recites that the former Acts, namely, the old Acts beginning with 1592, gave the vacant stipend, whether "occa- "sioned by death, resignation, deprivation, transportation, or any "other way," to the patrons; it recites that as to the former Acts, and if that were not sufficient to affix a Legislative construction upon those former Acts, which possibly it may be argued it was not, then it proceeds to enact that the same stipend whether vacant in one way or the other, or vacant in any other way, shall be given to one particular class of pious uses, viz., for the relief of Ministers who had suffered during the late troubles.

This being an Act passed in 1661, the Act of 1672, Chapter 20, gives the vacant stipend not to the same parties, the object probably having been satisfied by the payment of the vacant stipends during the intervening eleven years, but it gives the vacant

stipends to the universities. Well, therefore, may Mr. Erskine in his 4th Book, title 5, state, which he does, that if any doubt had existed as to the former Acts, vesting the vacant stipend in the patrons, not for their own benefit, but for pious uses within the parish, these two last Acts which he cites, and the words of which I have just adverted to, viz. the Act of 1661, and the Act of 1672, vested the vacant stipends in the patrons, but only to be applied by them as trustees for pious uses.

Now, my Lords, the question is, whether this is a vacant stipend. I should say that these Acts are sufficient to show, that any vacancy which continued, though occasioned by death, comes within the purview of the former Acts; and therefore, as the Act of the 54th of George III. transfers all such stipends from the patrons to the Widows' fund, making that, as it were, the pious use to which it shall be applied, I should say that that completely proves the proposition.

But let us see how it stands upon the pleadings, because that is worth considering; before going into that, however, I should remind your Lordships of what my noble and learned friend has adverted to, viz., Lord Stair's authority, which is express. I believe that it is first mentioned in Book the 2nd, title 8; but in Book 4, title 24, his opinion is more full. He says, "In *bene-* "*ficies patronati*, the patron had a right to the teinds *sede va-* "*cante*. But several Acts of Parliament have restricted the "rights of patronage, and now the patron has only the applica- "tion of vacant stipends to pious uses within the parish." I refer to page 694 of Lord Stair's Institutes.

Now, my Lords, let us just look for one moment to the statements in facts to the pleadings here, in order to see in what way these parties themselves have dealt with the question, and on looking at those pleas, I should have said that this argument which they now set up must have been an afterthought. They begin by stating very fully and very distinctly that the vacancy took place in a certain way. I am reading the revised con-

descendence for the present appellant, Lord Kinnoull, and the Reverend Robert Young the presentee, "That the church and "parish of Auchterarder became vacant by the death of the "Reverend Charles Stewart on the 31st August, 1834." Answer for Presbytery, "admitted;" answer for Widows' fund, "admitted:" and then they go on through all the stages of the proceeding to shew in what manner the vacancy continued. Taking the whole of that together it amounts to this,—that a vacancy originated in the death of the late incumbent, was continued by the refusal of the Presbytery to admit the presentee of the patron.

But now we have this in the statement of facts for the respondent, Doctor Grant, collector of the Widows' fund, which statement, with the answer taken together, form the matter upon which we are to decide. I do think it is somewhat extraordinary that the learned persons who have considered the case at very great length and with elaborate learning, (not applied very happily to the point before them, the felicity being very small though the prolixity is very great,) should not have looked at these two lines which I am going to read, for they would have seen that the argument had no *locus standi*, this is the way it is described: "In consequence of the death of the Reverend Charles "Stewart on the 31st of August, 1834, the parish of Auchter-"arder became vacant, and remains so at the present date." From the argument, I should have thought that those who meant to maintain the present contention of the appellant, would have denied that, instead of which they say, "admitted." What have they admitted? Why, they have admitted themselves out of Court, for they say that the vacancy began with the death of the former incumbent, and that the vacancy which began with his death, continues to the present date. What become, then, of all the arguments of those learned persons who say, "It is very "true that the vacancy began by death, and was continued for "six months by death, and we do not deny that the stipend

" during that period is to be paid to the Widows' fund; but " then, all of a sudden, it adopted a new character,—it assumed " a totally different shape,—it became no longer a vacancy by " death, but became a vacancy arising from something else, " namely, from the non-reception of the patron's presentee." But it is a very remarkable thing that none of these learned persons can define the period when this marvellous change took place in the character of the vacancy; for your Lordships will find that some of them argue that it took place upon the refusal of the Presbytery, (I have shewn that that cannot be held after the statement of facts which I have read, and which is admitted; but I will presently shew that it is opposed to the authority of the case referred to by my noble and learned friend,) and at other times they seem to think that the marvellous change in the character of this vacancy took place at the time when this House affirmed the decision of the Court below. Now, in the first place, it is clear upon this admission, that this vacancy did not begin to take place at the time of the refusal of the Presbytery; for the statement is, that up to the present time the vacancy continues as a vacancy by death, and that is after the refusal by the Presbytery.

Then they will say that the vacancy took place at the time of the House of Lords deciding the Auchterarder case, that that decision terminated the vacancy which death had originated, and created a new vacancy. Suppose they put it in that way, just consider what that decision was; was that a decision that A B was the minister of the parish? Was it a decision that Mr. Young the presentee was in, and that he was the incumbent? Was it a decision that there was plenarty? No such thing. It was a decision that admitted that the vacancy continued; for it was a decision ordering the Presbytery to take Mr. Young upon trial, who might have been found incompetent upon two or three canonical grounds, which I call canonical in contradistinction to the Veto Act; that is to say, he might have been found *minus*

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sufficiens in doctrina, he might have been found *minus sufficiens in literatura*, or he might have been found *minus sufficiens in bonis moribus*, and he might have been rejected though your Lordships said that there was an undoubted right in Mr. Young to be admitted on trial. The decision of this House did not create a new vacancy; it only called upon the Presbytery to admit the presentee on trial. How can any mortal man say that that constitutes a plenarty, which put an end to the vacancy?

But if there was a plenarty Lord Kinnoull had no right to the stipend any more than the Widows' fund, so that really this argument, (which it is impossible to seize hold of or deal with in any other way than as I have dealt with it,) is an argument more inept, and more without foundation, than any that I ever saw raised in any case.

Now the case which has been adverted to by my noble and learned friend, of Dick *v.* Carmichael, was a very different case from the present. But the case which is first adverted to in this argument is the case of Moncrieff *v.* Maxton, the effect of which is thus given. "If Presbyteries refuse a presentation duly "tendered to them in favour of a qualified minister, against "which presentation or presentee there is no legal objection, "(which is this case,) and admit another person to be minister," (that is quite immaterial, the question is, who is in? and who is out?) "the patron has right to retain the stipend as in the "case of a vacancy." That is a very general statement; I have looked into the dictionary from which it is quoted, and I find no further account of it, but Lord Moncrieff, a very learned person, who is most diligent in his investigation of all cases, states that the sources of that case when examined into, (he must, therefore, have examined into them,) fully support that proposition. I have endeavoured to find out, in order that I might follow the justice of his lordship's remark, though by no means doubting it, what the sources are in which that case is more

fully stated. *Morrison's Dictionary* is a very useful work, a highly useful compendium, but it is in many of its articles carelessly done, and we know the history of it, that it was somewhat hastily done, and that very often the compilers were frustrated in their attempts to make the work complete. It sometimes says, "See more in Appendix," and when you look there is no appendix. In this case there is "See Appendix," and there is nothing in the appendix which says one single word upon this case, though it gives two other cases. I have therefore been unable to follow Lord Moncrieff, though I have no doubt of the accuracy of his remark, and that he had looked to the original papers in which the case was to be found.

But that is the less important, because there is the case of Lanark, or Dick *v.* Carmichael. Carmichael was a person appointed factor by the Barons of the Exchequer, acting on behalf of the Crown, the Crown being patron, and in that case your Lordships reversed the decision given against what I am going to read, and therefore set up the ground which I am now going to state, and it is most important, for it makes an end of any controversy remaining in this case. "The Court then "decreed that the stipend should remain in the patron as "vacant, or till the Presbytery admit the presentee." The Presbytery had not admitted the presentee, and therefore it remained as vacant.

Now I find that some of the learned Lords, in a very elaborate judgment, particularly my Lord Justice Clerk, (whose judgment extends over twenty pages, and I must take the liberty of saying, embraces the case without touching it,) says that he cannot see how that case applies. If his Lordship's judgment had extended over two pages, like Lord Moncrieff's and Lord Jefferey's, he very likely would have seen it without any difficulty. I do not see how his judgment applies to the case, but I see most clearly how the judgment of this House, in the case of Lanark, that is to say, Dick *v.* Carmichael, applies to the

case, because it shows that it is a vacancy, and if it is a vacancy the patron is entitled, under the Acts, as construed by us and by Stair, and the highest text writers, and as construed by a still higher authority than either, or both together, the Legislature itself, of 1661 and 1672, chapter 20, that the patron in such cases of vacancy is entitled, *ad pios usus*, to the vacant stipend. The decision lays it down that it is a vacant stipend, and it is treated, dealt with, and recognized as vacant.

Therefore, my Lords, I have no doubt whatever in this case, and I greatly wonder that it ever should have occasioned a contrary decision. I have read all the judgments in the Court below with great attention. I have read some of them with great approbation: I have read others of them with great pain; and I confess I do not think they show that a very careful and deliberate attention, (I say no more,) has been paid to the whole circumstances of the case.

LORD CAMPBELL.—My Lords, I have paid the greatest attention to this case, but I do not like to trust myself to enter into the detail of it, therefore I shall content myself with saying, that I entirely concur with my noble and learned friends who have preceded me in the construction that they have put upon the Statutes.

With regard to the objection upon the personal exception, for the credit of the administration of justice in my native country, I regret that that defence ever was set up. I still more deeply regret that any weight was given to it by any of the learned Judges.

Ordered and adjudged, That the interlocutor complained of in the appeal be reversed, and that the appellant defender be assoilzied from the whole conclusions of the action of declarator, and that the said respondent do repay to the said appellant the costs decerned for by the said interlocutor appealed from, if paid by the said appellant, and

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do pay to the said appellant the costs incurred by him in the Court of Session: and it is also further ordered, that the said cause be remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with this judgment.

SPOTTISWOODE and ROBERTSON—RICHARDSON and CONNELL, Agents.