for a prior debt contrary to the Act 1696—there is no room for the plea of fraud at common law—and these are the points which seem to have exclusively occupied the attention of parties in the Court below. But the sole question really is, Is it proved that the respondent took these indorsers as simple cautioners for the £300, the only sum lent, and if so, for what sum is he entitled to rank on their respective estates? He cannot rank on these estates for a larger sum than he could have required them actually to pay had Mackay been the only party insolvent.

The other Judges concurred.

Counsel for the Trustee—Balfour and M'Kechnie. Agents—G. & H. Cairns, W.S.

Counsel for M'Iver—Kinnear and Trayner. Agents—Irons & Roberts, S.S.C.

Wednesday, July 7.

SECOND DIVISION.

[Lord Mackenzie, Ordinary.

(Before the Judges of the Second Division and Lord President, Lord Ardmillan, and Lord Mure.)

REV. ALEX. HARPER AND OTHERS *v.* REV. R. HUTTON AND OTHERS.

Statute 7 and 8 Vict., c. 44, sec. 8—Marriage Proclamation of Banns—Church and Parish Erected Quoad Sacra.

Held that where, under the provisions of 7 and 8 Vict., c. 44, sec. 8, a church has been erected into a parish church, with a district attached *quoad sacra*, the minister and kirk-session of the *quoad sacra* parish are entitled to make proclamation of banns within the church so erected into a parish church.

The summons in this suit, at the instance of the Rev. R. Hutton and the Kirk-Session of the parish of Cambusnethan, concludes for declarator that the Rev. Alex. Harper and the Kirk-Session of the *quoad sacra* parish of Wishaw are not entitled to make proclamation of banns in the *quoad sacra* church and take fees therefor, and for interdict against them so doing.

It appeared from the record that in 1855 a district of the parish of Cambusnethan was erected into a parish *quoad sacra* under the name of the Church and Parish of Wishaw. The church of the *quoad sacra* parish is situated not more than a mile from the parish church of Cambusnethan. The proclamation of banns of parties residing in the area of the original parish of Cambusnethan continued for some years to be made in the parish church of Cambusnethan, but recently the proclamation in the church at Wishaw of parties residing within the *quoad sacra* parish was introduced.

The plea in law for the pursuers was:—"The defenders are not entitled to make proclamations of banns of marriages in the church of the said *quoad sacra* parish of Wishaw, or to permit such proclamations to be made in the said church, and in respect that they have been and are making such proclamations and exacting such dues or fees, the pursuers are entitled to have decree of declarator and interdict as concluded for, with expenses."

The pleas for the defenders were:—"1. No jurisdiction, in respect the proclamation of banns is not a civil but an ecclesiastical institution. 2. The pursuers have not set forth, and do not possess, any right or title to insist in the present action. 3. *Separatim.*—The defenders are entitled to absolvitor, in respect the parish of Wishaw was regularly erected as a *quoad sacra* parish in virtue of the Act 7 and 8 Vict., cap. 44; and the defenders, as the kirk-session thereof, are entitled to continue the practice of proclamations of banns in the church of said parish as hitherto."

The Lord Ordinary (MACKENZIE) pronounced the following interlocutor and note:—

"*Edinburgh, 30th January* 1875.—The Lord Ordinary having heard counsel, and considered the closed record and process—Finds, declares, and decerns that the defenders are not entitled to make proclamations of banns of marriages in the church of the *quoad sacra* parish of Wishaw, or to cause or permit proclamations of banns of marriages to be made in the said church, or to demand, exact, or receive dues or fees in respect of such proclamations made in the said church, and that proclamations of the banns of marriage in the church of the said *quoad sacra* parish of Wishaw are not legal or valid, but are, on the contrary, illegal and invalid: interdicts, prohibits, and discharges the defenders in terms of the conclusion of interdict, and decerns; finds the pursuers entitled to 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 question raised in the present case is whether the minister and kirk-session of a *quoad sacra* parish, erected under the provisions contained in the 8th section of the statute 7 and 8 Vict., c. 84, are entitled to make proclamations of banns of marriages within such *quoad sacra* church for the district designated and attached thereto.

"Although publication of banns was first introduced by the Lateran Council of 1216, and was afterwards confirmed by the Canons of our Provincial Council in 1242 and 1269, it became on the Reformation part of the common law of Scotland. It is one of the requisites of a regular marriage, which is a civil contract. Since the Reformation publication of banns has had, as Lord Jeffrey remarks in the case of *M'Donald* v. *Campbell*, March 1836, Jurist 9, p. 5, more of a civil than of a religious character. And although by the Act of Assembly 1638, Sess. 23, c. 21, marriage was prohibited without proclamation of banns, 'except the Presbyterie in some necessarie exigents dispense therewith,' yet the Presbyterian clergy, as Mr Erskine states (6, 1, 10), have not exercised such dispensation since the Revolution.

"Various provisions have been made by statute with reference to proclamation of banns. By the Act 1661, c. 34, all persons having their ordinary residences within this kingdom are prohibited from marrying others within England or Ireland, 'without proclamation of banns here in Scotland, and against the order and constitution of this church or kingdom,' under the penalties therein specified, one-half whereof belong to the Crown, and the other half to the parish or parishes where

the married parties resided, 'which pains, corporal and pecunial, shall no wayes be prejudicial to or derogat from the order and censures of the kirks to be inflicted against the delinquents.' By the Act 10 Anne, chapter 7, Episcopal ministers are empowered to celebrate the marriage of persons whose banns have been duly published three several Lord's-days in the Episcopal congregations which the two parties frequent, and in the churches to which they belong as parishioners, and the ministers of the parish churches are thereby obliged to publish the said banns; and by the statute William IV., c. 28, it is declared to be lawful to all persons in Scotland, after due proclamation of banns, there to be married by priests or ministers not of the Established Church, and also for such priests or ministers to celebrate marriages. It is thought that no valid change on the present law could be made by the General Assembly with reference to the proclamation of banns, and that such change could only be made by legislative enactment. Proclamation of banns must, therefore, be held to be much more of a civil than of a sacred character.

"The defenders maintained that it is provided by the statute 7 and 8 Victoria, c. 44, sec. 8, that the ministers and elders of a *quoad sacra* parish shall 'have and enjoy the status and all the powers, rights, and privileges of a parish minister and elders of the Church of Scotland,' and that the power to proclaim banns is one of the rights and privileges of such parish ministers and elders. But the Lord Ordinary is of opinion that the defenders are mistaken in this. It is, he thinks, no part of a parish minister or an elder's duty to make proclamation of banns. It is the duty of the session-clerk of the parish to do so, or to get this done by the precentor. The proper legal evidence of such proclamation is a certificate signed by the clerk of the kirk-session of the parish, and a certificate under his hands that the banns were duly published cannot be traversed by proof that all the three proclamations were made on the same day (Ersk. 1, 6. 10). The session-clerk and precentor are not *quoad sacra* officials. The proclamation is not done during Divine service, but before it begins; and it is not, the Lord Ordinary thinks, a religious but a civil act. That the defenders attach an erroneous meaning to the words of the statute above quoted is shown by the provisions of the 13th section of the statute, which empower the Lords of Council and Session to erect a Gaelic church and congregation into a separate parish 'although the members of such congregation be scattered and no territorial district may be assigned to such parish exclusively,' and provides that it shall be lawful for the minister or ministers and elders of such parish 'to have and enjoy the status, all the powers, rights, and privileges of a parish minister or parish ministers and elders of the Church of Scotland.'

"Mr Erskine (2, 10, 64) states that, 'by annexing *quoad sacra* is understood that the inhabitants of the annexed lands are, for their greater conveniency in attending Divine service, brought under the pastoral care of the minister of the church to which they are annexed. But such annexation affects only the inhabitants; the lands continue in all civil respects part of the old parish.' If this be a correct designation of the effect of erection of a parish *quoad sacra*, the claim of the defenders that they have right to proclaim the banns of persons within the annexed district, is inadmissible."

The defenders reclaimed.

Authorities cited—Statute 1661, c. 34; 10 Anne, c. 7; 1699, c. 5; 1784, c. 8; Acts of Assembly 1638, 1699, 1711, 1784; *Ballantine*, 3 Irvine, p. 352; Ferrarius Reb. Cannon *v.* Parochus.

At advising—

Lord President—My Lords, in the year 1855 a district of the parish of Cambusnethan was erected into a parish *quoad sacra*, and a church in said district was erected into a parish church under the name of the Church and Parish of Wishaw, in virtue of the provisions of the Act 7 and 8 Vict., cap. 44, sec. 8. The question raised by this declarator is, whether persons residing in the new parish of Wishaw ought to have their banns proclaimed in the Parish Church of Wishaw or in the Parish Church of Cambusnethan. It seems to me, under the authority of the statute the one is as much a parish church as the other. I am not speaking of the territory at present, but of the church. Section 8 of the statute provides—"That if any person or persons shall at his, her, or their expense have built or shall have acquired, or shall have undertaken to build or acquire, a church, and shall have endowed or undertaken to endow the same, it shall be competent for the Lords of Council and Session, on the application of such person or persons, to erect such church into a parish church in connection with the Church of Scotland." In that section nothing is said about the church being *quoad sacra tantum*, or differing in any way from an ordinary parish church. The statute then proceeds as to marking out a district as follows:—"and to mark out and designate a district to be attached thereto *quoad sacra*, and to disjoin such district *quoad sacra* from the parish or parishes to which the same may have been attached, and to erect such district into a parish *quoad sacra* in connection with the Church of Scotland; and it shall and may be lawful for the minister and elders of such parish to have and enjoy the status and all the powers, rights, and privileges of a parish minister and elders of the Church of Scotland." We have thus created a parish church in connection with the Church of Scotland, also a parish minister and elders forming a kirk-session, and that parish church and these elders are to enjoy all the rights of a parish church. It is said that persons resident in the attached district, annexed *quoad sacra tantum*, must as regards all civil effects be regarded as connected with the old parish. This leads to the inquiry, what is meant by the erection of a parish *quoad sacra?* and this, again, makes it necessary to consider what is meant by a parish. This takes us back to a very remote period, and to a matter which has never been clearly ascertained. But it is clear that the division into parishes was, previous to the Reformation, entirely ecclesiastical. I find the definition of a parish in the Canon Law (Ferrarius Reb. Canon *v.* Parochus) to be a certain territorial district determined by the Pope or the Bishop, having a permanent rector, with the power of government and jurisdiction over the people within the district, and of administering to them the sacraments and other divine ordinances. The government and jurisdiction which make part of this definition are afterwards explained by the same authority when enumerating the *essentialia*

of a parish—"Quarto requiritur ut unum solum ac perpetuum rectorem seu parochum habeat, cum cura animarum, et potestate fout pœnetentialis ipsi solo competenti, ita ut jure ordinario nullus alius sed solus ac unicus parochus prædictam habeat curam ac potestatem."

Before the Reformation, therefore, it is clear that the parochial division of the county was a purely ecclesiastical division, and that the parochial establishment was perfectly complete in itself without aid from the civil government. The patrimony of the kirk furnished the pecuniary means of sustaining and carrying on the whole parochial economy. The provision for the parochus or rector, for the maintenance of the ecclesiastical buildings, for the relief of the poor, and for the support of education, were all made by the church tself out of its own ample revenues.

During this period of ecclesiastical history, therefore, there could not exist any distinction between those parts of the parochial economy which are now reckoned *inter civilia* and those which are reckoned *inter sacra*, because every parochial right and interest fell under the exclusive jurisdiction of the church. But one of the results of the Reformation was that the patrimony of the kirk was appropriated by the Crown, and disposed of by the Crown and by Parliament, and thus it became necessary for the Crown and Parliament to provide the means of carrying on the parochial economy. From this time accordingly ministers' stipends, and manses and glebes, the relief of the poor, the establishment of parochial schools, and the maintenance of children and churchyards, are provided by Act of Parliament, and all these parts of the *ancient* parochial economy are thenceforth naturally and even necessarily classed *inter civilia*. But if to the above be added the right of patronage, we shall, I think, have a complete catalogue of the parochial concerns which after the Reformation fell to be classed as *inter civilia*.

The parochial division of the county, though originally an ecclesiastical institution merely, has been found a practice very convenient for civil purposes also, and some things which have no connection with the ancient parochial economy have by statute received a sort of parochial character. Of these the most obvious example is afforded by the statutes providing for the maintenance of roads by statute labour. But it is almost needless to say that this kind of legislation does not affect the question we are considering.

If I am right in the enumeration of the parochial concerns which after the Reformation came to be civil as distinguished from sacred, it will not be very difficult to fix what remains of the parochial administration to be reckoned *inter sacra*.

That this must embrace the conduct and regulation of public worship, pastoral superintendence, the exercise of church discipline, and infliction of church censures, and the administration of the acraments, will not admit of dispute. But the right and duty of a parish minister extends also to the administration of all religious ordinances to the people of his parish. The early liturgy or Book of Common Order of the Reformed Church of Scotland, in every example, whether MSS. or printed, contains special directions for the manner of conducting the visitation of the sick, the burial of the dead, and the solemnisation of marriage, and in all these services I apprehend the minister is handling sacred things only, and not performing any statutory or civil duty.

The reformers, although they rejected the idea of marriage being a sacrament, and assumed it to be a civil contract, always claimed the right to regulate the preliminaries to marriage as being an ordinance of the church and so *inter sacra*, and I can find no distinction drawn by the reformers in this respect between marriage and baptism or any sacrament of the church. I had occasion to examine this matter historically in the case of *Ballantine*, and I showed then that from the Reformation till 1661 this matter of the proclamation of banns was left entirely in the hands of the church, and the ordinance required proclamation of banns as an essential condition precedent. In any aspect, this matter of the proclamation of banns is entirely ecclesiastical, not in the sense of consistorial, but as being within the regulation and control of the church, and particularly of the minister of the parish. If, therefore, a new church is formed and erected and made a parish church, with a district attached *quoad sacra*, and parties resident in that district are ordained to attend it as a parish church, it would be a most anomalous thing if such were not to be the church for proclamation of banns.

The matter is plain historically, and, from the reason of the thing, celebration of marriage by the church is not essential to the constitution of marriage, but necessary for decency and order, and the church may attach conditions preliminary to the ordinance. The statute says if you fail in compliance with these we will visit you with civil penalties. It is asked, What if the church should dispense altogether with proclamation of banns, would that be *ultra vires?* I think a regulation of this kind, and so ancient, may be so deeply imbedded in the customs of the country that it would not be in the power of the church altogether to dispense with it, having become part of the common law, but I am not saying they may not regulate it as to manner, time, and place if they see fit. For these reasons I am compelled to differ from the Lord Ordinary and to move your Lordships to recal the interlocutor reclaimed against.

LORD JUSTICE-CLERK—When this case came before the Second Division we felt that as it involved important and very general interests, it would be advisable to consult your Lordships of the first Division, in order that the decision should be more weighty and authoritative. I entirely concur in the opinion just now expressed, and shall add very little. My opinion proceeds on two grounds. First, I think that a parish erected *quoad sacra* in virtue of the provisions of 7 and 8 Vict. sec. 8. has within itself all things necessary pertaining to the maintenance of order and discipline within that parish. The terms of the section are precise, the minister and elders are to have and enjoy the status and all the powers, rights, and privileges of a parish minister and elders of the Church of Scotland. It is not necessary to draw the line between what is civil and what is sacred, for I am clear that the right of exercising discipline and the duty of looking after the discipline of the parish is devolved on the kirk session of the erected church. In the second place, I have no doubt that proclamation of banns is part of the

discipline of the Church. It is prescribed by the Church, the object is the discipline of the parish, but devolves on the session. In itself it is a matter indifferent, and the Legislature might no doubt regulate it, but there is no doubt it was enacted by the Church for purposes of discipline. The First Book of Discipline makes that clear, and it was followed by a complete series of Acts of Assembly down to 1784.

As to the Act 1661, I think it is the strongest attestation we could have of the importance attached to this part of the powers and censures of the Church; and the penalties therein specified are expressly declared not to be prejudicial to or derogate from the orders and censures of the kirks to be inflicted against the delinquents. For these reasons I think we ought to recall the interlocutor of the Lord Ordinary.

LORD ARDMILLAN—I have felt this case to be interesting, and attended with some, but not much, difficulty. The question is one which, in regard to the *quoad sacra* parish of Moneydie, I was called on to decide when Sheriff of Perthshire in 1852, and I have now arrived at the same conclusion as I did then — a conclusion in accordance with your Lordships' opinion. Marriage is undoubtedly a civil contract. But the constitution of the contract of marriage is distinct from the procedure by which the sanction of religion is given to the contract. That added religious sanction is appropriate, important, and becoming. But, though necessary to the regularity, it is not essential to the validity of the marriage, which remains, as Protestant Reformers have always strenuously proclaimed it, a civil contract.

Now, the proclamation of banns is a step of orderly procedure in the celebration of marriage by which religious sanction is given to the contract. It is intended to promote and secure the prior notice of intended marriage, and the becoming regularity of the celebration of marriage; but it does not affect its validity. It is not, I think, a step of civil procedure in the constitution of the marriage, but a step of discipline—a step in the orderly ecclesiastical procedure by which the Church gives sanction, seriousness, and solemnity, to marriage as the most important and abiding of human contracts. If this view of the proclamation of banns is correct, the result is that the banns may be lawfully and validly proclaimed in the *quoad sacra* Church at Wishaw, and the interlocutor of the Lord Ordinary should be recalled and the interdict refused.

I shall not presume to add anything more; as I concur in the opinion of your Lordship in the chair and of the Lord Justice-Clerk.

The other Judges concurred.

The Court pronounced the following interlocutor—

"The Lords of the Second Division having, along with three Judges of the First Division, heard counsel on the reclaiming note against Lord Mackenzie's interlocutor of 30th January 1875; in conformity with the unanimous opinion of the seven Judges, Recal the interlocutor complained of; sustain the defences; assoilzie the defenders from the whole conclusions of the summons, and find them entitled to expenses, and decern; and remit to the Auditor to tax the same and to report."

Counsel for Pursuer—Dean of Faculty (Clark), Q.C., and Balfour. Agents—Ronald, Ritchie & Ellis, W.S.

Counsel for Defender—Solicitor-General (Watson), and Gloag. Agents—W. & J. Burness, W.S.

Thursday, July 8.

SECOND DIVISION.

[Sheriff of Lanarkshire.

APPEAL—TAIT *v.* M'MILLAN.

Affiliation—Onus probandi.

Circumstances in which *held* that the evidence for the pursuer had failed to fix upon the defender the paternity of her illegitimate child.

The circumstances of this case, which came up on appeal from an interlocutor of the Sheriff of Lanarkshire (DICKSON), reversing one pronounced by the Sheriff-Substitute (CLARK), are sufficiently set forth in the following opinions:—

LORD JUSTICE-CLERK—This is an important and rather an unusual case, and one to which the learned Sheriffs in the Court below have addressed themselves with great attention; but they have differed as to the result at which they arrived. The case has come up to this Court on appeal, and your Lordships have given it very great attention. The summons proceeds at the instance of the pursuer, Elizabeth M'Millan, for damages for seduction, and for the aliment of an illegitimate child, of whom it is alleged the defender Tait is the father. Statements have been made on record which are of very considerable importance, but the substance of these statements is to the effect that the parties met on the Saturday previous to the autumnal Sacrament in September 1872, by mere accident; that on that occasion the defender went with the pursuer to Kelvingrove Park, and there had intercourse with her; and that he afterwards induced her to take a house for herself without the leave or knowledge of her mother, at 70 Robertson Street, where he had frequent carnal connection with her from 26th October 1872 until April 1873. The defender denies these statements, and on record he avers that he is an elder in the Reformed Presbyterian Church, and is in the habit of visiting to a large extent among the poorer portions of the population; and that all that took place between him and the pursuer was in pursuance of his general occupations in that direction.

Voluminous evidence was taken during a period extending over the large portion of a year, and I regret to see this, because it is manifest from the evidence itself that it has not tended to the furtherance of the ends of justice that this protracted period should have been allowed to intervene before the record was closed in the action. In regard to the principles of law applicable to the case, it is certain that since the Act of Parliament under which parties have become competent witnesses in their own cases, the law as to the effect of *semi-plena probatio* no longer has the same force—it has now become a question of ordinary evidence; and the pursuer may now be examined not merely upon the question of paternity, but may cause herself to be examined as to the whole surroundings of the case. But it does not follow that more evi-