(M. 7471.)

1800.

M'CULLOCH v. ALLAN, &c.

The Rev. Doctor Michael M'Culloch, Minister of the Gospel in the Parish of Bothwell, - - - - - } *Appellant;*

William Allan, Schoolmaster of Bothwell, Colonel John Hamilton of Motherwell, The Right Honourable William Lord Belhaven, James Cunnison, Esq. of Jerviston, James Hamilton, Esq. of Holmhead, and other Heritors of the Parish of Bothwell, - - - } *Respondents.*

House of Lords, 18th Feb. 1800.

Jurisdiction—Schoolmaster.—In the appointment of a parish schoolmaster, the minister of the parish dissented to the election of the person appointed by the other heritors. He repeated his objections before the presbytery, who is appointed by act of Parliament to take trial of his fitness and qualifications for the office. These objections being over-ruled, the minister appealed to the Synod, and the schoolmaster brought an advocation to the Court of Session. The Synod unanimously reversed the sentence of the presbytery, notwithstanding the sist had been intimated to them, whereupon the schoolmaster also tendered a petition and complaint, and the whole question of jurisdiction was discussed under the following heads; 1st. Whether the sentence of the presbytery was final? 2d. Whether, if not final, the appeal lay to the Synod, and other higher Ecclesiastical Court? or, 3d. Whether the appeal was to the Court of Session? Held the review to be in the Court of Session; Reversed in the House of Lords, and the interlocutor affirmed, remitting the cause to the presbytery, with an opinion expressed, that it was not the province of the Court of Session, but of the higher ecclesiastical courts to say, whether the sentence of the presbytery was final or not.

Under the act 1696, c. 26, the right of electing parochial schoolmasters is vested in the heritors and minister of the parish; but the person so elected has no right to enter upon the exercise of his office, nor is he entitled to draw the salary, or enjoy any of the civil emoluments of it, until the presbytery of the bounds has taken trial of the sufficiency and qualifications for the proper discharge of the duties of that office which he has been chosen to fill.

William Allan, the respondent, was elected by the heritors schoolmaster of the parish of Bothwell; but the minis-

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ter of the parish not being satisfied with his qualifications, dissented, and stated his objections at the meeting on the day of election. These objections were overruled by a majority of the heritors present. Mr. Allan then went before the presbytery, in terms of the act, to undergo his trials of his qualification for the office into which he had been elected. Dr. M'Culloch again renewed his objections before the presbytery as to Allan's qualifications, but these being overruled, Mr. Allan was found duly qualified. The appellant protested, and appealed to the next synod, or church court. This appeal being allowed and recorded, the respondent Allan presented a bill of advocation to the Court of Session, in which he obtained a sist. The bill was passed, and ultimately discussed before the Lord Justice Clerk as Ordinary.

In the meantime, the Synod of Glasgow and Ayr, although the sist was intimated to them, considering that this sist could only apply to the civil right of election, proceeded to take up the appeal from the presbytery of Hamilton; after considering which, they unanimously reversed the sentence complained of, and declared Mr. Allan not qualified. Whereupon he presented a petition and complaint to the Court of Session, complaining of the synod as a body, and of the appellant as an individual, for having been guilty of a contempt of authority, by proceeding to take cognizance of these appeals notwithstanding the sist in the bill of advocation. The Court dismissed the petition and complaint in so far as regarded the synod; but it was remitted in so far as concerned Mr. M'Culloch, the objector, to the process of advocation depending before the Lord Justice Clerk, before whom the general quèstion of jurisdiction of the Court of Session was to be discussed, to try, 1st. How far these proceedings of the presbytery were final? or, 2d. If an appeal was competent from their sentence, Whether it was to the superior ecclesiastical judicatories alone? or, 3d. To the Court of Session?

The appellant maintained that the proceedings of presbyteries, in taking trial of the qualifications of schoolmasters, under the act 1693, c. 22, were only reviewable by the superior ecclesiastical courts. All presbyteries, according to the constitution of the Church of Scotland, were courts whose sentences were in no case final; and, when reviewed, the only court competent to review their sentences, was the superior ecclesiastical tribunal. To suppose that the sen-

tence of the presbytery could be final, would be to suppose that it had within itself a supreme jurisdiction. By the particular schoolmasters' act, it has no such final jurisdiction. By the constitution of the church, which exhibits a regular and gradual subordination, from kirk-sessions to presbyteries, from presbyteries to provincial synods, and from provincial synods to General Assemblies, the right of review lies from all subordinate to the higher, which leaves no final jurisdiction in the subordinate court, as is shown by the act 1592, c. 116, regulating the various jurisdictions of the church. And as by the schoolmasters' act 1693, c. 22, the power of taking the trial of the qualification of schoolmasters was declared to belong to "presbyteries of the bounds;" and as an appeal to the superior ecclesiastical courts is not thereby excluded, an appeal must lie, according to the constitution of the church, to their superior tribunals, and consequently cannot be final with the presbytery.

As therefore the power of review is not expressly excluded, and the proceedings of the presbytery not declared to be final, it follows, 2d. That an appeal lies to the superior ecclesiastical court alone, and not to the Court of Session, or any other civil court; because it would require an express enactment to make the proceedings of a court, with known and established powers, subject in one instance to review in a different court, which had no superior jurisdiction in regard to it in ordinary cases. And, on these grounds, the presumption of law is, that the appeal must go from the presbytery to the synod.

By the respondent it was answered, 1st. That the powers of presbyteries in taking trial of the qualifications of schoolmasters, was not part of their proper ecclesiastical jurisdiction, conferred upon them by the laws of the church; but only a statutory jurisdiction conferred on them by the legislature, as parliamentary commissioners, employed to exercise certain ministerial powers; and, consequently, this being the origin of their powers, and these being civil in their nature, as connected with the election of a schoolmaster, which was a civil act, and the schoolmaster not an ecclesiastical person, the right of review lay from the presbytery to the Court of Session, and consequently the Court of Session had proper jurisdiction in the matter.

The Lord Justice Clerk (M'Queen) reported the case to the Court.

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And the Court pronounced this interlocutor:—"Upon "the report of Lord Justice Clerk, and having advised the "informations for the parties, the Lords, in the advocation, "remit the cause simpliciter; and in the petition and com-
May 25, 1792. "plaint, assoilzie the defender, and dismiss the petition and "complaint, and decern."*

On reclaiming petition the Court ordered memorials; and thereafter, on considering these, the Court altered "the in-
May 21, 1793. "terlocutor reclaimed against; find that the sentence of "the presbytery is not final, but that the power of review "lies in this Court, and not in the supreme church judica-"tories; and therefore advocate the cause, and remit to the
Nov. 26, —— "Lord Ordinary to proceed accordingly." On reclaiming petition the Court adhered.

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* Opinions of the Judges.—(Interlocutor 25th May 1792.)

LORD PRESIDENT CAMPBELL.—"This is a question of jurisdiction with respect to the qualification and admission of a schoolmaster.

"Three opinions have been entertained. First, that the sentence of the presbytery is final. 2d. That the review is in the Court of Session. 3d. That it is in the superior church courts.

"1st. Point. This is the most important of any. The proposition is adverse to the fundamental principles of the constitution. No inferior judicature in this country is final, unless it be so declared by statute. Even the supreme Courts of Session and Exchequer, and Commission of Teinds, are subject to appeal to the House of Lords. As to the last instance, see Decisions 1781, &c., case of Kirkden, (ante vol. II. p. 621.)

"In all civil matters, the Court of Session has a supreme controlling power, and, laying special statute aside, no injustice or wrong can take place, nor any grievance be stated of a civil nature, which may not in some one form or another be brought under cognizance of this Court; even those instances which must originate before other courts. And we often review acts of a ministerial nature done by public officers, without the intervention of an inferior court, properly so called, *e. g.* in the execution of legal diligence, or we stop by suspension, acts done or attempted by private individuals against law.

"It may happen that the act complained of, is the result of discretionary powers vested in certain officers, or exercised by inferior courts' by statute, or at common law, which a court of superior jurisdiction, although competent, ought not to interfere with, unless the boundaries of sound and reasonable discretion have been exceeded. Thus the Court of Tithes has a discretion with respect to the

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—By the act 1693, c. 22, all schoolmasters and teachers of youth in schools, are declared quantum of stipends, and the Court of Session has a discretion with respect to granting protections under the bankrupt act. An appeal against any judgment of that kind would not be well received, although not incompetent. In the cases of Kirkden and Tingwall, (ante vol. III. p. 140,) the appeal was received, and certain points discussed; but the causes were remitted to reconsider circumstances. It is believed in a late instance, viz. Robertson of Banff, an appeal was attempted against an interlocutor refusing a protection, but the House of Lords thought it improper, and did not allow the cause to be heard.

"In many instances of a discretionary nature, this Court has given relief against the actings of inferior courts, magistrates, or public officers; Tailors of Edinburgh *v.* Journeymen Tailors, 28th July 1778, (Mor. 7623.) (Wages of Workmen); Paterson *v.* Magistrates of Stirling—(Regulations of Market,) 28th Feb. 1783, (Mor. 1997.) Wilson *v.* Magistrates of Glasgow, (Stent dues), 16th June 1759, (Mor. 13076.)

"It is still more clear that acts of a ministerial nature are subject to review; Finlay *v.* Magistrates of Linlithgow, (Weights and Measures,) 21st July 1782, (Mor. 7390.)

"It is equally clear that the idea of this Court, acting as Commissioners of Parliament, not being subject to review, is ill founded. The Court of Teinds is an instance of this, and Commissioners of Supply, another. Ross *v.* Mackenzie, 10th March 1774, (Mor. 8663.) See also the cases mentioned on p. 78 of this paper, (printed pleading lodged in Court containing the case, and quotation of authorities) about Justices of the Peace.

"The trial of a schoolmaster's qualifications is not purely ministerial, but of a judicative nature. Neither is it discretionary. What if a majority of ignorant lay elders, &c. from pique and malice, had found the pursuer disqualified, where he could prove that he was well qualified? Would there be no redress? See cases of Penpont, (Thomson); Telfer, Schoolmaster of Langholm; Schoolmaster of Kilbirny, &c.

"It is clear as to censure and deprivation, that the presbytery's (sentence) cannot be final, and no instance of the kind can be given with respect to the sentence of any subordinate court, either civil, criminal or ecclesiastical, being final, especially where the trial is without jury, and the act 1693 makes no distinction in this respect between the previous trial and the subsequent sentence.

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to be liable to the trial, judgment, and censure of the presbytery of the bounds, for their sufficiency, qualifications, and deportment in the office; and as the jurisdiction of the superior church courts is not excluded, an appeal must lie

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"It may be noticed, that the extraordinary commission granted in 1690 for visitation of universities, colleges, and schools, was not at an end in 1693. Vide Act 1693, c. 41. But this was not considered as interfering with the common right of visitation which belonged to presbyteries in the case of schools, fixed by the act 1693, c. 22, upon the foundation of a right existing in the church long before. Whether the extraordinary commission was understood to have final powers or not, is doubtful; but the power declared to be in presbyteries, as a standing and perpetual commission, has never, either in that or in any other article of jurisdiction, (*e. g.* the cognizance with respect to manses and glebes,) been held to be final, nor could any reason of expediency or justice be figured for vesting such a power without control in any inferior judicature, such as a presbytery.

"The case of strong and idle vagrants mentioned in p. 70 of the memorial, seems to be misunderstood. A power of cognizance is given to kirk-sessions, because the fines are applied to the support of the poor; but the act 1600, c. 19, says expressly, that there shall be a control in the presbytery, and if in the presbytery, it must from thence go to the superior kirk courts. But at least there is a power of review somewhere, and nothing that either a kirk-session or a presbytery could do, in that matter, would be final.

"The same thing is to be said as to the steeping lint, the fines being applicable to the poor.

"As to the distinction attempted between one kind of qualification and another, and the difficulty of trying professional skill in the Court of Session or General Assembly, the matter is easily extricated. No such distinction is to be found in the statute, and nothing is more easy than trying professional skill in a court of review, by remitting the matter to persons of skill, to take trial and report, in the same way as is every day done in matters of accounting.

"The case of mechanics, and judging of the essay piece of any candidate to be admitted to any incorporation, admits of an answer. A corporation may do great injustice, and be guilty of great oppression, if a majority of its members are allowed to judge finally upon such points. Accordingly, their actings must be liable to control in the higher courts, such as the Convenery, the Magistrates, or the Court of Session; and it is presumed that the proceedings of a presbytery, in licensing preachers, or trying the qualifications of ministers, are liable to review in the superior church courts.

from every sentence of a presbytery relative to this matter, to the synod, and from thence to the General Assembly, being the courts to which, according to the constitution of the church, an appeal lies, as to all matters and causes

"As to manses and glebes, upon examining the acts of Parliament, it will be found that none of them vest any proper jurisdiction in the presbytery, though by custom they have assumed the jurisdiction, subject to control in the Court of Session, as the supreme civil court. The act 1572, c. 48, taking it for granted that there were manses and glebes already existing, which belonged to parsons and vicars, declares that the "manses maist nearest to the kirk, with four "acres of the glebe lying contigue, or maist nearest to the manse," shall be specially "marked out and designed by the bishop, superin- "tendant, or commissioner of the diocese, with the advice of two of "the most honest and godly of the parishioners, as a manse and "glebe for the minister serving the cure in time coming;" and the acts 1649 c. 45, and 1663 c. 21, ordain the heritors, at sight of the bishop, or such ministers as he shall appoint, with two or three of the most knowing and discreet men in the parish, to build manses, and the heritors to be at the expense of repairing. These acts appear to have laid the foundation for the customary jurisdiction, assumed by presbyteries, in designing manses and glebes, but which in law, seems to require the concurrence of the heritors or parishioners; and hence the powers of the presbytery or church, go no further than simply to design, *i. e.* point out what is necessary to be done, in the same way as they may call upon the heritors to contribute the necessary fund to a schoolmaster; but they have no further power over schoolmaster's salaries; see Brown *v.* Heritors of Dunfermline, 22d July 1768, (Mor. 7689), and in the same way the church courts have no further power over manses and glebes; but the parties who have the patrimonial interest must be left to their remedies at common law.

"At the same time, if the members of a presbytery were to decline doing their duty in designing a manse or a glebe, by refusing to give any determination at all, it is thought the remedy would be, by appeal to the Synod and General Assembly, to compel them. If they once execute the trust committed to them, they are *functi*, and neither they nor their superiors have more to do in the business; but it is on all hands admitted that still there is a power of review: viz. in the Court of Session.

"2d. Question. Whether, in the case of schoolmasters, the review is in the Court of Session or superior church courts? After the profusion of learning we have had on this question, it remains where it did. The act 1693 means to give exactly the same power

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which come under cognizance of presbyteries. This jurisdiction of the presbyteries relative to the qualifications of schoolmasters is not a ministerial power, conferred upon them *vi statuti*, and which is enjoyed by them independent and the same cognizance as in the case of ministers; and whether wisely, and according to just principles or not, considers the jurisdiction in the one case to be just as much ecclesiastical as the other. This is the plain construction of the act; and it is put beyond doubt by the explanation which it has received in practice as well as by the prior foundation which it had, both before and since the reformation. Besides, why may not a cumulative jurisdiction be supposed? In the case of universities, there are ordinary and extraordinary visitors. Even in the schools, we have this lay and clerical visitation. And in the commission 1690 and the act 1693, this Court, like the Court of King's Bench, may have a right of visitation or control, if we were applied to, and a case of injustice or oppression stated, yet the ordinary procedure may be in the church courts; and the presbytery may remain, as it ought to be, subject to have its proceedings in all matters of discipline corrected and reviewed by the superior church courts. Supposing the case had come directly to us from the presbytery, we could not have done better than to have sent the parties to the synod for examination of the candidate there. In the case of Campbelton, the objection never was before the presbytery at all, but originated before the magistrates, and the matter of jurisdiction was very much overlooked. The presbytery is not only an inferior, but a subordinate court, like inferior commissaries and admirals, conveners, &c.; in all which the superior court of the same nature, as well as the Court of Session, has a right to review. See also Erskine B. I. tit. 2, p. 9, where the doctrine is not very accurately treated.

Vide ante vol. II. p. 277.

"The objections to Mr. Allan were twofold:—1st. Cruelty to the scholars, of which a proof ought to have been allowed. 2d. That he could not teach Latin, which was a fact admitted. Both of these were matters of judgment, which any court as well as the presbytery can judge of. It is not like the case of a comparative trial of skill. The cognizance of the schoolmaster's deportment was, antecedent to the act 1693, understood to be in the kirk courts, as a matter connected with ecclesiastical polity. The act 1693 does not confer this right *ab initio*, but means to declare and regulate it. The act had no occasion to mention appeal from presbytery; and this necessarily followed as a matter of course. If the presbytery does wrong, it is natural that they should be corrected by the superior church courts, who may call the schoolmaster before them, and examine into the

of the church courts; but is a branch of their own proper ecclesiastical jurisdiction—that these trials and examinations have always been considered matter of proper ecclesiastical jurisdiction; and therefore the only right of review lay in appeal to the superior ecclesiastical court, which alone had power to review, and therefore the Court of Session had no jurisdiction in the matter.

Pleaded for the Respondents.—In spiritual matters the Church of Scotland acknowledges no power of control, even by the crown or the legislature; but the church courts have no civil jurisdiction. The censures of the church have no patrimonial consequences, and civil magistrates are prohibited from carrying their sentences into execution. The church courts cannot directly deprive a clergyman of his benefice, because this is a patrimonial right, enjoyed as a consequence of his being possessed of the clerical character. Yet they may deprive him of this clerical character, on which event his benefice falls of course, and thus indirectly the church courts can affect his civil interest. This is the only exception where church courts can interfere with civil rights. Wherever, therefore, these courts assume to themselves jurisdiction in matters civil, and do not confine themselves to matters spiritual, the Court of Session has jurisdiction to control and review the judgments of the church courts. But although church courts have no inhe-

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qualifications. It is not fit for this Court to do so. If he has done any thing criminal, it should go either to the kirk courts, or criminal courts."

Lord Swinton.—"The sentence of the presbytery is not final—a review lies in the synod, and thence to the General Assembly."

Lord Eskgrove.—"I am of the same opinion. The act 1693 did not mean to reverse the order of things."

Lord Henderland.—"Of the contrary opinion. If the church courts have the power, they may also regulate it by laws."

Lord Dreghorn.—"The act 1693 made it clearly ecclesiastical."

Lord Justice Clerk.—"The proceedings of a presbytery, in such a case, are not subject to review. Suppose the legislature had said, let them be tried by the professors of humanity of the different colleges, is not that, from the nature of it, conclusive? Could the Court of Session entertain the question in such a case I think not. It is the same here."

Lord President Campbell's Session Papers, vol. 71.

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rent jurisdiction in civil matters, the legislature has judged it expedient to delegate to them, by special statute, particular branches of civil jurisdiction. In these matters, however, the church courts act not as a branch of the ecclesiastical establishment, but as a civil court, vested with the special powers of the statute. One of these is the presbytery's right to judge in regard to manses and glebes, under 1572, c. 48, and 1663, c. 21. And, in like manner, the powers delegated to them under the schoolmasters act in question. Any appeal from their sentences, in questions of this nature, is competent only to the Court of Session, who have proper jurisdiction in the matter.

After hearing counsel,

The LORD CHANCELLOR LOUGHBOROUGH said,

" My Lords,

" The matter which gave rise to the present appeal was originally a very small patrimonial interest or concern. It relates to the settlement of a parish schoolmaster, who, if successful, after a very long litigation, would gain a salary of about £10 per annum. The question at issue, however, is most important to the public, and to the ecclesiastical polity of Scotland. It has been argued on both sides with a vast profusion of learning. One of the objections made to the settlement of the schoolmaster was, that he was not qualified to teach the Latin tongue; but one of his advocates, in a long paper, where a very subtile and ingenious argument is maintained, supported his case by reasoning drawn from the practice of the Greek Church and of the Church of Rome, from the earliest periods.

" If my opinion, (however clear in my own mind it might have been,) had run counter to the opinion of the Court of Session, I should have felt embarrassment in suggesting what should be done in the present case. Though my habits of life have led me to some knowledge of the law of Scotland, I do not feel that knowledge such as to call for your Lordships to rely upon it, as I doubtless may be led to form a wrong conclusion. But I am quite relieved from all difficulty in the present case; my opinion coincides with that of the majority of the Court of Session, when the judgment prior to the last decision was pronounced, though, from the forms of the Court, which are somewhat repugnant to our ideas on similar occasions, this decision was afterwards departed from.

" Your Lordships know that the Court consists of fifteen members, the first judgment given, with which I concur, was that they had no jurisdiction in the case. Upon a rehearing, this judgment was altered, and when the last decision was pronounced, the Court was equally divided; but by the practice of the Court the Lord Pre-

sident does not vote, but when the numbers are alike exclusive of his own vote, which is then decisive. If the President had voted and given a casting vote on the same side, the majority would have been with the present appellant.

" I must not go into a detail of all the arguments which were held in the present case ; the matter, I conceive, rests on the construction of a positive act of parliament, the words of which I do not find any means of qualifying, neither need I enter into a long detail of the jurisdiction to which schools were subject previous to the Reformation. Before the Reformation, schools were under the cognizance of the bishops ; and, when episcopacy was abolished in Scotland, various church judicatories were appointed in place of the jurisdiction of the bishops, the first of which was the presbytery, and these courts succeeded to all the power of the bishops. In 1606, cap. 2, episcopacy was re-established, and continued to be the church government, except during the interval of the rebellion, till the revolution. At that time presbytery was re-established, ratified, and confirmed, as formerly set up, and then particularly referred to.

About the same period several acts of a temporary nature were passed ; and in 1693 an act was made (cap. 22), the title of which is, " For Settling the Quiet and Peace of the Church." Certain regulations are there laid down for all ministers before being admitted to churches in future ; and those who had not been expelled at the revolution are required to conform to the then church government, on pain of expulsion. These matters are contained in the enacting part of the act. Then these words follow :—' And it is hereby ' declared that all schoolmasters and teachers of youth in schools are ' and shall be liable to the trial, judgment and censure of the pres- ' bytery of the bounds.' And it is afterwards statuted and ordained that the Lords of the Privy Council, and other magistrates, &c. give all the assistance for making the sentences of the church, and its jurisdiction to be obeyed.

" I cannot, in defiance of this act of parliament, maintain that schools are not under the cognizance of the presbyteries. It is there expressly laid down that they are and shall be liable to that jurisdiction. Neither am I at liberty to inquire into the propriety of that regulation ; though I conceive there would be little difficulty in defending this as a fit subject of ecclesiastical cognizance, and that it contained nothing incongruous with sound wisdom, propriety, or convenience. By the description of every established school in Scotland, the children on Saturdays are to be taught the Church Catechism, and trained up in the precepts of religion ; and it is surely proper that those who are to inculcate to others the serving their Creator in the days of their youth, should themselves be tried upon their own principles of religion.

" A question was made, whether the power of the presbytery was merely ministerial, or if it was judicial ? A ministerial act, in my opinion, is where a person is enjoined to do an act of which he

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is not left at liberty to judge whether it be right or wrong:—they execute a thing which is merely personal to themselves; but when a trial is to take place, perhaps by the means of witnesses, that is a judicial act. Such an act is here vested in the presbytery, which is one of the inferior church judicatories.

The late Justice Clerk M'Queen.

"One of the judges in the Court below was of opinion that the judgment of the presbytery was final: and he was also of opinion that the Court of Session had no jurisdiction. But whether the judgment of the presbytery be final or not, I entirely agree with Mr. Solicitor General that the Court of Session has no right to say so. I do not give it as my own opinion, that the judgment of the presbytery was final; but it would be much easier to maintain that doctrine, than that the Court of Session had any jurisdiction whatever.

"There is a rotation of courts of ecclesiastical jurisdiction in Scotland; from the presbytery an appeal lies to the synod, and from the synod to the General Assembly. It will be with the General Assembly to declare whether the appellate jurisdiction takes place in this case or not; nay more, it is in their power, in conjunction with the King's Commissioner, to make regulations on the point, and to new model the inferior courts.

"In the course of the argument, it was given up on the part of the respondents that this could be carried to the Court of Session by way of jurisdiction. It was contended, however, that much inconvenience and delay would occur, if appeals were allowed to be carried to the synod, and from thence to the General Assembly; but how would this be mended by giving jurisdiction to the Court of Session, before whom we see it might be argued for several years, and then come before your Lordships? No part of the ecclesiastical jurisdiction in Scotland can go to the Court of Session except where it is so appointed by the legislature, as in consistorial cases relative to matrimony and wills, which may be reviewed by the Court of Session, as directed by an act of parliament. But, since the Reformation, the consistorial courts, too, have been wholly in the hands of laymen.

"I have stated to your Lordships what, in my mind, is sufficient ground for reversing the last judgment given in this case by the Court of Session, and affirming the first interlocutor."

It was ordered and adjudged that the interlocutors of the 21st May and 26th Nov. 1793, complained of in the appeal be reversed; and it is further ordered and adjudged that the interlocutor of 25th May 1792 be affirmed.

For the Appellant, *J. Grant, Wm. Adam, Wm. Robertson.*

For the Respondents, *Henry Erskine, D. Douglas.*