cargo, were liable for general average, which formed a lien over the cargo; 1 Bell, pp. 542–3, and 2 Bell, pp. 99–100, and 103. It may indeed be assumed that the defenders would not have come under the special obligation they did if they could have insisted for delivery of the cargo without it. And the Lord Ordinary cannot consider it of any importance that the master of the 'Reggente' subsequently to the 6th of March got a settlement of the general average from Messrs Melas Brothers, and that the defenders' obligation therefor was then given up and cancelled. No such subsequent transaction can be allowed to affect or prejudice the rights and interests previously secured to the pursuers by their arrestment.

"It was understood at the debate that the Lord Ordinary should not at once, or till parties were heard on the subject of the claims, if any, of the other arresting creditors of the 'Reggente,' pronounce decree of furthcoming. The parties will now, of course, be heard on that subject, and also on the question of expenses of process."

Thereafter, on 26th February 1870, the Lord Ordinary pronounced this interlocutor:—"The Lord Ordinary having heard parties' procurators, in respect it is admitted that there are other arresting creditors of the brig or vessel 'Reggente,' and that a multiplepoinding is now in dependence before his Lordship at the instance of the arrestees, Messrs Alexander and Robert Tod, against the pursuers and others, for the purpose of determining the claims of all parties upon the amount of funds in the hands of the said arrestees, and in which the arrestees have been found liable in once and single payment: On the motion of the pursuers, decerns and ordains the said arrestees, and the principal debtors for their interest, to consign within eight days the sum of £451, 3s. 7d. sterling, for which the arrestees have been found liable to account by interlocutor of 14th December last, with the interest thereon since the date of citation, in the Royal Bank of Scotland, upon a deposit-receipt payable to the party or parties who shall be ultimately found entitled thereto in the said process of multiplepoinding; and ordains the defenders, arrestees, and the principal debtors, for their interest, to lodge said deposit-receipt in the said process of multiplepoinding within the said eight days: And holds said consignation of the said sum of £451, 3s. 7d. to be equivalent to payment of the same in this action, and decerns: Finds the principal debtors liable in expenses up to the lodging of the defences by the arrestees; and the arrestees liable in the whole expenses incurred subsequent to the lodging of their defences; and remits the accounts thereof, when lodged, to the auditor, to tax and report."

The defenders reclaimed against both interlocutors.

DUNCAN for them.

ASHER in answer.

The Court unanimously adhered.

Agents for Pursuers—Murdoch, Boyd, & Co., S.S.C.

Agent for Defenders—Henry Buchan, S.S.C.

Wednesday, June 29.

SECOND DIVISION.

WIGHT *v.* THE PRESBYTERY OF DUNKELD.

Church—General Assembly—Civil Court—Jurisdiction—Review—Procedure. A minister was proceeded against by a Presbytery by libel, charging him with fornication and with indecent and scandalous familiarity with a woman unbecoming a minister of the Gospel. The relevancy of the libel was objected to, but it was sustained. Ultimately, the minister pleaded guilty to the charge of scandalous familiarity alone, and that being accepted by the Presbytery, he was suspended for six months. In this sentence the minister acquiesced, but the case was taken by petition by certain elders of the congregation before the General Assembly. After a variety of procedure, the Assembly quashed the proceedings of the Presbytery, and remitted to them to proceed of new against the minister, and to exhaust the libel. The minister then brought a suspension in the Court of Session, in which he prayed the Court to suspend the deliverance of the Assembly, and to interdict the Presbytery from again putting him on his trial. *Held* that the question raised in the note of suspension being a mere matter of procedure in an ecclesiastical proceeding, the Court of Session had no jurisdiction to review the deliverance of the Assembly.

Observed that the constitution of the General Assembly stands upon statute like the Court of Session and the Court of Justiciary, and has like them an independent jurisdiction.

Opinions, per Lords Benholme and Neaves, that the proceedings complained of were liable to no objection on the ground of irregularity.

This is a question between the Rev. Mr Wight, minister of Auchtergaven, and the Presbytery of Dunkeld. Mr Wight had been served by the Presbytery with a libel, charging him with fornication, and also indecent and scandalous familiarity with a woman unbecoming a minister of the Gospel. When the case came before the Presbytery Mr Wight pleaded not guilty to the charges in the libel, but, in a subsequent conference with a committee, he acknowledged that he had been guilty of scandalous familiarity, expressly denying, however, fornication or indecent familiarity. The Presbytery accepted that plea, and pronounced sentence suspending Mr Wight for six months. The decision was acquiesced in by Mr Wight, but was afterwards petitioned against by elders of his congregation, and it was on that petition that the matter came before the Assembly. After receiving the report of a committee, and hearing parties in the case, the Assembly pronounced the Presbytery's proceedings irregular, and altogether null and void, and ordained the inferior court now to discharge the duties undertaken by them in commencing the process against Mr Wight, in conformity with the laws of the Church.

Mr Wight then raised an action of suspension and interdict in the Court of Session against the Presbytery of Dunkeld, as also against the General Assembly. He craved the Court to suspend the judgments of the Assembly, and to interdict the Presbytery from carrying into effect those judgments, and from proceeding in any manner of way, in respect of said judgments to revive or re-open the process of libel which had been served by the said Presbytery upon him.

The suspender maintained the following pleas:—

"1. The complainer having tendered a proper plea to part of the charge preferred against him in the libel, and such plea having been accepted by the Presbytery, and judgment having been pro

nounced and sentence passed upon him without complaint or appeal, and he having submitted to said sentence and undergone the greater period of the term of suspension, it is incompetent for the Presbytery to proceed to try him again upon the same libel or for the alleged offences covered by that libel.

"2. It was *ultra vires* of the General Assembly, according to their own constitution and laws as an ecclesiastical Court, upon the terms of and form of proceeding in the petition of the elders of Auchtergaven presented to them, to take the same into consideration, and to direct the said Presbytery of Dunkeld to reopen the case against the complainer.

"3. The complainer having, after libel for alleged offences, undergone trial and received sentence of a competent Court, and the judgment of the Court become final, it is contrary to the law of Scotland that he should be tried again before that Court for the same alleged offences.

"4. The same deliverances of the General Assembly, which are in their manner and operation in violation of the constitution and laws of the Church and the laws of the realm, commit an infringement of the complainer's civil rights, and are in excess of the powers of the Courts of the Church and unjust and oppressive, and they ought to be suspended by the Supreme Civil Court, and the persons defending the same ought to be found liable to the expenses of the complainer."

The case came on before LORD MACKENZIE, Ordinary on the Bills.

SOLICITOR-GENERAL, MAIR, and J. M. GIBSON for suspender.

LEE (Procurator) for respondents.

Mr LEE said he should endeavour to state the grounds on which he submitted that the Court could not interfere.

LORD MACKENZIE asked if it would not be advisable to have answers.

Mr LEE said he had considered that point, and he thought that practically the question arose quite sufficiently upon the note of suspension. Complaint was made regarding two judgments of the General Assembly. By the first of those judgments the Assembly found that a certain proceeding on the part of the Presbytery of Dunkeld in an ecclesiastical prosecution which they had undertaken against the complainer was competently brought under their notice; and by the second they found that the procedure of the Presbytery in accepting a certain acknowledgment by Mr Wight as a confession of guilt, and in sentencing him to punishment thereupon, without disposing of the charges in the libel, to both of which Mr Wight had pleaded not guilty, was on the face of it irregular, contrary to the laws and practices of the Church, and altogether null and inept, and ordained the Presbytery to proceed forthwith in discharge of the duties undertaken by them in beginning the said process against a minister of the Gospel, in conformity to the laws of the Church. The complainer prayed his Lordship to interdict any such proceeding on the part of the Presbytery. Now, his contention was that in the circumstances set forth on the face of the interdict the Court could not entertain such an application. The objections stated in the complaint were two. There was, first, the objection that the Assembly had not the matter competently before them—that was, that the petition by which the matter was brought before them was incompetent. The second objection was, that the proceedings of the Assembly in dealing with the matter were incompetent, supposing it to be competently before them. As to the first objection, he submitted that the question whether the matter was competently before them was a question for the Assembly, and it was a question accordingly on which the party appeared at the bar to be heard and was heard. There was no allegation that the subject-matter was not within the jurisdiction of the ecclesiastical courts. It was a case of discipline against a minister, and the subject-matter of the petition to the Assembly was concerning the regularity of the proceedings of a Presbytery in its dealings with such a case. It was not stated in the complaint that it was a matter beyond the jurisdiction of the Assembly, and it was obvious that the subject-matter was not beyond their jurisdiction. What was said—and it was all that was said—was, that in entertaining the petition by which the proceedings of the Presbytery were brought under their notice the Assembly proceeded contrary to their own rules of procedure. It was not said there was any excess of jurisdiction, but that the petition was incompetent, and that the Assembly should have rejected it as incompetent according to their own rules and laws. No particular rule or law was stated in violation of which they were said to have proceeded, but it was said that the Assembly entertained the petition contrary to their own laws. All the length, therefore, that he went was to say that that was a question for the Assembly. He did not maintain that the Church, which had an independent jurisdiction in matters spiritual and in cases of discipline, was in all cases the judge of the extent of its jurisdiction. It was a settled point that the Court of Session was entitled to consider whether the matter in which the Church had been dealing was a matter spiritual or a matter civil; and if the Court found it was a matter civil, and not a matter spiritual, then there was the foundation for an allegation, which was not made here, of an excess of jurisdiction enabling the Civil Court to interfere. In the present case, the subject-matter was clearly within the jurisdiction of the Assembly. The only question, therefore, was, whether the jurisdiction of the Assembly was competently evoked by the petition? and that was the question which, he said, was a question purely for the Assembly. The Assembly considered the question, and heard parties upon it; it was a matter depending entirely upon Church law and upon the rules of the Church Courts, and particularly the rules of the Assembly, and the Assembly decided, after hearing parties, that the matter had been competently brought before them. He did not admit that it was necessary he should explain or justify the views upon which the Assembly proceeded on coming to this decision; but for the sake of illustration, he might state what the kind of views were on which the Assembly naturally and necessarily proceeded in holding that the matter was competently before them, so as to enable his Lordship to decide whether the Court could or ought to review the judgment the Assembly pronounced on the question of competency. The Assembly were intrusted with the duty of superintendence and control over all the inferior Church Courts, and all ministers, and such superintendence and control they were entitled to exercise and bound to exercise in proper cases *ex proprio motu*. This had never been doubted, and certainly it had never been questioned in any

cases which had occurred in reference to any conflict of jurisdiction between the Courts civil and the Courts ecclesiastical. In the ordinary books relating to the matter—as, for instance, in Dr George Hill's View of the Constitution of the Church—it was stated in express terms as one of the ways in which the Assembly proceeded. There was a public duty imposed upon them in regard to the matters within their cognisance—the duty of attending to the interests of all the parishes and presbyteries throughout Scotland.

LORD MACKENZIE—You maintain that their duty is not only judicial but also ministerial.

Mr LEE said there was no doubt of that, and, if necessary, by going back to the statutes founding Presbyterian Church government in this country, it could be easily seen that this was an essential part of that form of Church government. In practice this power has been constantly exercised. There were cases in which the Assembly had found it necessary to exercise this power of supervision and control. For example, the Assembly were sitting, and a statement was made by a member that a minister had been endeavouring to get into the House in a state of intoxication. The Assembly had no original jurisdiction; they could not deal with the accused by way of libel, nor could they summarily depose him, because, according to the Church laws, it was necessary to proceed by way of libel. But they were entitled, upon the mere statement, to examine into the matter, and, if they found grounds, to pronounce an order ordaining the Presbytery to proceed according to the laws of the Church. Such a case actually occurred in 1838. Other cases had occurred where a minister, being under a *fama*, had been allowed by a Presbytery to resign,—which was a very convenient thing for the Presbytery. That was contrary to the laws of the Church; and if the Assembly heard of it, however it might be attempted to be concealed by both parties, they took it up, they examined into the matter, and they had on various occasions declared the whole proceedings irregular, and ordained the minister to return to his charge, and censured the Presbytery.

LORD MACKENZIE—And the minister to stand his trial.

Mr LEE—Of course.

LORD MACKENZIE—The reason being, that although he had demitted his charge, he had not demitted his ministerial office.

Mr GIBSON said he did not maintain that, supposing Mr Wight had not been tried before the Presbytery, and a member of Assembly had got up and stated that there was a *fama clamosa*, it would not then have been in the power of the Assembly to order the Presbytery to proceed. He did not dispute the existence of such a power.

Mr LEE said that enabled him to advance almost the whole length of his first proposition—namely, that the Assembly had power to originate an examination into the regularity of the proceedings of Presbyteries in cases of discipline. That inevitably led to this, that the public interest in matters spiritual might in many cases require that the Assembly should exercise that power of spontaneous action which it admittedly possessed. If that was so, he was enabled to advance this length—the Assembly had held, after hearing parties, that this was a matter which on the face of it appeared to be an utter and fundamental irregularity in such a case. They had decided that it was a case in which it was competent to them to exercise their spontaneous power of jurisdiction and control; they decided that, if the allegation in the petition was true, if the Presbytery had pronounced such a sentence as was set forth, there was a case making it competent for them to inquire into the matter, and to do so in the proper way. Accordingly, they resolved to cite the Presbytery with the records, that they might hear whether the statements in the petition were well founded. Was the Court then to review that decision? Unless the Court could review the Assembly's decision upon that matter, it was quite plain that the first objection of the complainer was one which the Court could not entertain, because the procedure was only questioned as being contrary to the laws of the Church. Coming to the second point, what the complainer said was, that the matter was *res judicata*, that he had tholed an assize, and therefore that it was not competent for the Assembly to order the Presbytery to proceed any farther. That raised two questions. The first was, for whom was it to decide whether he had tholed an assize or not? The Assembly had decided that there was no sentence at all, that the procedure was utterly null and inept on the face of it. The accused party, whom the Presbytery had taken upon them to libel for the most serious offences, was neither convicted nor acquitted. On the face of the judgment he stood in the position of being a party who had made an acknowledgment not of either of the charges made, but an acknowledgment of a nature entirely consistent with his plea of not guilty. Upon the face of the Presbytery's judgment, therefore, the Assembly, after inquiry, saw that what the Presbytery had done was to accept an acknowledgment which was consistent with that plea of not guilty. Now, there must be a power somewhere to correct an irregular proceeding of that kind. How was it to be corrected if not by the Assembly? There was no power of appeal in the parishioners; they were not parties to the prosecution. What, then, was to be the remedy when a Presbytery pronounced such a judgment, which, on the face of it was a nullity and an obvious dereliction of duty? Would it be said on the other side that the Assembly or some other Church Court should go to the Court of Session with an action of reduction of the judgment of the Presbytery, containing conclusions *ad factum præstandum*, asking the Court to order the Presbytery to proceed in the discharge of their duty? That was the only way of correcting it that could be suggested, but was any such a thing as that ever heard of? Supposing such an action brought in the circumstances of the present case, the Court would never listen to it, but would at once say: —"There is a competent court of supervision and control—there is the General Assembly, which has the power and duty of supervision in all such matters of ecclesiastical discipline, and we shall not interfere." How then was the manifest radical error, appearing *ex facie* in the judgment of the Presbytery in such a matter to be corrected, if not by the form of procedure which had been adopted in the present case? He said, therefore, that wherever the Assembly had reason to conclude or to fear that there had been a fundamental error of the kind in question on the part of a Presbytery, they were entitled to call for the proceedings, as they had frequently done, and if they found on examination that the proceedings were irregular, as they had been alleged to be, they were entitled and bound to put the matter right in the public interests—for they had public interests intrusted

to them—irrespective of all consequences, either to the minister over whom they had superintendence, or to the Presbytery over whom they had superintendence. If any wrong had been suffered in consequence of the illegal and irregular act on the part of the Presbytery, or to which the Presbytery were parties, every right would be open to any party who had suffered such wrong to be reponed against it. But that was a separate matter. It was obvious that if there was a fundimental irregularity involving those interests which were intrusted to the Assembly, the Assembly were not only entitled, but bound, regardless of all consequences, to do what was necessary to put the matter right. In this case they had found that the procedure of the Presbytery was altogether contrary to the laws of the Church, and absolutely on the face of it null and inept; they had found that the minister had not tholed an assize, and that the Presbytery had committed the irregularity of accepting as a confession that which was on the face of it no confession of either of the ecclesiastical offences laid to his charge; and that, he submitted, was a matter purely for the Ecclesiastical Court. His Lordship, he thought, would find it impossible, upon the statements made by the complainer, to review the decision of the Assembly on the question whether the Presbytery's sentence was or was not a valid one; and unless his Lordship could make such review, there was nothing to justify or enable the Court to entertain the present application. It was said that the judgment of the Presbytery had been acquiesced in and acted upon, and that therefore it was final. Now, upon that he said it was clearly not final to the effect of preventing the Assembly from considering whether it was not a nullity altogether on the face of it. And if it was a nullity upon the face of it, then he submitted that no acquiescence between the parties could avail anything to the effect of enabling the Court to entertain an application for interdict against the proper Church Court now taking the proper steps to put matters in their true and right position. That was what was sought to be stopped by the application. It was said that after the pronouncing of the sentence the Presbytery proceeded, under Lord Belhaven's Act of 1862, to require that the minister should provide a certain amount of his stipend for an assistant. The Act enabled a Presbytery, when a final sentence had been pronounced suspending a minister, to take those proceedings in the way of supplying ordinances during the suspension. It only applied where final sentence had been pronounced. In the present case, according to the judgment of the Assembly, no final sentence had been pronounced. The action taken might or might not give the minister a civil right to recover from the Presbytery what they had taken from him under an illegal or null sentence, but it never could enable him to ask the Court to interfere to prevent the Assembly from doing that which was necessary to put matters in their right position if they had competently found that the judgment of the Presbytery was utterly irregular and null. Therefore his Lordship would not be much affected by any consideration of what had followed upon the irregularity. These being the grounds upon which he contended that there was no case in which the Court could interfere, he would mention three cases which seemed to bear upon the question at issue. The first was that of *Lockhart* against the Presbytery of Deer. In that case a minister was deposed on the ground of immoral conduct. He presented a note of suspension against the sentence being carried into effect, on the grounds that the libel on which the sentence proceeded was defective in the instance—being merely at the instance of the Presbytery without any names—and that the Presbytery had rejected all evidence on his behalf, and had acted very oppressively, and disregarded the forms of procedure in such matters. The Court decided practically that this was a matter for the cognisance of the Church Courts. There was no allegation in that case any more than in the present of excess of jurisdiction; the allegations all went to irregularity of procedure, and the Court said they could not review the judgments of the Church Courts in those matters. Another case was that of *Paterson* against the Presbytery of Dunbar. A minister was libelled, and the libel found relevant. Counsel then appeared for him before the Presbytery, and said he was insane, and unable to give instructions, and craved delay. The Presbytery, in respect of his having given in defences, and thus sisted himself as a party to the case, and of the vagueness of the crave for delay, refused to sist proceedings. A note of suspension and interdict was presented, on the ground that the case involved civil rights, and that it was contrary to all law to proceed in such matters in the face of an allegation of insanity. The First Division of the Court, affirming the judgment of Lord Jerviswoode, refused the note without answers. Then, in the case of *Campbell* against the Presbytery of Kintyre, the same thing was recognised in the most explicit manner. In that case the allegation was that the Commission, an incompetent court, had ordered certain proceedings, and the suspension was asked on the ground that the Presbytery could not proceed on the orders of a Court which had no constitutional existence. It was assumed that the Commission had no constitutional existence, but it was urged that the Presbytery had power to go on of itself. That involved considerations very much of the kind here presented, and Lord Fullarton said that if the Presbytery had power to proceed independently of the Assembly, there was an end of the case. But his Lordship went on to say, if it were assumed that they had not, what was the result? Only that they, an ecclesiastical court, did, in a case clearly within their province, something which, according to the form of ecclesiastical procedure, they were not entitled to do; but on such a ground the Court of Session was clearly not entitled to interfere. Therefore, in the absence of anything like excess of jurisdiction—in the absence of anything like what occurred in the Presbytery of Strathbogie, where the order of the Assembly to the Presbytery was to do what had been decided by the Court of Session and the House of Lords to be absolutely contrary to the law, and what involved the interest of third parties, namely, the patrons—in the absence of any allegation that the Church Court was proceeding under an Act of Assembly which it was clearly beyond their power to pass, such as the Veto Act—he submitted that there was no possibility of interfering in the present case. It certainly would be most unfortunate if there should be any interference. If the Court should interfere on the grounds here alleged, there would be cases of discipline affecting interests which required to be attended to, and which could only be attended to by Church Courts, which might come into such a position as to admit of no remedy whatever. If the procedure of the Presbytery of Dunkeld was, as it had been decided

to be, utterly irregular and illegal, the Court of Session could not have interfered to put the matter right. The only court which could interfere was the superior Church Court, and, failing its interference, they would have in this case, and in many cases, a minister under the jurisdiction of the Church standing neither convicted nor acquitted, and maintaining a public office in that unfortunate situation. The minister was entitled to be—and he could not understand why he should not wish to be—acquitted or condemned; he was entitled to have his case investigated; and he was also entitled to have all remedies against any irregular act which might have taken place on the part of the Presbytery. His Lordship would not forget that the Assembly had a right to consider the interests of ministers in such a situation as well as the interests of the parish and the duties of a presbytery, and he did not doubt that the Assembly in coming to the judgment it pronounced had in view the interests of the minister as well as the interests of all others concerned. It could not be for the legitimate interest of anybody, certainly not of a minister of the Gospel, under such charges, that he should be neither acquitted nor convicted under the libel which the Presbytery had undertaken to present against him.

SOLICITOR-GENERAL for complainer—The only question the Lord Ordinary had to dispose of was the question whether this was or was not a case for inquiry, justifying his Lordship in ordering answers to be lodged, and at the same time granting interim interdict. The case arose in this manner: A libel was presented against the complainer at the instance of the Presbytery of Dunkeld, accusing him of two offences—the one being a charge of fornication, and the other a charge of indecent and scandalous familiarity with a woman. There could be no doubt that these offences were offences contrary to the laws of the Church, and were relevant as charges upon which to found a libel against the complainer. After the libel was served the Presbytery occupied the anomalous position of being in the first place the prosecutors of that libel, and in the next place the judges of the question raised by the libel. There was thus a proper prosecution, commenced by a libel duly served upon the defender, which led to the process before the inferior court of the Church—namely, the Presbytery of Dunkeld. In the course of the process the accused made a confession to the effect of admitting that he had been guilty of scandalous familiarity with a woman, but denying the other charge of indecent familiarity and fornication. That plea having been accepted by the Presbytery, the Court at once proceeded to pronounce sentence upon him, suspended him for six months, and ordered provision to be made for supplying his pulpit. The Presbytery, it should be kept in view, acted in the twofold capacity of prosecutors and judges. As prosecutors they accepted the plea which had been tendered by the accused, and as judges they dealt with him in respect of his confession; and one would have supposed that the proceedings would thereupon have taken end. But it appeared that certain of the kirk-session were of opinion that the Presbytery had acted improperly in the case, and accordingly they presented a petition to the General Assembly asking the Assembly to take the matter into consideration, and to do in the premises what should seem right and just in the interest of morality and religion. Now, these petitioners were not in any way parties to the case before the inferior court, and the case in the inferior court had in no way come up before the Assembly, because it had terminated with the sentence which the Presbytery had thought fit to pronounce, and therefore this was a new procedure for the purpose of inducing the Assembly to order the Presbytery to do something with reference to a litigation which had terminated before the Presbytery, and which was in no respect before the Assembly. Notwithstanding an objection taken to the competency of the petition, the Assembly took it into consideration, and pronounced a deliverance to the effect of annulling the whole proceedings before the Presbytery subsequent to the finding of the libel relevant, and ordaining the Presbytery to proceed as prosecutors in the libel as from that date. In short it came to this, that, while a trial and procedure had taken place, resulting in a sentence of deposition, the General Assembly had ordered the trial to proceed again, to the effect, it might be, of a severer sentence being pronounced against the accused. Now, the question arose whether or not the General Assembly was entitled to make this order, and whether or not it was exceeding its jurisdiction, so as to entitle the complainer to appeal to the civil courts, and to stop proceedings which the Assembly had ordered to be re-inaugurated in the Presbytery of Dunkeld. His Lordship would keep in view that in arguing this question he was not disputing in the least degree the supremacy of the General Assembly. It was undoubtedly the Supreme Court of the Church, and when acting properly within its jurisdiction the Civil Courts could not interfere; but the question was whether in this matter it had been acting properly within its jurisdiction; and if he could make out a reasonable case to show it had not, then he was entitled to the only order he could ask at the present time—namely, an order for answers, and a judgment of interim interdict. The first consideration which had been presented on the other side, to the effect that the General Assembly was within its jurisdiction, resolved itself very much into the argument that this was a proper case of discipline—that the Presbytery was acting in its proper jurisdiction in trying the case—and that the Assembly had a jurisdiction in the Church in all cases of discipline. Now, that was very true, expressed in those general terms, but it did not necessarily follow that at all times the General Assembly had a right to interfere and to pronounce any order it might think proper with respect even to an existing process, far less with respect to a process which had ceased to exist before the Assembly was called on to interfere. The three cases referred to by Mr Lee did not in the least degree suggest any reason to doubt that the civil Courts could interfere when the General Assembly or any Church Court was proceeding against a minister without a process at all, or by means of an irregular process not recognised by the laws of the Church; and he contended that they could not be said to throw any light upon the present case, in which the point raised was whether, after what had taken place in the Presbytery of Dunkeld, there remained any process at all which could go on. Now, it was not for the Assembly to pronounce a judgment on such a question, raised, not by parties to the process, but by parties who were entire strangers to it. He conceded that where the point was raised by parties to the process it might be competent for the General Assembly to

say whether the process did or did not subsist; but he was not aware of any authority for saying that the Assembly, for the good of the Church, should have it within its jurisdiction to determine, on the call of any person unconnected with the case, whether a process which had been exhausted by plea, judgment, and sentence, might be gone on with as if the plea had never been given, and as if judgment and sentence had never been pronounced. He would just ask the Court to look to what lengths this might be carried. The General Assembly might be said to have supreme power in the Church. In one sense that was true enough, but could the General Assembly at once order a person to be deposed? The only way in which it could depose any minister was by regular libel, raised in the proper court, and carried before the Supreme Court by proper process. And in dealing with an institution whose boundaries and powers were so well defined by public law—for this was not a case of contract—he could not imagine any one contending that the General Assembly might of its own motion, or, what was the same thing, upon the petition of a third party, order a minister to be deposed or to be tried without a libel, or, in short, to be proceeded against by any process except such as was recognised by the laws of the Church. Should the Assembly do so, it would necessarily be exceeding its jurisdiction. Reference had been made to the Court of Justiciary, and an argument had been drawn from the fact that the Court of Session could not control the Court of Justiciary any more than the Court of Justiciary could control the Court of Session. That was quite true; but it should be observed that the relations between these Courts were different from the relations between the Court of Session and the Supreme Court of the Church. The Court of Session and the Court of Justiciary were absolutely supreme in their several departments in this realm; but the moment he could establish the proposition that the Supreme Court of the Church was travelling beyond its jurisdiction—

LORD MACKENZIE—Is this a question of excessive jurisdiction?

The SOLICITOR-GENERAL—I put it so.

LORD MACKENZIE—Is it not one of procedure rather?

The SOLICITOR-GENERAL said he would put the matter in this form—The Assembly might order the Presbytery to proceed without a libel, or might order the minister to be deposed at once. That might be called procedure. Anything might be disguised under the name of procedure, but, at the same time, it was an excess of jurisdiction when jurisdiction was exercised in any process except that in which it could be competently exercised. Now, there was a regular mode of jurisdiction in the Church. It must be commenced in the Presbytery by libel. If any person should be dissatisfied with the judgment of the Presbytery the case might be removed from the Presbytery to the Synod, and from the Synod to the Assembly. But the General Assembly was in no respect a court of radical jurisdiction—it was merely a court of review; and if a process were brought to an end, then he denied the right of any court of the Church to interfere, because it would come to this, that if an unqualified plea of guilty should be tendered, and a sentence pronounced which some person thought inadequate to the offence, the General Assembly might be moved, by a petition from persons not parties to the case, to annul the whole procedure.

LORD MACKENZIE—Who is to decide the question whether the process is at an end?

The SOLICITOR-GENERAL replied that it was to be decided certainly by the Civil Court, because the recognised process of the Church Courts was settled by the law of the land. The argument of his learned friend on the other side implied that the General Assembly might, if it thought proper, proceed to depose a minister—or rather, remit to the Presbytery of new to proceed with the libel after it had disposed of it in full—because the argument was that all this was process, that the Supreme Court of the Church was the judge of its own procedure, and that the Court of Session could not interfere. But he maintained that the Court of Session could interfere, because the Supreme Court of the Church had not any process it liked to adopt but a process which took its origin in the law of the land, and was recognised by the law of the land.

LORD MACKENZIE—You mean by common law.

The SOLICITOR-GENERAL—Yes; and partly by statute law.

LORD MACKENZIE—There is no statute regulating this procedure?

The SOLICITOR-GENERAL could not at that moment say there was any such statute. With regard to the jurisdiction of the Assembly, he did not doubt the Presbytery might be censured by the Assembly if the latter Court thought it had gone wrong in its judicial capacity. But it did not follow that the Assembly could annul the procedure taken by the Presbytery to the effect of altering the position the accused had obtained under the procedure. The case of the accused had been absolutely disposed of by a sentence in which the prosecutor, accused, and judges acquiesced. Had any of the parties dissented, an appeal might have been taken; but it would be a strange thing indeed, and a thing for which there was not the slightest suggestion of authority, were the General Assembly to be at liberty to revive a process after it had come to a termination by a plea and a sentence. There was no law of the Church which recognised the proposition that a man should suffer his sentence to the full, and then, on the complaint of outsiders who were not parties to the libel, that he should anew suffer another sentence under the same libel. It had been said, however, that there had been certain irregularities in the procedure before the Presbytery which entitled the Assembly to pronounce this order. He submitted that he had nothing to do with that. The General Assembly had no process before it, and could not pronounce an order upon a process which was not before it. But at the same time, adverting to the alleged irregularity, he remarked that the charges in the libel were fornication and indecent and scandalous familiarity with a woman. The accused denied the indecency, but admitted the scandal. It was true that the charge to which he pleaded guilty was not contained in express terms in the libel; but practically the libel was amended to admit of the plea being accepted. Suppose it had been agreed to strike out the words "indecent and," leaving only "scandalous familiarity," would it not have been a proper charge for the Presbytery to try? The members of the Presbytery were masters of the libel, and could alter the major proposition if the accused did not object. They did actually amend it, not by striking out the words, but by accepting the plea, which was equally—

LORD MACKENZIE—Is there any difference be-

tween "scandalous familiarity" and "indecent familiarity" with a woman?

The SOLICITOR-GENERAL said the distinction was very fine, but he was arguing as if there were some distinction between the words. At all events, there was an adjective in the proposition which did not appear in the plea of the minister. But what then? It was just that the libel had been amended by consent of the parties—accused, prosecutors, and judges—as if it contained the offence to which the accused pleaded guilty. With respect to the interim interdict, all he wanted was that matters should remain entire until it should be decided whether the Assembly had been exercising a jurisdiction competent to it. Provision had been made for the supply of ordinances in the parish, and he submitted that it would be better to keep matters *in statu quo* than allow the case to go on they know not to what extent or with what results, while all the time the question was being tried in the Court of Session whether the General Assembly had the power to revive proceedings which had come to a termination in the Presbytery of Dunkeld.

LEE replied. He said that through the whole of the Solicitor-General's argument there ran the fallacy of assuming that the Presbytery of Dunkeld had pronounced sentence, and that there was an existing sentence against the accused. The judgment of the Assembly had proceeded upon the ground that there was no sentence at all, that the whole proceedings of the Presbytery were on the face of them fundamentally irregular and null, and, therefore, that it was impossible to sustain the plea urged before the Supreme Court of the Church that the matter was *res judicata*. He maintained that it was within the competency of the Assembly to judge whether the process had come to an end in the Presbytery of Dunkeld. It was not disputed that the Assembly had original powers and duties in calling for and examining these proceedings; and surely, if it had these powers, it had also the power of declaring the proceedings null if it found them to be wrong; and if it found the proceedings not at an end, surely it had the power to order the Presbytery to go on in the discharge of its duty. Even if the sentence had not been a nullity, he would have contended that the General Assembly, in virtue of its power of superintendence and control, would have had a right to examine the proceedings of the Presbytery, and to declare them null if it had found what amounted to fundamental error. But in this case it was not necessary to advance such a plea, for, according to the express terms of the judgment of the Assembly, the proceedings of the Presbytery were, on the face of them, "irregular, contrary to the laws and practice of the Church, and altogether null and inept."

The Lord Ordinary, having made avizandum, ultimately pronounced the following interlocutor: —"The Lord Ordinary having considered the note of suspension and interdict, and heard counsel thereon, and on the caveat lodged for the respondents, the Rev. George Ritchie and Others, as representing the General Assembly of the Church of Scotland, refuses the note, and finds the complainer 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 leading facts stated in the note of suspension and interdict for the complainer, who is minister of the parish of Auchtergaven, in the Presbytery of Dunkeld, are to the following effect: —On 14th December 1869 the Presbytery of Dunkeld served a libel upon the complainer, in which he was charged with 'fornication, as also indecent and scandalous familiarity by a minister of the Gospel with a woman, to the disgrace of the sacred profession of a minister.' On 30th December 1869 the complainer lodged answers, in which he objected to the relevancy, and on the merits pleaded not guilty; and on 4th January 1870 the libel was found relevant, and a committee of the Presbytery appointed to confer with the complainer, and to endeavour to bring him to a confession. This committee dealt with the complainer, and he acknowledged, in regard to the charges in the libel, that he had been guilty of that part of the alternative charge which accused him of scandalous familiarity with a woman unbecoming the character of a minister of the Gospel, expressly, however, denying on soul and conscience fornication or indecent familiarity, and he also declared his deep contrition for having so acted, and his willingness to submit himself to the censure of the Presbytery. This was reported to the Presbytery, and on 1st February 1870 the report of the committee was taken into consideration, and the complainer, being at the bar, pleaded guilty to the charge of scandalous familiarity as libelled. The Presbytery thereupon, by a majority, received the complainer's acknowledgment without proceeding further in the prosecution of the libel, suspended him from the discharge of his ministerial duties for the period of six months, and admonished him, and fixed the amount to be paid to an assistant to discharge the duties of the cure during said period at £55. The complainer avers that intimation was also made to him that the libel *quoad ultra* had been abandoned. He also avers that no appeal or complaint having been taken to the Synod, the sentence and judgment of the Presbytery, 'by the laws and practice of the Church, became final,' and that he has, in accordance with the terms of his sentence, performed no ministerial duty since the date of his suspension, and has paid to the clerk of the Presbytery the foresaid sum of £55 for the assistant who is discharging the duties of the cure. The complainer further avers that a petition was presented, at a meeting of the General Assembly of the Church of Scotland held in May 1870, by five elders of the parish of Auchtergaven, who had not appeared in and were not parties to the proceedings before the Presbytery, in which they prayed the General Assembly to take the foresaid judgment of the Presbytery into their consideration, and thereafter to do in the premises what should seem right and just in the interest of religion and morality for the parish and Church; that on 24th May, the petition having been a second time called, counsel for the complainer objected to its competency, and was heard, and that the General Assembly found 'that the proceedings of the Presbytery are alleged to have been tainted by irregularities, that in the special circumstances alleged the matter had been properly and competently brought under the notice of the General Assembly;' appointed intimation to the Presbytery; ordained them to appear at the bar on 27th May, and continued the cause to that day; that on 27th May the cause was remitted to a committee; and that on 30th May 1870, parties having been heard, the General Assembly found 'that the proceedings of the Presbytery of Dunkeld in accepting a certain acknowledgment by Mr Wight as a confession of guilt, and in

sentencing him to punishment thereupon without disposing of the charges in the libel which they had served on Mr Wight, to both of which Mr Wight pleaded not guilty, were, on the face of the said proceedings themselves, irregular, contrary to the laws and practice of the Church, and altogether null and inept; ordained the said Presbytery now to proceed forthwith in the discharge of the duties undertaken by them in beginning the said process against a minister of the Gospel, and that in conformity to the laws of the Church,' and reserved to the complainer 'his whole objections and pleas to the said libel, or such other proceedings as the Presbytery may adopt.' On this statement the complainer prays that the judgments or deliverances of the General Assembly of 24th and 30th May 1870 be suspended, and interdict granted against the Presbytery proceeding in accordance with these judgments to revive or reopen the process of libel served by the Presbytery upon the complainer. It was not disputed by the complainer that the offence with which he was charged was an ecclesiastical offence, and that it was properly brought before the Presbytery against him. The General Assembly is the Supreme Ecclesiastical Court in Scotland. The judgments complained of were therefore pronounced by the Supreme Ecclesiastical Court on a person subject to their jurisdiction in a cause strictly ecclesiastical. The complainer prays for suspension of these judgments, and interdict against their being carried out, and the grounds on which he does so are, that the proceedings before, and the sentence of the Presbytery, were at an end and final; that he has suffered nearly the whole of the punishment imposed; and that no man was bound to thole an assize twice; that the elders on whose petition the General Assembly proceeded were not parties to the libel before the Presbytery, and made no appearance there; that there was no process before the General Assembly; and that the judgments and proceedings of the General Assembly were in excess of their jurisdiction, grossly irregular, and contrary to the laws and constitution of the Church. The Lord Ordinary is not aware of any authority for holding that the General Assembly exceeded their jurisdiction in the matter complained of, and the complainer did not cite any statute or other authority to that effect. There has been, so far as he can see, no excess of powers or disregard of statutory provisions. It appears to the Lord Ordinary that the whole matter was within the jurisdiction of the Church Courts, and if so, then the only other question is whether or not the General Assembly proceeded correctly and acted rightly in sustaining the competency of the petition of the elders, and pronounced judgment according to the laws and practice of the Church? The Lord Ordinary considers that this was a question of ecclesiastical law and proceedure of which it was the exclusive province of the General Assembly to judge, and with which the Court of Session has no right to interfere. If this Court were to do so, it would simply, it is thought, be reviewing the proceedings of the Supreme Ecclesiastical Court in a matter and in procedure purely ecclesiastical. The answers to the objections stated by the complainer to the procedure and judgment of the General Assembly all depend upon the law and practice of the Church of which the complainer is a minister, and the General Assembly, after hearing parties, and considering these objections, pronounced judgment thereon. The Lord Ordinary is of opinion that the Court of Session has no right to review or interfere with that judgment: Further, there was reserved by the judgment of 30th May to the complainer his whole objections and pleas to the foresaid libel, or such other proceedings as the Presbytery may adopt. If the law and practice of the Church be as stated by the complainer, he will have an opportunity of stating it to the Church Courts who have the sole cognizance thereof; *Campbell* v. *Presbytery of Kintyre*, Feb. 21, 1843, 5 D. 657; *Lockhart* v. *Presbytery of Deer*, July 5, 1851, 13 D. 1296; *Paterson* v. *Presbytery of Dunbar*, March 9, 1861, 23 D. 720.

"The respondents pressed for judgment on the note of suspension and interdict, and maintained that answers were unnecessary. After a very full and able argument, the Lord Ordinary has given effect to the contention of the respondents, as he considers that on the averments made on the note of suspension and interdict the Court of Session cannot review the proceedings and judgments complained of."

The suspender reclaimed.

JOHN M. GIBSON, in stating the case for him, recapitulated the proceedings of the General Assembly to which exception had been taken, and quoted the grounds on which Lord Mackenzie had proceeded in refusing interim interdict. His Lordship had cited as authorities the cases of *Campbell* v. *the Presbytery of Kintyre*, *Lockhart* v. *the Presbytery of Deer*, and *Paterson* v. *the Presbytery of Dunbar*; but he contended that there was no principle involved in any of those cases which, if carried out, would lead to the result at which the Lord Ordinary had arrived. All of them, in fact, fell short of the case in hand. In the present case he submitted that the elders of Auchtergaven, not having given in their dissent at the proper time, in a court where they were entitled to be present if they choose, were not entitled to go to the Assembly to complain of the Presbytery's judgment. It had been stated in the Assembly that the Court had a right to open up the case in virtue of its *nobile officium*—that when a Presbytery acted inconsistently with its proper duty, it was competent for the Assembly to remit the matter back, and ordain the Presbytery to proceed in order. He was not in the position of denying that the Assembly had a certain and very great inherent power in itself of reviewing and keeping in order the inferior courts of the church, but the cases which had been quoted as illustrating the exercise of the *nobile officium* did not come up to the present case. A case was quoted to the effect that if a member appeared in the House intoxicated, it was in the power of the Assembly to call him to the bar. He did not deny that, nor did he even go the length of saying that the Assembly exceeded its powers in the very strongest case quoted—that of the minister of Whitsome, in the Presbytery of Chirnside. In that case a committee appointed by the Synod of Merse and Teviotdale to examine the records of Presbyteries found, by the records of the Presbytery of Chirnside, that a *fama* had got abroad regarding the minister of Whitsome, that he had appeared before the Presbytery and acknowledged his guilt, and that the Presbytery thereupon censured him, and suspended him for six months. The committee were of opinion that the Presbytery should have proceeded by way of libel; they reported this to the Synod; and the Synod ordered the Presbytery to proceed in that way. On appeal

to the Assembly the decision of the Synod was affirmed, although the minister had already suffered a sentence of suspension. That, however, was a very different case from the present. In that case the ground of complaint was that the Presbytery had not proceeded against the minister by libel, but had accepted a confession and entered into a sort of compromise with him. In Mr Wight's case, on the other hand, there had been a libel and, *ex facie*, a regular proceeding. That, he thought, made a very great difference. It was only fair to suppose that when the Presbytery accepted Mr Wight's plea, having a regular libel and precognitions before them, they were of opinion that it was a plea which did really meet the libel. The sentence passed proceeded upon Lord Belhaven's Act; but if it was competent for parties to go to the Assembly at any time after punishment had been undergone by a clergyman, that Act would never apply. If the procedure of the elders, and the procedure of the Assembly, in this case, was to be held as regular, it would be impossible for a Presbytery to know when it was pronouncing a final sentence. The case was one in which the jurisdiction of the Court of Session was not excluded. Referring to the *Strathbogie* case, he quoted from the judgment of Lord Gillies to the effect that the spiritual courts had no jurisdiction to enforce illegal rules, although made by themselves; and any person injured by their doing so might apply to the Civil Court for redress. After referring in the same connection to judgments given in certain other cases, he submitted that in the present instance the Assembly, by directing the Presbytery to try Mr Wight a second time on the same libel on which he had been already tried, was acting contrary to the laws of the realm. The reverend gentleman had been tried, and competently tried, before a Court which was not only a Church Court, but a Court recognised by the law of the land. Everything which was essential to a proper trial had taken place; the libel had been served; it had been found relevant; the accused had tendered a proper plea, which had been accepted by the judges; sentence had been pronounced; and no appeal having been taken to either Synod or Assembly, the process was closed. It was said that the plea tendered was not a proper plea; but it was no ground for re-opening the case that the Presbytery accepted an improper plea. They were the judges; and if there was any irregularity in the case, that was not a matter which should tell against the accused, who had already suffered his sentence. It might be within the jurisdiction of the Assembly, on going over the records of the Presbytery, and finding what it thought irregularities, to censure the Presbytery; but it had no right to take any steps which would re-open the case as against Mr Wight. The mere fact of irregularities having taken place in a trial did not give the Court the right of trying a panel a second time upon the same charge.

[Some discussion here took place between bench and bar, in the course of which attention was called to the fact that Mr Wight only pleaded guilty to scandalous familiarity, whereas the libel charged scandalous and indecent familiarity.]

Mr GIBSON contended that, admitting the plea was not a right plea to the libel, if the Presbytery accepted it they were barred from proceeding again.

LORD NEAVES asked if it could be regular in the Presbytery to allow a man to plead to something which was not charged against him.

Mr GIBSON did not say whether it was regular or irregular; but, even supposing it irregular, that was not a ground for proceeding again.

LORD BENHOLME asked whether, if the Presbytery's procedure was irregular, the Assembly was not entitled to set it aside.

Mr GIBSON said the Assembly was entitled to censure the Presbytery. Supposing the Presbytery had refused to accept the plea, the complainer would not have been in such a disadvantageous position as he was in now. He had undergone a sentence, and if tried again he might have to undergo a second sentence.

LORD COWAN said that, supposing the plea had been to the alternative charge—of indecent and scandalous familiarity—the question would remain so far as irregularity was concerned—whether the Assembly was not entitled to order the Presbytery to proceed by libel on the higher charge of fornication? Or, supposing the Presbytery had taken a plea of guilty to the whole libel, and then had simply suspended the man, instead of deposing him, could not the Assembly review that sentence? Had it not power to reconsider the whole proceedings; or, supposing it was wrong, had the Civil Courts any power to interfere with the judgment pronounced by the highest ecclesiastical authority established by law in this country?

Mr GIBSON said the way he put it was, that the ecclesiastical court interfered with Mr Wight's civil rights to this extent—that he had already undergone one sentence at the hands of a court which had power to judge what sentence should be pronounced.

LORD COWAN asked whether, supposing the Presbytery had found the complainer not guilty of the whole matter, the Assembly had not power to say he had not been properly tried.

Mr GIBSON said he maintained that it had not power to proceed against him on the same libel and for the same offence.

The LORD JUSTICE-CLERK asked if there was a case where an appeal having been competent, but no appeal having been taken, the matter had been brought up by petition.

Mr GIBSON said there was a case in which it was found that parties who had made no appearance before the Inferior Court, were not entitled to be heard before the Assembly on petition.

The LORD JUSTICE-CLERK asked what irregularity the Assembly found in the Presbytery's procedure.

Mr GIBSON said the irregularity was in accepting a certain acknowledgment as a confession of guilt, and pronouncing sentence thereupon, without disposing of the charges in the libel, to both of which Wr Wight pleaded not guilty.

LORD COWAN said the Court was asked to reconsider that matter, and say that the Assembly was wrong in finding that the proceedings of the Presbytery were contrary to the ecclesiastical law.

Mr GIBSON did not go the length of saying that the Assembly had not the power of passing a resolution to that effect. What he objected to was its ordaining the Presbytery now to proceed.

LORD COWAN asked if counsel drew any distinction between a case occurring in the Established Church and a similar case occurring in a Voluntary Church.

Mr GIBSON thought the question of contract would come more into play in the latter case. In the present case he thought they could not go upon that ground; but even here there was a *quasi*

contract. When the Presbytery agreed to accept the plea, and when Mr Wight accepted their sentence, there was a *quasi* contract that he should not be again proceeded against, and it was a violation of that contract that he should be again proceeded against. On the whole case, he submitted that their Lordships should not decide summarily, but should at any rate pass the interdict, with the view to allowing a full argument.

LEE (Procurator) and KINNEAR, for the respondents, were not called upon.

At advising—

The LORD JUSTICE-CLERK could not say that he had any doubt at all as to the judgment the Court should arrive at. Unquestionably, if he thought it were the law that Church Courts were no more than an inferior civil judicatory in such questions, he should think there was a great deal more difficulty in the case than it occurred to him that there was. That there was bare ground for saying that the complainer did thole an assize he could scarcely doubt. The Presbytery charged him with indecent and scandalous familiarity; that was to say, familiarity with those aggravations; they departed from one of the aggravations—namely, the indecency; and, after dealing with him, accepted his confession, which did not need to be put in any technical way in a Church Court, of scandalous familiarity. They pronounced a sentence which had a civil effect, because it suspended him for six months, and compelled him to pay his stipend to an assistant, under Lord Belhaven's Act. Nobody appealed against that; and if he were to look at all into the practice of Church Courts he should certainly have doubt whether a petition, at the interval of nearly six months after the pronouncing of the sentence, was a competent way of reviewing that sentence. But it was altogether unnecessary for the Court to pronounce any opinion upon that matter. He held that the jurisdiction of the Church Courts was just as statutory as the jurisdiction of the Court of Session. If he could look upon the Church Court as simply an analogous jurisdiction to a Justice of Peace Court, or any inferior judicatory of that kind, there would be a great deal more to say; but he did not think that was the law of this case. On the contrary, he thought that the Church Courts, within their ecclesiastical province, were just as supreme as the Court of Session. Seeing, therefore, that the Church Court had considered the matters in question, and passed a sentence which was within their sphere, and according to their own rules as they had interpreted them, he did not think the Court of Session had any power to interfere.

LORD COWAN was of the same opinion. He did not enter into the question what was the precise character of the procedure before the Presbytery. He thought there was a great deal in this, that the procedure had reference to a minor charge; and it might be that the larger charge, as to which there was no acquittal, might yet be revived by the Church Courts. As regarded the mode in which the matter was brought before the Assembly, he found that the Presbytery were made parties in the case, and were asked what they had to say on the subject of their deliverance, and they made answer, and left the matter in the hands of the Assembly. Then the Assembly, as the supreme tribunal in ecclesiastical offences, whether attaching to the morality of ministers or alleged heretical opinions, entered into the question, and produced a deliverance finding that the Presbytery's proceedings were on the face of them irregular, contrary to the laws and practice of the Church, and altogether null and inept. Having come to that resolution, the Assembly proceeded, in the operative part of their judgment, which was necessary if they were to do anything in the matter at all, to ordain that a new libel should be prepared and carried on by the Presbytery. But before reaching the propriety of the remit to the Presbytery to proceed by libel, it was necessary to get over the preliminary findings in the Assembly's resolution—that the proceedings in question were irregular, contrary to the laws and practice of the Church, and altogether null and inept. He repudiated the idea of a Civil Court being entitled to overrule a deliverance of the Assembly in matters of that kind. He thought the Assembly were supreme for questions that came legitimately and regularly before them—just as much so as the Court of Justiciary. Both Courts stood upon statute. The Court of Session had no right to interfere with judgments of the Court of Justiciary; neither, he apprehended, when the Assembly kept within matters of ecclesiastical law and procedure had the Court of Session power to interfere with the deliverances of the Assembly. It might be that, incidentally and necessarily, the civil interests of the clergyman, or those who were made subject to procedure, might be affected. Every judgment pronounced by the Assembly in reference to a *fama* against a minister had necessarily that effect; but because the civil interests of the man who was found guilty of an offence leading to deposition or suspension should be thereby affected, was that any reason for the Civil Court interfering? By no means. On the whole matter, believing that the Court had no jurisdiction to review the proceedings of the Assembly in this case, he refused to consider whether the proceedings were regular or not, and confined himself to saying, as the ground of his judgment, that they had no jurisdiction to review the proceedings of the Assembly.

LORD BENHOLME said it occurred to him that if there was any force in Mr Gibson's pleading, it was that here was a party called upon twice to thole an assize for the same offence. Now the maxim of not tholing an assize twice was very well known in the Criminal Court, where a verdict had been pronounced either for acquittal or condemnation. A man who had been acquitted of an offence could not be tried again for that offence: a man who had been condemned and suffered punishment could not be tried again for the same offence. But he found no such case here. The libel against Mr Wight charged him with fornication, as also indecent and scandalous familiarity. These were two offences. He might be guilty of the one, not guilty of the other. It seemed he made a certain qualified confession, which did not exhaust either of the charges; but in respect of that confession the Presbytery declined to proceed further with the libel. They neither found him guilty nor not guilty. They did not go on with the libel, and, as the Assembly thought, they failed in their duty. How could it be said that a man tholed an assize twice when he had not been tried at all? It might be said he had been tried already, or at least that he had confessed in a qualified manner to one of the charges; but upon the main and graver charge he had never tholed an assize, or anything analogous to an assize. He pleaded not guilty, and it

had not been determined by the Presbytery whether he was or was not guilty. In these circumstances, the Assembly were of opinion, and he could not say he differed from them, that there had been a total departure from the duty of the Presbytery in not going on with and exhausting the libel; and accordingly, although there was no regular complaint or appeal, they might exercise their supereminent jurisdiction in finding that the Presbytery had proceeded irregularly in quashing the proceedings, and remitting to the Presbytery to exhaust the libel. Could it be said that this was irregular, or that there was any case here of a man being tried twice? He thought it was merely securing that the man should be tried once. Therefore the strength of the case, as involving a double trial, failed, he thought, entirely. If the case had been more doubtful than it was upon the facts, he believed he should have concurred in the opinion that the Court had no jurisdiction. He considered that within their own department, in the trial of ecclesiastical offences, the law of the land gave the Assembly an exclusive and a final jurisdiction. He thought the whole constitution of the Assembly stood upon statute as well as the constitution of the Court of Session or the Court of Justiciary. The whole constitution of the Assembly appeared to him to render them independent of any interferference at the instance of the Court of Session within their own jurisdiction. They might do in justice, but they did it under their own constitution, and the Court of Session had no right to interfere with that which they did within their own jurisdiction. In the present case he could not say that he could see any injustice at all, or that they had done more than redress what appeared to them, and what appeared to him, a very irregular proceeding on the part of the Presbytery. On these grounds he adhered to the Lord Ordinary's judgment.

Lord Neaves was not prepared to say that there might not be proceedings of the General Assembly which the Court of Session might interfere with. If the Assembly sustained a sentence deposing a man for praying for the Queen, he should be inclined to say that was so outrageously unconstitutional that the Court might interfere. But when they were dealing with matters of mere procedure in a matter purely ecclesiastical, he quite agreed that the Court had no power. They were not the judges of ecclesiastical proceedings. Ecclesiastical proceedings were very anomalous altogether. The prosecutor and the judge were the same. That had always been the ecclesiastical law ever since there was any constitution. The Inquisition was both prosecutor and judge, and all Church Courts were more or less inquisitorial. They began by accusing a man upon a *fama clamosa;* they decided whether there was a *prima facie* case for inquiry; and after that the party was libelled; and a great deal took place that the Civil Court could not judge of, and were not entitled to interfere with. Therefore he thought that in the present case nothing had been shown on which the jurisdiction of the Court of Session could be sustained. But at the same time, he thought the case had completely broken down in the way in which Lord Benholme had explained, upon the substance of it. He could not say that it was tholing an assize that a charge against a man was abandoned by the prosecutor's not proceeding with it. On the matter of the fornication, it neither came to guilty nor not guilty. The accused pleaded not guilty, and there the matter dropped. As to the other charge, he must say he quite concurred with the Assembly. It would appear that the law, ecclesiastical or other, had not got into full observance in the Presbytery of Dunkeld. For what was done by that Court? A libel was brought forward containing two charges—the one, fornication; the other, indecent and scandalous familiarity by a minister of the Gospel with a woman, to the disgrace of the sacred profession. The relevancy was objected to, and the libel was found relevant; that was to say, the indecent and scandalous familiarity was found relevant. The Presbytery then proceeded to commune with the accused. He denied the fornication entirely; he denied also the indecency on soul and conscience; but he said he was willing to confess to scandalous familiarity. The word "scandalous," as often used in common conversation, was a vituperative epithet, but looked at strictly, it merely meant a thing that led others to stumble. Now, whether a scandalous familiarity which was innocent and denied anything of guilt formed a relevant charge, he could not take it upon him to say; it certainly was not found so; it was essentially a different charge that was found relevant. An innocent familiarity with a woman that led to scandal or offence to some weak brother or sister standing by was a very different affair from an indecent and scandalous familiarity. Now it was to the modified charge that the accused was willing to plead in a kind of way, and the Presbytery took that plea; allowed the charge to be docked down to that, without a new interlocutor of relevancy; and so the whole thing was got rid of, and sentence pronounced. Now he must say, when that was noticed by any person interested in the parish, it was competent for the Assembly to go back and revise the procedure. He for one should have concurred in holding, if canon law was the same as civil law, that the Presbytery's sentence was null and void—that the plea on which it proceeded was null and void. A plea to part of the charge, denying the indecency, and merely pleading to the scandal, was what in the criminal court would have been regarded as a plea of not guilty. And yet upon such a plea the accused was sentenced. He thought such a sentence was rightly set aside. With regard to tholing an assize, he did not think the complainer tholed an assize on either of the charges. If he had suffered, he had suffered by a null sentence, which by appeal he could have got rid of. In any aspect of the case, it seemed plain that there were no grounds for interference on the part of the Court.

The Court accordingly adhered unanimously to the interlocutor of the Lord Ordinary, with expenses.

Agent for Suspender—W. Spink, S.S.C.
Agent for Respondents—A. J. Menzies, W.S.

Thursday, June 30.

FIRST DIVISION.

NISBET *v.* NISBET.

Judicial Separation—Adultery—Proof. In an action of separation and aliment, one witness alleged that she had seen one act of adultery between the defender and his servant. The