[HEARD 19*th*—JUDGMENT 22*nd February*, 1849.]

JOHN BAIN, residing at Moriston, and Others, *Appellants*.

THE REV. DR. WILLIAM BLACK, Minister of the Barony Parish of Glasgow, and Others, *Respondents*.

Society-Trust.—Individual members of a society, who have contributed towards its funds for the accomplishment of a certain public object, are not entitled to have the society dissolved and its property realized and divided among the members upon proof of greater or less improbability of the general object being accomplished—they must shew that the object cannot by possibility be accomplished.

IN the month of May, 1833, the General Assembly of the Church of Scotland appointed a committee of its body to consider the means which could "promote more effectually the "spiritual edification of the people, and increase the comfort "and usefulness of ministers of Chapels of Ease."

Shortly afterwards, the Assembly passed an Act that the districts provided with churches under the provisions of the Acts of Parliament, 4 Geo. IV. c. 79, and 5 Geo. IV. c. 90. should be thenceforth separate parishes, *quoad sacra*, disjoined from the parishes of which they had constituted parts, and that the ministers of these new parishes should enjoy the status and all the rights and powers of parish ministers.

In the month of April of the following year, printed "pro-"posals" for the building of twenty new churches within the city and suburbs of Glasgow, were circulated by a body of private individuals in that city. These proposals were accompanied by a subscription list, which repeated the terms of the "proposals," and contained likewise the conditions upon which the proposed new churches were to be built and endowed, and

by another paper which was entitled "The Constitution of the "Society."

At the time at which these papers were issued two obstacles presented themselves to the accomplishment of what they were intended to effect. The first was a doubt of the competency of the Church Courts to erect churches built by voluntary subscription, and a district annexed to them into parishes; and a second existed in the circumstance that the right of patronage of the new churches would by law belong to the patron of the already existing parishes, within which the new churches might be erected.

The first of these obstacles was obviated by proceedings adopted by the General Assembly, which on the 31st May, 1834, passed an Act by which it declared, "That all ministers "already inducted and settled, or who shall hereafter be in- "ducted and settled, as ministers of chapels of ease, presently "erected and established, or which shall be hereafter erected "and established, in terms of the Act anent chapels of ease, of "1798, or prior thereto, by authority of the General Assembly, "or by the Presbyteries of the bounds, are, and shall be, con- "stituent members of the Presbyteries and Synods within whose "bounds the said chapels are or shall be respectively situated, "and eligible to sit in the General Assembly; and shall enjoy "every privilege as fully and freely, and with equal powers, with "parish ministers of this church; hereby enjoining and requiring "all Presbyteries, Synods, Church Courts, and Judicatories, "within whose bounds the said chapels are, or shall be situated, "to receive and enrol the said ministers as members thereof, and "put them in all respects on a footing of Presbyterian equality "with the parish ministers of this church; giving, granting, and "committing to the said ministers the like powers and authority "and privileges now pertaining to ministers of this church, "within their respective bounds. And, further, the General "Assembly did, and hereby do, remit to the Presbyteries within

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" whose bounds the said chapels now established are situated, " to allot and assign to each of the said chapels a territorial dis- " trict, and to erect such districts into separate parishes *quoad* " *sacra*, and to disjoin the same *quoad sacra* from the parishes " whereof they at present form parts; and also to take the " necessary measures for selecting and ordaining, according to " the rules of the Church, for each of the said districts so to " be erected, a body of elders who, with the said ministers re- " spectively, may exercise sessional jurisdiction within the " same. And the Assembly instruct Presbyteries to be cau- " tious not to assign a more populous district than it seems " possible to attend to; provided always, that it shall be un- " derstood that the chapels to be erected into parishes shall " first have been constituted according to the laws of this Church, " for which purpose it will be open to chapels to apply, if not " so constituted already."

And the second obstacle was thought to be overcome by an Act of Parliament (Colquhoun's Act), entitled "An Act to " regulate the Appointment of Ministers to Churches in Scot- " land, erected by Voluntary Contributions," which was procured to be passed in the month of July, 1834, and by which it was enacted *inter alia*, " That where any church, chapel, or " other place of worship in Scotland, built or acquired and " endowed by voluntary contribution, shall, according to the " provisions of the existing law, be erected into a parochial " church, either as an additional church within a parish already " provided with a parochial church, or as the church of a sepa- " rate parish to be erected out of a part or parts of any existing " parish or parishes, whether the same be established and erected " merely *quoad spiritualia* by the authority of the Church Courts " of the established Church of Scotland, or also *quoad tem-* " *poralia* by authority of the Lords of Council and Session as " Commissioners of Teinds, neither the King's Majesty, nor " any private person, nor any body-politic or corporate, having

" right to the patronage of the parish or parishes within which
" such additional churches shall be established, or out of which
" such new parishes shall be erected, shall have any claim, right,
" or title whatsoever to the patronage of such newly-established
" churches or newly-erected parishes; but the appointment of
" ministers thereto shall be made according to the manner and
" subject to the conditions which shall be or have been pre-
" scribed by the said Church Courts, subject always to such
" alterations as shall be made by them, according to the laws of
" the Church from time to time: Provided also, that nothing
" herein contained shall be construed to limit or affect the
" powers of the Commissioners of Teinds exercised under and
" according to the provisions of the Act of the Scottish Par-
" liament, sixth of Queen Anne, c. 9, intituled *An Act anent*
" *the plantation of Kirks and Valuation of Teinds.*" And by an
Act of the General Assembly passed in the same year for regulating the call of ministers to churches, and generally known as the " Veto Act."

These proceedings of the Legislature and of the Church Assembly gave such a stimulus to the project of Church extension, which had been mooted by the circulation of the papers which have been mentioned in the early part of the year 1834, that between that time and the month of October of the same year a sum of 20,000*l.* had been subscribed for carrying out the project.

In the month of July, 1835, a printed paper, entitled " First " Annual Report of the Society for erecting additional Parochial " Churches in Glasgow and Suburbs," was circulated among the persons who had subscribed towards that object, but who had not as yet been in fact constituted into a society. Shortly afterwards that step was taken, and the society was formed under the title of "The Society for Erecting Additional Parochial Churches in " Glasgow and Suburbs," the object and constitution of which were regulated in conformity with the proposals and conditions

which have been mentioned as having been circulated in 1834. The office-bearers appointed by this Society got in from the subscribers the amount of their subscriptions, and by this and other means realized a sum amounting to upwards of 40,000*l.* —26,419*l.* of this sum was contributed by members of the society—the rest was obtained partly by additional subscriptions from individuals whose names were communicated—partly by promiscuous contributions at the doors of different churches, the donors of which were necessarily unknown—partly in the shape of drawbacks allowed by Government on the duty payable on the wood and other articles used by the society—and partly by a contribution from a committee of the General Assembly of the Church on Church Extension.

With the funds so raised, the society built fifteen churches within the city and suburbs of Glasgow. The titles of these churches were taken to members of the society as trustees for purposes which were very fully disclosed in the deeds.

The General Assembly then gave each of these churches a constitution which set forth the terms upon which they were to be held, and the purposes to which they were to be applied.

Afterwards the enactments of the General Assembly in regard to chapels of ease were acted upon by the inferior church judicatories in regard to the churches erected by the society, by enrolling the ministers appointed to them as members of the Presbyteries and Synods within whose bounds the respective churches were erected; by assigning districts or parishes *quoad sacra* to them; and by appointing separate Kirk Sessions.

But while the churches had been thus erected, and put into a condition for use, sufficient funds had not been procured for the endowment of clergymen to serve in them; for this purpose a sum nearly equal to 50,000*l.* beyond what had been raised by the society, would have been necessary.

After all this had been done, the Court of Session decided in a case which arose before it in regard to the Parish of Stew-

arton, that the Church Courts had no power by law to erect new parishes *quoad sacra*, or in any way to alter or infringe the state of the existing parishes at the time at which the Act of the Assembly of 1834 was passed. In another case with regard to the Parish of Brechin, the same Court found that no collections can be made under the authority of the Church Courts at any place of worship which is not an ordinary parish church, and that all collections so made must be applied to the purposes for which collections made at parish churches are by law applicable. And in several other cases the Court of Session found that the Church Courts had no power to enforce the Act of Assembly in regard to calls or the "Veto Act," but were subject in the admission and deposition of ministers to the control of the Court of Session, in so far as their proceedings in these respects might be contrary to law.

The consequence of these various decisions was a necessity, recognised by the Church Courts, of retracing the steps which had been taken in regard to the erection of new parishes. Accordingly in the month of May, 1843, the General Assembly by two several Acts rescinded the Acts which had been passed by them in regard to the erection of new parishes *quoad sacra*, and the calling of ministers.

These decisions of the Court of Session, some of which were affirmed by the House of Lords, were followed by a disruption of the Church of Scotland, and the separation from it of a large body of communicants, who formed for themselves a new Church, which they called the "Free Church."

In the year 1844 the Appellants, members of the society which has been mentioned, who had contributed 16,461*l.* of the aggregate sum of 26,419*l.*, which had been paid by the whole body of the members, raised a summons in the Court of Session, against a variety of persons designated as being "the remanent "members of the said society other than the Pursuers," and against other persons described as the Acting Committee of the

General Assembly of the Established Church on Church Extension, as representing the Committee by which the contribution towards the erection of the places of worship had been made. This summons narrated what has been detailed, and set forth that the General Assembly of the Church, by its proceedings in the year 1834, held out and represented to the members of the Church, that the fundamental principle that no pastor be intruded into any congregation contrary to the will of the people, the disjunction and erection of parishes *quoad sacra*, the constitution of additional Kirk Sessions, and the establishment of new pastoral charges, and the admission of ministers thereof as constituent members of church judicatories, and the placing them in all respects on a footing of Presbyterian equality with the ordinary parish ministers of the Church, by the sole authority of the Church and judicatories thereof, without the intervention of any secular Court, were in full accordance with the law and constitution of the Church of Scotland; that being anxious to promote the religious interests of the population of the city of Glasgow and suburbs, by means of the erection of places of worship, and relying on the assurance held out by the proceedings of the General Assembly, the Appellants adopted the measures which have been mentioned for the erection of places of worship, " That in the state in which the affairs of the said " places of worship are now placed, and the trusts constituted " by the dispositions, feu-contracts, ground-annuals, and infeft- " ments herein before recited, being no longer explicable, or " capable of being carried into effect, according to the terms " and provisions thereof, and according to the intentions and " purposes of the several contributors to the erection of the " said places of worship, and for which the society aforesaid " was formed, the said trusts ought to be brought to an end, " and the said places of worship, free from the conditions " thereof, disposed of in the manner most beneficial for the " contributors foresaid, with the view of restoring to them their

" several contributions, or such portion thereof as the value of the " said places of worship, under deduction of the debt aforesaid, " will provide." The summons therefore concluded to have it found, " That the said several places of worship cannot, in con- " formity with the conditions on which they were erected, and " the purposes and intentions of their erection, and the objects " for which the society, by whom they were erected, was " formed, and without violating the same, be used and em- " ployed as chapels of ease, in connection with the Established " Church, on the footing on which chapels of ease, in such " connection, now stand by law: And that the several trusts, " respectively created by the dispositions, feu-contracts, ground- " annuals, respectively herein before recited, and infeftments " thereon, of the said several places of worship above mentioned, " and the several pieces of ground whereon the same are res- " pectively erected, cannot now be explicated or carried into " execution, according to the terms and provisions therein con- " tained, or according to the purposes and intentions of the " several contributors of the sums of money for the erection of " the said places of worship, or the objects for which the society, " by whom they were erected, was formed, and that the said " trusts ought to be brought to an end, and the said several " places of worship, and the pieces of ground whereon they are " respectively erected, sold, and the prices, after paying the " expenses of the sale, and the debts of the said society, divided " among the several contributors, in proportion to the amount " of their respective contributions:" And that the surviving trust disponees of the places of worship were entitled to expose them to sale, and to convey them to the purchasers, and to apply the proceeds in discharge of the debts owing by the society, and to divide the residue among the Appellants, and the other contributors to the erection of the said places of worship in proportion to the amount of their respective contributions.

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Intimation of this action was ordered to be made to the officers of State, but no appearance was made for them, and a preliminary defence on this ground was not further insisted on.

On the 1st November, 1845, the Lord Ordinary (Robertson) pronounced this interlocutor,—" Finds that the churches in " question are declared to be held in trust, as places of worship " in connection with the Established Church of Scotland : Finds, " that there is no evidence of the subscriptions having been " made for the building of the said churches, on the faith that " parishes should be erected by a power erroneously supposed " to be inherent in the General Assembly alone, and not " otherwise, and according to law : Finds, that there is no suffi- " cient ground for maintaining that the trusts cannot be expli- " cated, or carried into execution, according to the terms and " provisions thereof, or according to the expressed objects and " intention of the contributors, as stipulated by them; and " therefore finds, that the pursuers have no right to insist upon " the said churches being sold and the free proceeds thereof " divided among the contributors. Sustains the defences; as- " soilzies the defenders; and decerns :"

On the 17th November, 1846, the Court adhered to this interlocutor. These interlocutors were the subjects of the Appeal. The greater part of the argument of counsel upon the hearing, was a critical examination of the terms of the different documents which had preceded and followed the formation of the Society with a view to discover its object, whether Church extension generally with parochial ministration as an incident of it, or parochial ministration with Church accommodation merely as an incident of that. But as no general principle can arise from that discussion, it will scarcely be further noticed.

Mr. Rolt and *Mr. Dunlop* for the Appellants. In England it is only by a strained and very extreme rule of construction that the doctrine of Cypres has been introduced to prevent gifts

to charity from failing. But even in England with that doctrine prevailing, if a condition be annexed to a gift, the condition receives effect, and if it fail, the gift returns to the donor. But in Scotland the doctrine of Cypres in regard to charity, is altogether unknown, there if the purpose for which a gift was devoted cannot be attained it may be resumed. And both in England and in Scotland, if a body of persons form themselves into a society for the attainment of an object which proves in the end to be unattainable, the members are entitled to insist upon a dissolution of the society, and the distribution of its funds.

Such being undoubtedly the law, what was the object of the society in the present case? Church accommodation, no doubt; but Church accommodation attended with extension of the parochial system, and all its machinery for proper and effective ministration. Ministers of chapels of ease, have, by the law of the Church, no jurisdiction in ecclesiastical discipline among the members of their congregation; they are merely teachers of those who sit under their ministry. They have no power as to communication or excommunication, and no right to sit as members of the Presbytery, Synod, or General Assembly; nor are they, in short, in that position which, in the opinion of divines, can be relied on for the proper diffusion of religious instruction. This defect in their position was supposed to have been remedied by the Act of Assembly of 1834, which placed ministers of chapels of ease on the same footing with parish ministers. The operation of that Act, coupled with the Act of Parliament, 4 and 5 William IV., cap. 14, which took away the right of the patron of existing parishes to the patronage of churches erected by voluntary contribution, seemed to offer an opportunity for extending the parochial system in large towns, such as Glasgow. It was the contemplation of accomplishing this great object that gave rise to the formation of the society of which the Appellants became members. All the documents from the original proposals to the titles of the churches show

that the erection of *parish churches*, not *chapels of ease*, was what was desired. If the churches erected by the society cannot be erected into parishes, then they cease to be of that use and benefit which alone induced the Appellants to come forward with money for their erection. They will no doubt afford increased means of accommodation for those disposed to attend divine worship; but they will not afford opportunities for that private ministration which parochial pastors are so eminently esteemed for. Now that the Act of Assembly has been rescinded, and rescinded because the Courts of Law have decided that what it was intended to accomplish is illegal, it is no longer possible for the society to attain the object for which it was formed.

The formation of the churches built by the society into parishes can now only be achieved by an application to the Court of Commission of Teinds under the Act 1707, cap. 9. By that Act, the consent of three-fourths of the heritors of the parish from which the disjunction is to be made, is requisite, and the practice of the Court, though not prescribed by the statute, has been to require provision of a stipend of not less than 150*l.* for the minister of the proposed parish. Admitting it to be possible to obtain the requisite consent for the disjunction, there is no probability of the society being able to make the necessary provision for the minister. For this purpose a sum of not less than 50,000*l.* for the whole fifteen churches would be necessary. What probability is there that such a sum could be raised, when the utmost exertion in the prospect of the Society's scheme being worked out by itself, as originally contemplated, has failed in raising more than sufficient money to build the churches? But assuming that a sum sufficient for the endowment of the clergymen could be raised in time, the Church of Scotland has already, since the disruption of the Free Church, more churches within the city of Glasgow and suburbs than it has members to occupy. There is no reasonable probability,

therefore, that the Court of Commission of Teinds, if applied to for the erection of these churches into new parishes, would, in the exercise of the discretion with which they are bound to regulate their procedure, grant the application, whatever may be the wants of the community apart from those of the Church itself.

If then the creation of the churches, built by the society, into parish churches, be an improbability amounting almost to an impossibility, the trust cannot be allowed to remain where it is. Something further must be done to prevent the churches falling to decay, and the property in them becoming valueless.

Mr. Bethel, *Mr. Wortley*, and *Mr. Gordon*, for the Respondents.

LORD CHANCELLOR.—My Lords, this case is no doubt one of very great importance, involving a question extremely difficult of solution. Many years ago, (the precise date of the commencement of the subscriptions does not appear), but in 1834 the pursuers met and formed themselves into a society for certain purposes, which I shall feel it my duty to investigate in detail.

The ground upon which they institute the present proceedings is, that the object for which the parties subscribed their money has entirely failed; so entirely failed, that the object of the subscriptions no longer exists, and that therefore they are entitled to have their money realized which was so subscribed, and which had become the property of the society to which they gave ther subscriptions; that they are entitled to have their subscription-money returned, or at least to participate in the proceeds which may be realized by the sale of the property.

Now, my Lords, this society was not only formed by sub-

scription; the fund sought to be provided was not a fund entirely raised by money coming from various subscribers, but part of it was contributed by Government in the remission of dues to a very considerable amount—about 3000*l.*, which would otherwise have fallen into the Treasury, which were remitted for the purpose of assisting the society. And part of the money was contributed by subscriptions from public bodies, and part by subscriptions at the church doors; by persons, therefore, who cannot be ascertained, and to whom it is impossible that any portion of the money can be returned. These are difficulties which would have been to be considered, if the facts of the case were such as, in the opinion of this House, would call upon the House to consider how the decision to which they might come in favour of the pursuers was to be carried into effect.

It appears to me to be full of difficulty. I need not do more than state this, in order to show how extremely difficult it would be to carry into effect the relief which the pursuers think they are entitled to. In this country a case of this sort has not, that I am aware of, arisen. Many cases have arisen in which societies have been formed entirely by subscriptions, and by monies advanced, and in which the object sought for could not be obtained; and then the question has arisen as to the means by which the property so collected, could most fairly and properly be re-distributed amongst those from whom it had come, and it has been found that the existing establishments of this country were totally inadequate to perform that duty, and Acts of Parliament have therefore passed for the purpose of establishing machinery peculiar to each case, and with a view to do that which the regular proceedings in our Courts were found totally inefficient to accomplish. Whether better means exist in the Court of Session it is not necessary now to enquire. I only mention it in the commencement of my observations in order to show how extremely difficult it would be to do justice

to the parties, if this case were one for the interposition of the Court at all.

But, it is quite clear that before any parties so subscribing can ask for the interposition of the Court with the views that these parties profess, they must first of all show that the purpose for which they subscribed was of a certain character, and that that purpose so ascertained cannot be carried into effect. Here, the proposition that the pursuers start with is, that the object of the subscription (and when I say the object, I mean the leading object, the purpose which they had in their minds at the time they parted with their money—that which induced them to part with their money) was to establish in Glasgow twenty new and entirely distinct parishes, that is to say, taking the existing parishes of large dimensions, that they should be sub-divided into other parishes of certain smaller dimensions, and that each of those sub-divided districts should be an entire and perfect parish of itself; that that was the object they had in view; that if that object of the subscription fails, they have parted with their money in expectation of that which cannot be realized, and therefore they ask to have it returned. If they established that to be the object of the subscription, and that which induced them to give their money by way of subscription, they then would have to show that that purpose cannot be carried into effect, that it altogether and entirely fails, and therefore a case has arisen in which they are entitled to have the money returned.

After a very careful perusal of the circumstances of the case as they are to be found in the papers, it appears to me that the pursuers fail in establishing both these propositions. It is quite clear that the leading object, (and it is most important to distinguish the main or leading object from any subordinate object, or purpose, or means, by which that proposed charity was to be carried into effect) the main and leading object, that which induced the parties to form the society, and induced the

subscribers to it to part with their money, was that there might be more church accommodation for the instruction of the people of Glasgow, and that that should be effected by the establishment of other churches in connection with the Established Church of Scotland. Beyond all doubt it formed part of the scheme, it was that which the parties also wished, that it should not be confined merely to church accommodation, not merely to the opening of new churches to facilitate the attendance of the public at public worship, but that there should be districts assigned to the new churches, and that those districts should be put under the control and jurisdiction of the ecclesiastical ministers and elders, in order not only that there might be accommodation for the parties if they did attend, but that there might be that species of private and individual superintendence by the pastor over the flock, that would induce them to go to a place of public worship. Now, it may be perfectly true that in contemplating the means by which this leading object was to be carried into effect, they did contemplate the establishment of distinct parishes; but to say that that was the object, the main object they had in view, that which induced the parties to subscribe their money, does seem to me to be confounding the means by which the object was to be carried into effect, with the object itself.

I think it appears hardly necessary, nor would it be convenient to go in detail through the various documents from whence this is to be ascertained. I find it in the proposals; I find it in the conditions; and I find it, in short, in every document which has been produced; from all these it appears to me to be quite clear that what I have now described, was the leading, main, and principal object, and that which induced the formation of the society, and that the other object was subordinate to that, and that the intention of the parties was that their leading object should be attained, if not precisely by the means contemplated, at least under circumstances which would

give to the parishes, if not quite all, at any rate a very large portion, of that benefit which those who subscribed to the society intended to give. It is perfectly competent, as the law of Scotland now stands, (though this relates to another part of the case) to carry the whole into effect, though there may be difficulties in attaining it; I say it is competent in point of law. There is an authority existing which can form distinct parishes, or if there can be no such establishment of distinct parishes, the erection of churches and the formation of particular districts within which the duties of the minister of a particular church or chapel is to be exercised, is perfectly feasible, and to give him any assistance he may require in the performance of his private duties, in visiting and instructing the people, is also perfectly feasible. This goes, if not the whole way, nearly the whole way, in attaining the object that the parties had in view.

But not only must the pursuers prove that that which they now state to have been the object of the subscribers, was the real object which they had in view. when they parted with their money, but they must prove that the circumstances are now such as to prevent that from taking place which was contemplated and intended as the leading object at the time the subscription was made and the society was formed. Now, what is the fact? At that time it was supposed that the General Assembly and the Ecclesiastical Courts had a power, which it turns out they had not, but it is nowhere put forward, and it nowhere appears as a proposal or condition that any such power or any such jurisdiction was contemplated by the society. It might or might not have been so, but the pursuers have to make out their case, and to prove that the circumstances are now so different from what they were when the society was formed, that that which was contemplated as the thing to be done, has now become impossible to be done. There was one authority then, and there is one authority now.

It is equally competent to carry this into effect. It is not because it is more or less probable that it may be attained; it is not because there is more or less chance of the jurisdiction now being put in motion, than of the jurisdiction being put in motion which was supposed to be competent for the purpose at the date, or anterior to the date, of the commencement of this society; it is not for that reason that the pursuers can allege that it is impossible to carry out this object. A public declaration of the opinion of the Ecclesiastical Courts as to what power they had, had not taken place at that time; that took place in May, 1834, and this society was formed in the early part of 1834: but still, it may be assumed that there was a general understanding or belief that that power existed, and that if it existed it would afford a means by which the whole object might be carried out. But to say that it is impossible to carry it into effect, depends entirely upon two propositions being established. First, that that jurisdiction which clearly could carry it into effect at this very moment, either will not be exercised, or, that the terms upon which alone they would exercise their jurisdiction, cannot be complied with because the parties will not be able to meet the conditions which that jurisdiction imposes. But great subscriptions have been raised, great subscriptions were raised at this time, and much greater subscriptions have been raised by other churches. Why are we at this moment to assume any more than at any period between the year 1834 and the present time, that there is not money enough to effect the purpose? It is an assumption perfectly gratuitous. But it is the bounden duty of the pursuers to prove that the object has failed. The object does not fail, simply because there may not be at this moment money sufficient to effect the purpose; the law provides the means by which it may be carried into effect.

I think that they have also entirely failed in establishing the second proposition to show that the object cannot now be

carried into effect. They have failed in the first in showing that the entire separation of the parishes, so as to detach them from the mother church, was the leading object of those who met together and subscribed their money. My opinion is, that the object they had was to increase church accommodation, no doubt aided by the personal superintendence of the minister of each district, with such other aid as he could obtain; and that so far the case remains just as it did at the time when the subscription was entered into. It was competent for them then, and it is competent for them now; though it may not be competent for them to do it in precisely the way in which they viewed it at the time the subscription was entered into and the society formed; but the main object still remains, and capable of being carried into full execution. Therefore, the pursuers have failed in making out both of their propositions, upon the establishment of both of which alone could they call for the interposition of this House to dissolve the society.

LORD BROUGHAM.—My Lords, I certainly have had some doubt in this case, as to my taking a part in it, as I had not the advantage of hearing the whole of the argument; nevertheless, I cannot but express my entire concurrence, in the opinion of my noble and learned friend, who has just addressed your Lordships. I really do not consider that there is any doubt whatever, that the obtaining divisions of districts was no portion of the object contemplated. It was a means by which the object of Church extension was to be accomplished, it was not essential for that purpose, but it was the means by which it was to be facilitated rather than accomplished. And because that may fail, it does not appear to me to follow, that the object itself fails. It is necessary to prove the failure of the object itself, and not of that particular means which was resorted to, or which was in the contemplation of the parties who had that object in view. The object they had in view was the ground

for the subscription,—the subscription was not for the division of parishes, or the creation of artificial or subordinate districts to the existing parishes, but the object was Church extension, and that object was expected to be facilitated by such division. But the division was not the object, but the means of obtaining the object; consequently, their not being able to attain the object of Church extension by that particular means, or to facilitate the attainment of their object of Church extension by that particular means, can in no sense be said to be a failure of that object, which object was the ground and the governing motive for the subscription.

My Lords, I am very much inclined to argue with my noble and learned friend upon the other part of the case, that there is no proof of any failure, even as to that particular means, if that were the object, but, as I consider that that was clearly not the object, it does not appear to be necessary to deal with that part of the case. As I said before, I should have great hesitation in giving an opinion, if I were not called upon to express it by my noble and learned friends who heard the whole case.

LORD CAMPBELL.—My Lords, I have very little to add to what has fallen from my noble and learned friends; but I think it right to say, that having heard this case with great attention, I am of opinion, that the interlocutor appealed from should be affirmed. The first question we have to consider is, whether the last conclusion of the summons ought to prevail, "that this society should be dissolved, and all the property "sold and distributed among the shareholders."

[*Lord Brougham.*—That is to say, including all those who gave at the church-doors.

Lord Campbell.—It would come to a question of multiplepoinding as to the various claimants, and a very difficult question would arise. What we are now to consider is, whether such a decree should be pronounced.]

Now, my Lords, I could obtain no satisfactory answer to the question I put to the learned counsel during the argument. If this right existed at the time the summons was sued out, when did it first accrue? The learned counsel intimated, I think, that he thought it accrued at the very moment when the subscription took place. It seems to me, that that cannot possibly be maintained, because, at that time, all the parties were engaged in a very pious and laudable object, and which there seemed every reason to believe might be completely accomplished. And it is impossible to say, that any one individual, who had subscribed five shillings to this Church society, might bring an action, and have the whole society dissolved upon the only ground that then could have been taken, which would have been that it was a *communis error*, the notion that the Church had the power to erect *quoad sacra* parishes, for that is the only ground that could then have been taken, and upon that ground at once, without any attempts being made to raise the necessary subscriptions, or to apply to the Court of Teinds, saying nothing of an application to the Legislature, one individual might, according to the argument, have defeated the whole object, and have procured repayment to all the parties entitled to the fund that had been raised.—My Lords, I think it is utterly impossible to maintain that proposition.

Then if there was not a right of action at that moment, when did it accrue? What circumstance has since supervened, to show that there is a right of selling the whole of the property, and defeating the scheme, if it did not exist at the time the scheme was formed?

My Lords, the disruption from the Church, a most lamentable event, if we are to take judicial notice of it, can be no reason why the plan that had been previously formed should be defeated, because it still may be carried into effect.

My Lords, I agree with my noble and learned friends who have preceded me, that, although it was one object, or the

earnest wish of those who subscribed their money, that there should be *quoad sacra* parishes, though they thought, in accordance with the opinion of Dr. Chalmers, that that was the most effectual mode of instructing the people, and leading them in the paths of religion and virtue, the main object certainly was, as has been stated by my noble and learned friend who last addressed your Lordships, the preaching of the everlasting Gospel, according to the doctrine and discipline of the Church of Scotland. They thought that the most reasonable mode of doing that would be by means of *quoad sacra* parishes, but not that that was the single and only mode of doing it. They did not make that a condition; it was not essential, although they very earnestly wished that that should be the mode which should be adopted for carrying that object into effect. Then if there had been no disruption, and those churches had been all well filled, and had been going on harmoniously, and to the edification of the people, because there had been no *quoad sacra* parishes assigned, all at once those churches should be shut up, that they should be sold, that they should be converted into theatres, and that the people should be deprived of the Christian instruction which they had so long enjoyed, certainly never could have been the intention of those who piously engaged in this scheme.

I likewise agree with my noble and learned friend, that if it were the main object, that there should be *quoad sacra* parishes, there is no proof whatever that that object is unattainable. It is allowed that the Court of Teinds has the power, and it is allowed that the Court of Teinds would exercise that power, if there were an endowment; therefore, all you want is that there should be an endowment. Is it to be supposed, that all charitable munificence is dried up in Scotland, and that those who belong to the Established Church may not imitate that most laudable example which has been set them by the members of

the Free Church, who have liberally subscribed to the instruction of the people?

For these reasons it seems to me quite clear, that the last conclusion of the summons ought not to have been conceded, and that upon that ground the interlocutor ought to be affirmed.

It was very anxiously pressed by Mr. Rolt, in his able address, that, at all events, there should be a declaration, that this fund cannot be applied to the maintenance of chapels of ease. What is contended for is certainly quite correct, as every one acquainted with the constitution of the Church of Scotland knows, that the minister of a chapel of ease is very little different from the minister of a parish *quoad sacra;* and if there had been, before this action was commenced, a controversy as to the construction of the deeds of foundation of those churches, if there had been a controversy as to the construction to be put upon the proposals, and the fundamental rules by which the society was to be held governed, and one party had contended that the fund ought to be applied entirely to chapels of ease, while another party contended that it ought to be applied to obtaining assignments of parishes *quoad sacra;* in an action of declarator, as to the construction to be put upon the deeds of the society, it might be a very fitting thing that such a declaration should be made; but there has never been any such controversy; no one has ever contended that the scheme of having parishes *quoad sacra* should be abandoned, and that they should be content merely with having chapels of ease; but what has been said is this, "We will have parishes *quoad* "*sacra* as soon as we possibly can, but, in the mean time, let "us go on with chapels of ease, and with having ministers for "them, to administer to the people all the religious consola-"tion that it is in their power to do." As to the framing of the summons, it will be found that the declarator, with respect

to chapels of ease, is introduced merely by way of inducement to the relief which is subsequently prayed. It is not at all the substantive ground upon which the summons rests.

For these reasons, my Lords, I am of opinion, that there is no occasion whatever for this House to interfere, but that we should do well to agree with my noble and learned friend, in the motion he has made to affirm the interlocutor.

Ordered and Adjudged, That the petition and appeal be dismissed this House, and that the interlocutors therein complained of be affirmed, with costs.

RICHARDSON, CONNEL, and LOCH—GRAHAME, WEMYSS, and GRAHAME, Agents.