Thursday, July 13.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

CRAIG AND OTHERS *v.* ANDERSON.

Church — Appointment — Jurisdiction of Presbytery—Exercise—Jus Devolutum—Church Patronage Act 1874 (37 *and* 38 *Vict. cap.* 82), *secs.* 3 *and* 7.

By the 3rd section of the Church Patronage Act 1874 the right of appointing ministers is vested in the congregation, and the church courts are declared "to have the right to decide finally and conclusively upon the appointment, admission, and settlement of the minister." Section 7, sub-section 1, provides that if on occasion of a vacancy no appointment is made by the congregation within six months, the right of appointment shall devolve on the presbytery.

A vacancy occurred in a parish on 23rd May, and A was elected to fill it at a congregational meeting on 25th July. Objections to the validity of this appointment were thereafter lodged with the presbytery by certain members of the congregation. These objections were directed partly against the conduct of A and the congregational committee during the election, but proceeded mainly on other grounds. A appeared to maintain the validity of the election. The congregation were called, but did not appear. The presbytery having allowed a proof, evidence for the objectors was led on two days. On the second day, before the proof for the objectors was completed, the parties lodged a joint-minute, stating that they had settled the matter on the footing that all imputations against A and the congregational committee were withdrawn, and that A agreed that the election should not be sustained. The presbytery thereupon pronounced a deliverance interponing authority to the joint-minute, and "in terms thereof, and with consent of parties," declining to sustain the election. A was again elected at a congregational meeting on 30th November.

In an action at the instance of certain members of the congregation, the Court *held* that the presbytery had validly exercised their jurisdiction and determined that the first election was void, and that accordingly there had been no interruption of the statutory period of six months, and therefore *reduced* the second appointment as having been made after the right of appointment had passed to the presbytery.

On 23rd May 1892 a vacancy occurred in the ministry of the parish of Old Deer owing to the deposition of the then minister by the General Assembly. On 25th July 1892 a meeting of the congregation was held for the purpose of electing a new minister. The only name submitted to the congregation was that of the Rev. James Duncan Anderson, who on a division received a majority of the votes of those present, and a minute stating the result of the election was in due course transmitted to the Presbytery. Objections to the validity of the appointment were thereafter lodged with the Presbytery by James Craig and other members of the congregation, who craved the Presbytery to decline to sustain the appointment. The main ground on which the objections proceeded was that the parish had been during the election subjected to the illegitimate influence of its deposed minister, but there were also objections to the regularity of the procedure, and to the conduct of Mr Anderson and the congregational committee in the election. Mr Anderson appeared to maintain the validity of the appointment. The congregation were called, but did not enter an appearance. The Presbytery having allowed a proof, evidence was led for the objectors on 1st and 2nd September. On 2nd September, before the proof for the objectors was completed, a joint-minute for the parties was given in, which was in these terms—"The parties concur in stating to the Presbytery that the matter has been settled between them on the following footing, viz., that all imputations of every kind of undue means, or corrupt practices, or complicity therein of Mr Anderson or of the congregational committee, are hereby unreservedly withdrawn, that Mr Anderson agrees that the election of 25th July be not sustained, and that the matter be remitted back to the congregation to commence the vacancy *de novo*." . . . On this minute the Presbytery pronounced the following deliverance—"The Presbytery interpones its authority to the joint-minute, and in terms thereof, and with consent of parties, decline to sustain the call, remits the case to the kirk-session and the congregation to proceed in the vacancy in terms of the regulations of the General Assembly." . . . Thereafter, at a meeting of the congregation held on 30th November, Mr Anderson was again nominated and elected.

In December 1892 James Craig and certain other members of the congregation raised an action against Mr Anderson, the Presbytery of the bounds, the Moderator of the kirk-session, and the rest of the congregation, concluding for reduction of the congregational minute of election dated 30th November, and for declarator that Mr Anderson had not been duly elected and appointed minister of the parish, and that in consequence of no appointment having been made within six months of 23rd May, the right of appointment had accrued to and now belonged to the Presbytery *tanquam jure devoluto*.

Mr Anderson was the only party who lodged defences.

The pursuer pleaded, *inter alia*—"(2) The right of appointment having devolved upon the Presbytery prior to the congregational meeting of 30th November 1892, the con-

gregation had then no right to proceed to election and appointment, and the pursuers are entitled to decree of reduction of the whole proceedings and minutes thereof. (3) The pretended appointment of 25th July 1892, being wholly inept under the statutory regulations, and not an appointment within the meaning of section 7 of the Act, and its illegality having been protested against at the time, and afterwards affirmed by the Presbytery, it did not interrupt the currency of the six months as from the date of the vacancy."

The defender denied that the Presbytery had declared the appointment of 25th July invalid, and averred that he had resigned the appointment by the joint-minute. He pleaded, *inter alia*—"(1) The congregation being entitled under the said statute to a period of six months during which to elect a minister, and the said period having been interrupted by the defender's appointment on 25th July 1892, and the second appointment having been made during the currency of the said period, the appointment now challenged is valid, and this defender is entitled to absolvitor."

By the 3rd section of the Church Patronage Act 1874 the right of electing and appointing ministers to vacant churches is declared to be vested in the congregations of such vacant churches and parishes, and the Courts of the Church are declared "to have the right to decide finally and conclusively upon the appointment, admission, and settlement in any church and parish of any person as minister thereof. . . ."

Section 7, sub-section 1, provides that "If, on occasion of a vacancy in any parish, no appointment of a minister shall be made by the congregation within the space of six months after the vacancy has occurred, the right of appointment shall accrue and belong for that time to the Presbytery of the bounds where such parish is, who may proceed to appoint a minister of the said parish *tanquam jure devoluto*."

On 17th June 1893 the Lord Ordinary (KYLLACHY) sustained the reasons of reduction, and reduced, decerned, and declared, and found, decerned, and declared in terms of the conclusions of the summons.

"*Opinion*.—The pursuers, who are certain members of the Parish Church of Old Deer, seek in this action to reduce a certain minute of a congregational meeting, whereby the meeting professed to elect and appoint the defender the Rev. James Anderson to be minister of the parish. The ground of reduction is that at the date of the meeting the right of election had passed to the Presbytery by the expiry of six months from the date of the vacancy; and the summons contains a conclusion for declarator to that effect, and to the effect that the right of appointment now belongs to the Presbytery *tanquam jure devoluto*.

"It is pleaded by the defender that the question thus raised is one which, upon a just construction of the Church Patronage Act of 1874, falls to be determined by the courts of the church, the 3rd section of that Act providing, *inter alia*, that the courts of the church 'are hereby declared to have the right to decide finally and conclusively upon the appointment, admission, and settlement in any church and parish of any person as minister thereof.'

"I cannot say that if this question had been open I should have thought it unworthy of argument. The words of the statute are comprehensive enough; and it may quite possibly have been the intention of the Legislature to confer upon the church courts a statutory jurisdiction which should exclude all recourse in such matters to the civil courts. But it is too late to raise this question now. It has been more than once decided that,—while the church courts are empowered finally and conclusively to determine all questions as to the mode of election, and as to the validity of any election so far as depending on the regularity of procedure,—the civil courts, and the civil courts alone, have the right of determining all questions as to the right to elect, and in particular all questions as to the emergence of the *jus devolutum*.

"In the present case there can be no doubt that the election in controversy took place more than six months after the occurrence of the vacancy, and it is therefore certain that the right of election had passed to the Presbytery *tanquam jure devoluto*, unless the defender can show that the running of the statutory period was in some way interrupted. The question is whether anything of that sort is averred or appears upon the proceedings.

"I am of opinion that there is nothing averred or disclosed upon this record which can be held to have interrupted the running of the six months. Such interruption may result in two cases; and I cannot at this moment figure more than two. The one case is where there has been a valid election of a duly qualified person who duly accepts, and the election is rendered abortive by the subsequent resignation of the appointee. The other case is where the Presbytery by themselves, or possibly by the moderator whom they appoint, have so frustrated or obstructed the action of the congregation, that the congregation has been deprived of the opportunity of exercising its statutory privilege. The examples of the first case have been numerous, at least in practice. The cases of *Cupar* and of *Cromdale* are examples of the second. But the present case does not, as it seems to me, fall within either category. It is impossible to say that during the six months there was here a valid election. There was an election no doubt, but it was challenged, and the Presbytery by a final judgment—none the less final because it was pronounced of consent—found that it was irregular, and therefore invalid. On the other hand, there is no room for the argument that the congregation was in any way impeded or unduly dealt with. The irregularity, such as it was, was their own fault. It was certainly in no sense the fault of the Presbytery. And if the irregularity was not a fatal irregularity, but one which might have been overcome, the parties had themselves to blame for consenting to, and indeed asking, a judgment which set the election aside. Altogether,

while regretting the miscarriage which has taken place, and being very willing if I could to maintain the right of the congregation, I find it impossible to do so consistently with the provisions of the statute. I must therefore pronounce a judgment sustaining the reasons of reduction, and reducing and declaring in terms of the conclusions of the summons."

Argued for the defender—(1) The pursuers had no title to sue, the only title to maintain that the *jus devolutum* had emerged being in the Presbytery. (2) The Presbytery had not declared the election of 25th July invalid. In signing the joint-minute the defender resigned his appointment, and all that the Presbytery did was to interpone authority to his resignation. It would have been *ultra vires* of the Presbytery to declare the appointment invalid of consent of parties, the congregation not being represented before them. The appointment of 25th July was a valid appointment followed by resignation. The currency of the statutory period of six months had thus been interrupted. The second election had therefore been made in time, and was valid—*Duff* v. *The Officers of State*, January 22, 1864, 2 Macph. 469.

Argued for the pursuers—(1) A Presbytery were not entitled to waive the exercise of the *jus devolutum*, which was laid upon them as a public duty—*Duff* v. *The Officers of State*, *supra*; *Stewart, &c.*, v. *Presbytery of Paisley*, November 15, 1878, 6 R. 178, *per* Lord President, p. 183-4. The pursuers were therefore entitled to sue as parties interested. (2) Here the *jus devolutum* had emerged, for the only appointment made within six months from the occurrence of the vacancy was declared void by the Presbytery, the deliverance of the Presbytery being a valid judgment to that effect. The currency, therefore, of the period of six months had not been interrupted, and the election of 30th November was too late.

At advising—

LORD PRESIDENT—There is no doubt that the space of six months elapsed after the vacancy occurred before the election took place which is now under reduction. Accordingly, *prima facie* it appears that the Presbytery are now, and were at the date of that election, the proper parties to make the appointment, and not the congregation. But it is said that a valid election was made within six months of the occurrence of the vacancy, and if this is true, section 7 of the Act of 1874 does not apply.

When we are considering the question whether there was a valid election, we have to bear in mind that the election of 25th July was challenged as invalid, and that the question of its validity was submitted to the Presbytery; it is admitted that the grounds of objection stated to the Presbytery were relevant grounds of objection, and formed a subject-matter of which the church courts were the proper and final judges. The question accordingly is, whether the Presbytery, whose decision was never taken by appeal to the Synod of General Assembly, did or did not decide as to the validity of the appointment to the vacancy in this parish.

Now, in due course, after the alleged election of July took place, papers and documents instructing the procedure which had been taken, and the election which had been made, were transmitted to the Presbytery, and objectors appeared before the Presbytery with a long and particular statement of objections. The Presbytery proceeded to consider these. I have already said that it is admitted that the Presbytery were the proper judges of the issue raised, the question being whether the appointment was valid or invalid. The case was sent to proof, and after the proof had proceeded for two days, a joint-minute was lodged by the parties—that is to say, the objectors and the newly-elected minister—and the Presbytery pronounced a deliverance upon the joint-minute. The minute stated that all imputations against the newly-elected minister and the congregational committee were unreservedly withdrawn.

Now, it is not unimportant to observe the nature of the objections which had been made. There were allegations of irregularity and corruption, but it is necessary to point out that the gist of the objections was that the parish was subject to the illegitimate influence and control of the person who had formerly been its minister and had been deposed for drunkenness. The joint-minute only withdrew the objections so far as they were applicable to the new minister and the particular individuals who composed the congregational committee. The others (and the gist) of the objections remained.

Well, then, the parties agreed in the joint-minute that the charges against the new minister and the congregational committee should be withdrawn, and went on to say that the new minister agreed that the election should not be sustained, and the Presbytery interponed authority to the joint-minute, and "in terms thereof, and with consent of parties, decline to sustain the call." It is to be observed that the Presbytery had the duty of deciding on the validity of the appointment, that they considered the case so far as to hear evidence, and that the only party who came forward to maintain the validity of the appointment agreed that it should not be sustained. I think that the Presbytery were quite right to decline to sustain the appointment, but not the less that they exercised their jurisdiction. It is said that the congregation were not at the bar, and that in their absence the Presbytery had no right to declare the election invalid of consent, but no doubt the congregation, seeing the newly-elected minister at the bar, were quite content to leave him to maintain the validity of the election, so long—and only so long—as it was maintainable, and when he decided that it could no longer be maintained, the Presbytery, as trustees for the congregation, were quite entitled to exercise their jurisdiction. Accordingly I hold, in conformity with the decision of the Presbytery, that

there was no election on 25th July, and no interruption of the currency of the six months, and this clearly leads to the decree pronounced by the Lord Ordinary.

LORD ADAM—I am of the same opinion. The question is not whether the election was or was not invalid, but whether we must hold it to be invalid. I agree with your Lordship that this question depends on whether the deliverance of the Presbytery is a judgment by the Presbytery, because if it is a judgment by the Presbytery it is not disputed that it is not subject to appeal to this Court, and is conclusive on the point. Now, I do not see how the deliverance can be anything but a judgment by the Presbytery. The present defender, whose election was in dispute, was a party to the proceedings before the Presbytery, the congregation was duly called, and there was a party of objectors. The case went to proof, and a minute was then put in which led to a settlement, and in that minute the Presbytery pronounced the deliverance in question. The first thing the Presbytery did in that deliverance was to "decline to sustain the call," and that, I think, was equivalent to saying that the appointment was a bad appointment. It seems to me to be incorrect to treat this as a case of a valid appointment followed by resignation, because the regulations issued by the General Assembly provide a course of procedure for that case. The judgment of the Presbytery is accordingly conclusive of the case, because it is not argued that if that was a valid judgment the defender has any case.

LORD M'LAREN—It has been held by the judgment of a competent Court, from which no appeal has been taken, that the defender was not duly elected minister of the parish of Old Deer. The agreement to the contrary is of this nature, that the deliverance of the Presbytery was nothing more than the registration of an agreement concluded between the parties before the Presbytery. Now, I am not prepared to assume that it would have been within the powers of the Presbytery, acting under the authority delegated to them by the Act of 1874, to declare the election void on a joint-minute by the parties before them, because there were other interests, namely, the interests of the congregation, to be kept in view. But in the present case proof had been taken, and giving to the proceedings of the Presbytery the presumption of regularity to which they are entitled, I take it that the Presbytery proceeded on the evidence before them, and on the admission by the present defender that he could not maintain the validity of the election. I hold accordingly that the judgment of the Presbytery was pronounced *causa cognita*, and that when the matter was remitted to the congregation in order that there should be a new election, there had been no such interruption of the legal course of proceedings as to entitle the congregation to an extension of time. In these circumstances I think it is hopeless to maintain that this is not a case contemplated by the statute when it provides that, in case there is no election within six months the right to elect shall devolve on the Presbytery. No election having been made within six months, it follows that when the congregation proceeded for the second time to elect a minister the right had passed from them to the Presbytery, and accordingly I come without doubt, and for the reasons stated by your Lordship and the Lord Ordinary, to the result that the election must be set aside.

LORD KINNEAR concurred.

The Court adhered.

Counsel for the Pursuers — Guthrie — M'Lennan. Agent—Alex. Morison, S.S.C.

Counsel for the Defender—Jameson—W. C. Smith. Agents—Henry & Scott, W.S.

Friday, July 14.

TEIND COURT.

BAIRD AND OTHERS, PETITIONERS.

Church—Parish Erected Quoad Sacra—Extension of Quoad Sacra Parish by Annexation from a Civil Parish—Act of 1707, *cap.* 9—*Statute* 7 *and* 8 *Vict. cap.* 44.

Held that a petition for the disjunction of a district from a civil parish and its annexation to a *quoad sacra* parish erected under the above Acts was competent under the Act of 1707, and that the consent of the heritors of a major part of the valuation of the parish was not required.

This was a petition at the instance of John George Alexander Baird, of Adamton, and others, trustees acting under the deed of constitution of the church and parish of Kelvinhaugh *quoad sacra*, and of the kirk session of the said parish, and of the present managers of the said church, praying for the disjunction from the Barony parish of the district lying along the east bank of the Kelvin, and its annexation to the parish of Kelvinhaugh *quoad sacra*, in the city and presbytery of Glasgow. The petition set forth that by an Act passed by the Parliament of Scotland in the year 1707, entituled "An Act anent plantation of Kirks and valuation of Teinds," the Court was empowered, authorised, and appointed to judge, cognosce, and determine in all affairs and causes whatsoever, which, by the Laws and Acts of Parliament of the Kingdom of Scotland, were formerly referred to and did pertain and belong to the jurisdiction and cognisance of the commissioners appointed for the plantation of kirks and valuation of teinds, as fully and freely in all respects as the Court does or may do in other civil causes; and particularly, *inter alia*, "to disjoin too large paroches, to erect and build new churches, to annex and dismember churches, as they shall think fit, conform to the rules laid down