husband, and the husband undertook liability for her debt. The question whether the spouses could declare the property to be alimentary, and so put it beyond the reach of their creditors, does not arise here, but in the adjudication, which will carry any interest the debtor has in the property.

LORDS NEAVES and BENHOLME concurred.

LORD ORMIDALE—I concur, though at one time I entertained doubts as to the point of excess in the provisions, but on close examination I am clear there is no exorbitancy in the provisions, and that reduction is not the proper action to get rid of the excess, if there is excess, especially when the income is conveyed so as to form an alimentary fund for the two spouses. The proper mode is to arrest in the hands of the trustees. A multiplepoinding would then be brought and the question would necessarily arise how far the provision would be alimentary. There is no statement in record of what the excess is, unless we find it in the alimentary nature of the provision or in the ultimate destination of the corpus of the estate. On the statute 1621, and at common law, I am clear that the allegations do not show—(1) that the parties were conjunct and confident, nor (2) is it said that there was any insolvency on the part of any concerned—certainly not on that of the lady whose insolvency it would be absolutely necessary to state in order to make the reduction relevant under the statute. I am far from thinking a reduction of an ante-nuptial contract cannot be sustained at common, law but it would require a very different state of facts from what is disclosed here.

The Court adhered.

Counsel for Pursuer—Watson and Trayner. Agents—Henry & Shiress, S.S.C.

Counsel for Defenders—Asher and Readman. Agents—Morton, Neilson & Smart, W.S.

Saturday, May 16.

FIRST DIVISION.

THE PRESBYTERY OF LEWIS *v.* RODERICK FRASER.

[Sheriff of Ross, &c.

Church Judicatories—Proof—Witness, Citation of—Judge Ordinary.

Held that it was competent for a presbytery of the Established Church to apply to the Judge Ordinary to grant warrant to compel the attendance of recusant witnesses.

Opinion (*per* Lord Ardmillan), that the same rule applied to Judicatories of Nonconformist Churches.

This was a petition presented by the Presbytery of Lewis to the Sheriff of Ross, Cromarty, and Sutherland, in the following circumstances:—

In April 1873 the Presbytery found it necessary to proceed by libel against Mr Roderick Fraser, a minister within the Presbytery, for acts of alleged drunkenness and profane language, and a proof of the charges was ordered. The Presbytery granted warrant to summon witnesses, and the witnesses were duly cited by a sheriff officer. A number of the witnesses failed to attend the diet of proof without any reason being assigned for their non-appearance, and this petition was presented to the Sheriff to grant warrant to summon the recusant witnesses.

Mr Fraser, the minister accused, opposed the application.

The Sheriff (FORDYCE), on 4th April 1874 pronounced the following interlocutor, with subjoined note:—

"*Edinburgh, 4th April* 1874.—The Sheriff having considered this petition, along with the original libel referred to therein, with list of witnesses, and authority of the Presbytery to officers to cite attached thereto, at the instance of the Presbytery of Lewis against the respondent, the Rev. Roderick Fraser, minister of Uig, and having also considered the whole productions contained in the Inventory of Process; and having heard parties by their counsel thereon, and advised the cause, refuses to grant the warrant craved in said petition: Dismisses the same as incompetent: Finds the petitioners liable in payment to the respondent of the expenses of process; allows an account thereof to be given in; remits the same to the Auditor of Court to tax and report, and decerns—one word being delete before signing.

"*Note.*—The question raised in this petition, which was represented by counsel for the petitioners as one of great importance in the conduct of ecclesiastical causes of the class referred to, was argued by the counsel for the parties with much ability and force. The substance of the argument for the Presbytery seemed to be—

"That the Courts of the Established Church of Scotland being recognised by the law of the realm, the Civil Courts, where the former were defective in power to carry out their own sentences, were bound, on being required, to aid the former in making their sentences effectual. In cases, for instance, where a minister is prosecuted before the Presbytery on such charges as are contained in the libel above referred to, the Church Courts have not the power to compel witnesses to attend to give evidence in the Church Courts, though properly summoned by them to appear and do so. In these circumstances, they were entitled to apply for and obtain the aid of the constituted civil tribunals, to enforce the attendance of such contumacious witnesses by issuing letters of second diligence.

"Thus the Sheriff, who is the representative of the Crown, the fountain of the law of the land, was, as head of the law within his own jurisdiction, bound to 'look after every matter which regards the Crown's interest' (Ersk. i. 4, 6). The Sheriff was especially bound to give aid in cases of the sort referred to. Thus the Act 1690, c. 5, '*ratifying the Confession of Faith and settling Presbyterian Church Government*' for Scotland, adopts and confirms the Confession of Faith, and thereby makes it the law of the land. Now, one of the provisions of the Act 1690, c. 5, as set forth in the 23d (subordinate) chapter or division, which relates to the powers of the civil magistrate with regard to ecclesiastical matters, provides as follows:—(3) 'The civil magistrate may not assume to himself the administration of the word and sacraments, or the power of the keys of the Kingdom of Heaven, yet he hath authority, and it is his duty, to take order that unity and peace be preserved in the church, that the truth of God be kept pure and entire, that all blasphemies and heresies be suppressed, all corruptions and abuses in worship and discipline

prevented or reformed, and all the ordinances of God duly settled, administered, and observed; for the better effecting whereof, he hath power to call synods, to be present at them, and to provide that whatsoever is transacted in them be according to the mind of God.'

"It was therefore clear that a case such as the present falls within the scope and meaning of the above enactment, because it was aid which was asked by the petitioners from the civil power to enable the Presbytery to enforce proper discipline, which that Court could not effect of itself, nor could they do so unless the Civil Court granted the warrant which was asked, viz., for letters of second diligence to compel the witnesses to attend and give evidence in the Church Court. This was just one of the very things which the statute declares it was the duty of the civil magistrate to effect.

"Then the Act of 1693, c. 22, '*for settling the quiet and peace of the church*' confirms the Act of 1690, c. 5, and provides thus:—'Lastly, their Majesties do hereby statute and ordain that the Lords of their Majesties' Privy Council, and all other magistrates, judges, and officers of justice, give all due assistance for making the sentences and censures of the church and judicatories thereof to be obeyed, or otherwise effectual, as accords.'

"In reference to these enactments, it was maintained that the obtaining of the aid of the civil power in the matter here in question had been constantly observed from the date of the above Acts down to the present time. This was to be inferred from the Act of Assembly 1707, cap. 2, sec. 9, which sets forth, in regard to the citation of witnesses, that, 'if contumacious, application may be made to the civil magistrate that he may oblige them to appear.' It was also to be inferred from the Treatise of Stewart of Pardovan (Edinburgh edition, 1773) on Church Forms of Process, book iv. 3, 13, in which the writer observes, that 'if witnesses refuse, after three citations, to compear, then they may be proceeded against as contumacious; or if judged needful, after the first or second citation is disobeyed, application should be made to the civil magistrate that he may oblige them to appear'—(Act of Assembly 1707, c. 2, sec. 9). Again, the latest writer on Church Forms, the present Dr Cook of Haddington (Forms of Procedure and Practice, edition 1870, page 20) repeats the statement of Stewart of Pardovan. Thus it was maintained that the Act of Assembly of 1707, and the treatises referred to, together with practice conform, afforded the strongest presumption that the right of the Church Courts to obtain the aid of the civil power in the matter in question, and in the mode now craved, was indisputable from the dates of the Acts down to the present period.

"In regard to the argument of the respondent, suffice it to say, in a general way, that it was a denial of the existence of any practice, decision, or authority in the law to support the plea maintained by the petitioners.

"It may be admitted that the argument of the petitioners above sketched out has the merit of considerable plausibility, but, unfortunately for it, no decision of the Civil Courts in Scotland, as was admitted at the debate, could be pointed out showing that the Judge Ordinary of the bounds was entitled to issue a warrant such as was here craved, and no evidence of practice in conformity with the supposed principle had been referred to, save and except the case of *Auchtergaven*, where, however, no objection, as it was admitted, had been taken to the competency (date supposed to be 1869, 1870, or 1871), and from what might be inferred from the vague statements of the two treatises referred to. Besides, so far as the Sheriff has discovered, there is no writer on the law of Scotland who states that such a principle obtains in the law, and none was referred to at the debate. The plea, therefore, of the petitioners has no decision of the Civil Courts nor practice to support it; nor is it warranted by the opinions or speculations even of any text writer on the law.

"The want of decisions was attempted to be explained on the medium that the point was so clear in favour of the church, on the Acts of Parliament, that it was never questioned. But that is not a satisfactory answer, for it is impossible to suppose that, if there had been any practice in conformity with the principle during the 170 years elapsing since the passing of the Acts carrying out the principle of enforcing by the civil power the requirements of the church in the matter, questions of law arising thereon must have occurred, and consequently traces of such practice and its legal results must have appeared on the records of the Civil Courts. Besides, even supposing that a unanimity of belief in the existence of the principle explains the want of decisions, how can it explain the fact that no writer on the law has mentioned the principle as existing in the law and practice of Scotland? The Sheriff, therefore, cannot help being of opinion that there is no substantial ground for asserting that such a principle exists in the law as that a Sheriff is bound to grant a warrant for the citation of witnesses to appear and give evidence in an ecclesiastical court, and to issue letters of second diligence to enforce their attendance there, there being no cause in the Sheriff Court, present or prospective, having reference to the ecclesiastical suit in which the witnesses are required to give evidence.

"The only treatise in which the Sheriff has found any reference to the matter here in question is Dickson on Evidence, a book of unquestionably high character. In treating of the procedure for compelling witnesses to attend and depone (vol. ii., title 6th, sec. 1900, ed. 1855), the author says:—'Church Courts (like arbiters) have no power to compel the attendance of witnesses, or the production of documents, in cases before them, their compulsitors being limited to ecclesiastical censures, which only affect persons within their communions. It is not settled whether the Courts of the Established Church differ from those of Dissenting Churches in being able to obtain the aid of the civil force for this purpose.'

"Mr Dickson states that 'The point was raised in a recent case, where the presentee to a parish applied to the Sheriff to interdict certain persons from putting away or destroying a letter, which he alleged contained statements injurious to him, and which he expected to require in proceedings before the Presbytery as to his induction. The Court refused the application, on the ground that the petition did not set forth any proper title or interest in the document, and that the petitioner had not raised, or stated that he intended to raise, any civil action in which the document might be required' (*Barclay* v. *Gifford*, 1843, 5 D. B. M. 1136). 'The decision, however, proceeded upon the opinions of two Judges to one, and as it altered the interlocutor of the Lord Ordinary, it cannot be

held as authoritative. Their Lordships' views were conflicting as *to the competency* of the Civil Courts aiding those of the Church in ecclesiastical investigations. Lord Justice-Clerk Hope's opinion was against such a power, which his Lordship observed was not matter of statutory jurisdiction, and against which, he thought, there were reasons 'affecting the peace and well-being of society.' Lord Meadowbank entertained an opposite opinion.' Lord Medwyn considered that, if the document in question were required in a process in a Church Court, the machinery of ecclesiastical censure should be first used; and that no other Court could interfere, unless there was a competent process, n which the document was required for evidence, and unless the custodier of it was either not subject to the orders of the church, or defied them to the defeating of justice. Lord Cockburn's interlocutor implies that, in his opinion, the Civil Courts have the power in question.'

"The author adds, 'The point must be considered till open.'

"In a foot-note Mr Dickson states, that the then Procurator of the Church (Mr Bell) informed him that he was directed by the General Assembly of 1846 to try this question on the first favourable opportunity. The Sheriff may add, that at the debate reference was made to the Act 26 & 27 Vict. c. 47 (13th July 1863), which is entitled "An Act for removing doubts as to the powers of the Courts of the Church of Scotland, and extending the powers of the said Courts;" and it was stated further, that there was a clause in the Bill giving the Church Courts such a power as is here contended for; but no such clause was inserted in the Act on it being passed. It was explained by respondent's counsel that this was owing to the clause in the Bill being strongly opposed in Parliament.

"The Sheriff must own that, considering the want of any express and authoritative decision of the Supreme Court establishing either the existence of the principle here contended for by the Presbytery, or that the Sheriff-Court is a competent tribunal for dealing with it, and, moreover, having regard to the conflicting opinions in the case above referred to (*Barclay* v. *Gifford*), he feels he would not, as Judge Ordinary of the bounds, be justified in granting the warrant craved in the petition."

The petitioners appealed to the Court of Session.

Argued for them—A public duty is imposed upon the Presbytery which they could not carry out without the attendance of witnesses. The Presbytery had no effectual means of compelling the attendance of witnesses, and unless it was competent in the case of recusant witnesses to apply to the Judge Ordinary, then the Presbytery would be in the anomalous position of having certain public duties imposed upon them by statute which they had not the power to perform. Then the enactments of all the statutes upon which the Church Courts were founded clearly pointed to the assistance of the Judge Ordinary being demanded in a case, and although the question had never been decided by the Court, analogous decisions pointed in the same direction; Act 1690, c. 5; Act 1693, 22; *Presbytery of Dumfries, petitioners*, 7th July 1818, F.C.; *Barclay* v. *Gifford*, 6th June 1843, 5 D. 1136; *Presbytery of Dunkeld* v. *Wight*, Aug. 23, 1874, 14 Journal of Jurisprudence, p. 632.

Argued for the Respondents—Neither under statute not at common law, was there any authority for such an application to the Judge Ordinary in a purely ecclesiastical matter.

At advising—

LORD PRESIDENT—I confess that when I first saw this appeal I was surprised to find this question raised, because from recollections of my practice in the Ecclesiastical Courts I never doubted for a moment that the Judge Ordinary had power to summon witnesses who refused to attend. The question seems to have presented more difficulty to many learned persons than I would have thought possible, but I have no hesitation in saying that the Judge Ordinary has power to compel the attendance of witnesses who refuse to attend.

We are now dealing with one of the recognised judicatories of the country, for the Presbytery is just as much an established Court, and as much created by law, as any judicatory in the country.

Now, the time at which the existing judicatories of the church were finally settled was at the time of the Reformation, and the first step in the establishment referred to by the Sheriff throws great light upon the question. In the Act of 1693, c. 22, the following enactment is found:—"Their Majesties do hereby statute and ordain that the Lords of their Majesties' Privy Council, and all other Magistrates, Judges, and Officers of Justice, give all due assistance for making the sentences and censures of the church and judicatories thereof to be obeyed, or otherwise effectual, as accords."

Nothing can be stronger or more comprehensive than that enactment. Whenever the Church Courts cannot carry out these anactments the Civil Courts are to give their aid.

Now, no duty is more clearly incumbent upon all members of the community than to obey citation and give evidence; and when there is a deficiency in the machinery of the Ecclesiastical Courts, whereby they are unable to compel the attendance of witnesses, that is just one case in which the Civil Courts of the country are to give their aid.

The Act of 10th Anne, c. 7, in regard to Episcopacy in Scotland, provides in the 10th section, "that no civil pain, or forfeiture, or disability whatever, shall be in no way incurred by any person or persons, by reason of any excommunication or prosecution in order to excommunication by the Church judicatories; and all civil magistrates are hereby expressly prohibited and discharged to force and compel any person or persons to appear when summoned, or to give obedience to any such sentence when pronounced; any law or custom to the contrary notwithstanding." Now, this enactment shows that but for it the civil magistrate would have had power to compel attendance and obedience.

The case we have to determine brings up no question as to the Courts of Voluntary Associations, but concerns one of the legal judicatories of the land. I have no hesitation in saying that the judgment of the Sheriff should be recalled.

LORD DEAS concurred.

LORD ARDMILLAN—The question before us has arisen out of the procedure in a case of discipline in a Presbytery of the Established Church. But no question of discipline, and no properly ecclesiastical question, is here presented for decision. The enforcement of witness-bearing—not the en-

forcement of Church discipline—is the immediate end for promoting which the interposition of the Court is craved by the Presbytery. I agree in the view quoted to us, expressed by Mr Sheriff Barclay (14 Journal of Jurisprudence, p. 632); and I have hitherto been under the impression that the practice has been as he states it. Indeed I have never doubted it. Witness-bearing is a debt to justice; it is a duty—a moral duty—a citizen's duty,—it is not an ecclesiastical act; and its enforcement by a Civil Court is appropriate and legitimate.

Viewing the present question as limited to the claim for aid by or with concurrence of a Presbytery of the Established Church, I do not doubt that this Court can grant, and ought to grant, the aid which is demanded. The recognised relation between the Established Church and the State excludes all doubt on the point.

But I am further of opinion, and on broader ground, that the aid of the Civil Court to enforce the attendance of witnesses may be given, and ought to be given, when craved and required, even in causes within churches not established—that is, within a voluntarily constituted jurisdiction. This is well illustrated by the case of arbitration. The interposition by the Civil Court to compel a witness to attend and depone before an arbiter has been frequently exercised, and authoritatively recognised. On this point there are decisions from time to time between 1690 and 1860, and the practice has been accordingly.

On both grounds, I concur in recalling the interlocutor of the Sheriff, and remitting to him to interpone his authority to enforce the attendance of witnesses.

LORD JERVISWOODE concurred.

The Court recalled the interlocutor of the Sheriff, and remitted to him to interpone his authority to enforce the attendance of witnesses.

Counsel for the Petitioners—Dean of Faculty (Clark) and Lee. Agents—Menzies & Coventry, W.S.

Counsel for the Respondents—Watson and Mair. Agent—W. R. Skinner, S.S.C.

Wednesday, May 20.

SECOND DIVISION.

THOMSON *v.* JAMIESON.

[Lord Mackenzie, Ordinary.

Lease—Construction—Fallow Break.

Terms of agricultural lease under which *held* that the term fallow break did not include land which had produced a green crop during the last year of the lease.

This was a reclaiming note against an interlocutor of the Lord Ordinary (Mackenzie), in an action at the instance of an outgoing farmer against the trustee of the estate of Mr George Dundas, younger of Dundas, for payment of the sum of about £926, for labouring and manuring one-sixth of the farm of Echline, Dalmeny, in the last year of a nineteen years' lease, in terms of the tack. Under his lease the pursuer was taken bound, *inter alia*, to have during the last four years of the lease one-sixth part of the lands in fallow or a drilled crop properly cleaned and manured, and that wheat should not be sown except after fallow or a drilled green crop properly manured and horse or hand harrowed; and further, it was agreed that during the last year of the lease he should be paid for labouring and manuring the fallow break, according to the valuation to be fixed by arbitration, as well as for the value of the land left in bare fallow, according to the average rent of the farm. In accordance with these agreements, the pursuer, in the autumn of 1871, had 81 acres of land as fallow break for the succeeding year, and these constituted as nearly as possible one-sixteenth of the whole farm, having regard to the necessity of not dividing the fields. He thoroughly cleaned and manured these 81 acres, and in the spring of 1872 planted therein a green crop, which was sold at his displenishing sale in the autumn of that year. The sum claimed by the pursuer was for labouring and manuring these 81 acres, constituting the fallow break. The defender had several pleas in defence, but his chief contention was that there was really and truly no fallow break on the farm during the last year of the lease, on account of the green crop sown by the pursuer in that season.

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 22d January* 1874.—The Lord Ordinary having heard the counsel for the parties, and considered the closed record and proof, Assoilzies the defender from the conclusions of the summons, and decerns: Finds the pursuer liable in expenses, of which allows an account to be given in, and remits the same, when lodged, to the Auditor to tax and to report.

"*Note.*—The pursuer was tenant of the farm of Echline, on the estate of Dundas, under a lease for nineteen years from Martinmas 1853; and the question raised by him in the present case depends upon the construction of a clause in that lease, imposing an obligation upon the landlord at the expiry of the lease at Martinmas 1873. Before adverting specially to that clause, it is necessary to notice the obligations imposed upon the tenant with reference to cropping the farm. It is provided by the lease, as regards the cropping of the farm, that of the arable land there shall be in any one year not less than one-sixth part in summer 'fallow or green crop, and not less than one-sixth part in grass, sown off with the first crop after summer fallow or green cross, but not sown down with wheat after beans;' that the pursuer shall not 'take two white crops successively from the same land without a fallow or drilled green crop intervening, except that he may take barley after wheat which has been preceeded by a summer fallow or potato or turnip crop properly dunged and horse and hand hoed,' and which barley land must be sufficiently wrought, cleaned, and dunged; that during the last four years of the lease one-fifth of the arable land, but not necessarily the same land, shall be kept in grass, 'sown off after fallow or green crop, beans excepted, or with barley after beans;' and that there shall be during the last four years of the lease 'one-sixth part of the land in fallow or a drilled crop, properly cleaned and manured, and that wheat shall not be sown except after fallow or a drilled green crop, properly manured and horse and hand-hoed.' The pursuer also bound himself to consume upon the