The Jean Clark Memorial Lectures

THE COURTS, THE CHURCH AND THE CONSTITUTION

Aspects of the Disruption of 1843

Lord Rodger of Earlsferry

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A Lord of Appeal in Ordinary

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The Clark Foundation for Legal Education, 5 February 1992.
Jean Clark (Chairman), front row, centre.

Foreword

Jean Clark was born in 1918. A native of Troon, she was educated at St George's School, Edinburgh. She went on to Edinburgh University and graduated MA, LLB in 1943. Soon after, she was admitted as a solicitor and then worked in private practice for many years.

In 1967 a far-sighted President of the Law Society of Scotland appointed Jean to be the Deputy Secretary in charge of the then fledging Public Relations Department and of what was to become the enormously successful Postgraduate Education Department. Jean's care and attention to detail were important elements in the success of both. On a more personal level, behind a quiet and efficient manner, she hid a delightfully mischievous sense of humour, particularly about the pretensions of the great ones of the earth, most of whom, as it turned out, she could have bought out three times over. It was a great loss to the Law Society when she retired in 1980.

Few had suspected that, through her father, one of the founders of Saxone Shoes, Jean was a woman of considerable wealth. But, in fact, during her lifetime she used her wealth to support many good causes and charities – for which she was awarded the MBE. In 1991 she established the Clark Foundation to promote the Law of Scotland and support 'lawyers' who wished to further their studies. The Foundation has been pursuing that aim now for seventeen years.

When Jean died in 2001, she left additional funds to the Foundation. The Trustees decided that the Jean Clark Lectures should be established in her memory. She would have been delighted that, in 2007, the three lectures in the inaugural series were delivered by Lord Rodger of Earlsferry.

Through the Lectures and its other work, the Clark Foundation strives to support the development of Scots Law in ways which are a fitting memorial to a modest but remarkable woman.

Kenneth Pritchard
Chairman of the Clark Foundation
April 2008

Preface

In one sense, the origin of these lectures goes back to the day, about thirty years ago, when, in the (then) dusty back room of Wildy's shop in Lincoln's Inn Archway, I picked up a copy of Robertson's two-volume report of the Court of Session proceedings in the first *Auchterarder* case. Some years later, I bought a copy of Orr's report of the *Free Church* case in the House of Lords. But I would never have got round to writing anything based on these finds without the invitation of the Trustees of the Jean Clark Foundation to deliver the inaugural series of lectures in memory of the late Jean Clark in May 2007. In retrospect at least, I am grateful to them for that stimulus.

The text of the lectures has been substantially revised for publication. In particular, I have added footnotes and expanded the first lecture to cover the *Stewarton* case, which I had to omit from the oral version for reasons of time. Nevertheless, the lectures remain simply lectures: they do not pretend to be the much-needed modern authoritative account of the crisis.

The theme is a constitutional crisis, not only for the Church of Scotland, but also for the courts, and indeed for the country as a whole. What makes the cases which I discuss unusual, if not unique, is the vast amount of available material about them in special law reports, newspapers, pamphlets, books and memoirs. Read in moderation and duly sifted, this material allows us to see how the highly intelligent judges, lawyers and ministers of the day devoted their very best efforts to a subject which was of vital importance to the life of Scotland and of the United Kingdom. Whether they would have admitted it or not, they were all having the time of their lives. Although I have tried to be objective, as a judge, I am instinctively more sensitive to the plight of the judges than their colleague, the non-intrusionist sympathiser, Lord Cockburn, or the authors of the many other, often entertainingly partisan, accounts.

I am grateful to the Trustees for agreeing to the topic, even though – as I realised – they would probably have preferred something rather different. I also appreciate their financial and other assistance in arranging for the lectures to be published by Edinburgh University Press. My main point of contact was with the Chairman of the Trustees, Kenneth Pritchard. Along with Professor Paul Beaumont, he took immense pains with the practical

arrangements for the delivery of the lectures in Aberdeen University on 1–3 May 2007, starting on the three-hundredth anniversary of the United Kingdom. Lord Mackay of Clashfern kindly agreed to preside at the lectures, on a subject about which he knows far more than the lecturer. Behind the scenes, the Pritchards and the Mackays provided me with every kind of assistance and encouragement over the three days in Aberdeen. Sir David and Lady Edward were equally supportive, David having, months before, lent me various books on the Disruption and ecclesiastical history. He and James Mackay also agreed to read a revised version of the lectures, as did Lord Bingham of Cornhill, the Senior Lord of Appeal in Ordinary, Colin Mackay, of BBC Radio Scotland, Sheriff Andrew Bell and Philip Barton, of the Victorian Bar. I have tried to take account of the resulting suggestions, but I alone am responsible for the views expressed.

Among others who have helped in different ways I should mention Lord Hope of Craighead, who has a family connection with two of the main characters in the story and who showed me various items relating to them. John Summers, my judicial assistant at the time of the lectures, verified a number of points for me. Victoria Ailes, my judicial assistant when the text was being prepared for the press, cheerfully and expertly checked the legal citations and helped with the Table of Cases. My thanks also go to my sister, Dr Christine Rodger, two former Procurators of the Church of Scotland, Lord Davidson and Lord Hodge, and to the present Procurator, Laura Dunlop QC. The Depute Clerk of the General Assembly of the Church of Scotland, the Rev. Dr Marjory MacLean, kindly lent me a copy of her unpublished thesis on 'The Crown Rights of the Redeemer'. Lady Davidson provided a number of texts and Frank Cranmer a copy of his unpublished article on the *Percy* case. My former Oxford colleague, Peter Skegg, now Professor of Law in the University of Otago, helped with the Free Church settlement in Dunedin. Members of staff of the British Library, the London Library, the House of Lords Library (especially Andy Zelinger), the National Library of Scotland, the Advocates Library, the Edinburgh Central Library and Glasgow University Library all smoothed my path. So, too, did Esmé Watson, the commissioning editor, and Eddie Clark at Edinburgh University Press, my copy-editor, Helen Johnston, and Moyra Forrest, who prepared the index.

Finally, I am grateful to the Keeper of the Advocates Library for permission to refer to, and quote from, a number of letters in the Advocates' Manuscripts Collection in the National Library of Scotland.

Alan Rodger
27 February 2008

Note on the Terminology

At the time of the Disruption in 1843, as today, the Church of Scotland was organised in a hierarchy of **courts**, with the higher courts having power to review the decisions of lower courts.

At the lowest level was the **kirk session**, comprising the parish minister and his elders. They had jurisdiction over the members of the congregation in matters of discipline.

Above the kirk session was the **presbytery**, made up of the ministers of the parishes within the area covered by the presbytery, for example Glasgow or Edinburgh. The eighty-two presbyteries exercised discipline over the ministers in their area and also ordained and admitted presentees to office as parish ministers. Part of the procedure for the appointment of a minister involved a **call** from the congregation, inviting the person concerned to become their minister. (The status of such calls was disputed.) One of the purposes of the **Chapels Act**, passed by the General Assembly in 1834, but held to be invalid by the Court of Session in 1843, was to include ministers of churches, other than parish churches, as members of the presbytery and higher courts.

Above the presbyteries were the seventeen **provincial synods**, made up of the ministers who were members of the presbyteries within the area covered by the particular synod, for example Glasgow and Ayr or Lothian and Tweeddale. Synods, which usually met twice a year, were abolished in 1992.

Above the synods, and forming the highest court in the Church, was the **General Assembly**, which met in Edinburgh for about ten days each May. It was made up of **Commissioners**, the majority being ministers, and the rest **elders**, appointed annually by the presbyteries. The composition of the General Assembly therefore changed from year to year. The General Assembly was not only the highest court, but was also a forum for debate and a legislature, having the power to pass Acts of Assembly. The presbyteries could send **overtures** (proposals) for discussion by the General Assembly. By virtue of the **Barrier Act** (1697), Acts of the General Assembly were binding on the Church only if they had first been agreed to by a majority of the presbyteries.

Each General Assembly appointed a **Commission of Assembly**, made up of a number of its Commissioners who were given authority to conduct any business (especially legal business) which the General Assembly did not have time to complete, or which arose during the year before the next General Assembly met.

The Church of Scotland was the **Established Church** in Scotland, organised into parishes covering the whole of the country. As the Established Church, the Church of Scotland was officially recognised and protected by the State. The fundamental dispute between the civil courts and the Church came to be over the claim of the Evangelical majority in the Church that, despite its peculiar legal position as the Established Church under the Constitution, it should enjoy independence from any interference by the State and, in particular, by the State courts in any spiritual matters (**spiritual independence**). Proponents of that claim often accused their opponents of **Erastianism**. Using the term rather loosely, they meant that their opponents were in favour of undue subservience of the Church to the State.

For the sake of brevity, I have used the term '**the Disruption cases**' to refer to the various court cases, between 1835 and 1843, which eventually led to the Disruption. In quoting from them and other contemporary materials, I have occasionally modernised the punctuation and capitalisation.

Abbreviated References

Auchterarder Report	Robertson, Charles, *Report of the Auchterarder case: the Earl of Kinnoull and the Rev. R. Young, against the Presbytery of Auchterarder*, two volumes (Adam & Charles Black, Edinburgh, 1838).
Bayne	Bayne, Peter, *The Free Church of Scotland: Her Origin, Founders and Testimony* (2nd edition, T. & T. Clark, Edinburgh, 1894).
Bryce	Bryce, Alexander, *Ten years of the Church of Scotland: from 1833 to 1843: with historical retrospect from 1560*, two volumes (William Blackwood & Sons, Edinburgh and London, 1850). The historical retrospect is separately paginated. The references to volume 1 in the footnotes are to the account which begins after that retrospect.
Buchanan	Buchanan, Robert, *The Ten Years' Conflict*, two volumes (Blackie, Glasgow, 1849).
Cairns	Cairns, David Smith, *Life and Times of Alexander Robertson MacEwen D.D.* (Hodder & Stoughton, London, 1925).
Cameron	Cameron, John Kennedy, *Scottish Church Union of 1900: Reminiscences and Reflections* (The Northern Counties Newspaper and Printing and Publishing Company Limited, Inverness, 1923).
Candlish Memorials	Wilson, William, and Rainy, Robert, *Memorials of Robert Smith Candlish* (A. & C. Black, Edinburgh, 1880).
Chalmers, *What ought*	Chalmers, Thomas, *What ought the Church and the People of Scotland to do now?* (William Collins, Glasgow, 1840).
Cockburn Journal	*Journal of Henry Cockburn, being a continuation of the memorials of his time 1831–1854*, two volumes (Edmonston & Douglas, Edinburgh, 1874).

Cunningham	Cunningham, John, *The Church History of Scotland, from the commencement of the Christian era to the present century*, two volumes (A. & C. Black, Edinburgh, 1859).
Disruption Worthies	Wylie, James Aitken (ed.), *Disruption Worthies: A Memorial of 1843*, two volumes (new edition, Thomas C. Jack, Edinburgh and London, 1881).
Free Church Appeals	Orr, Robert Low (ed.), *The Free Church of Scotland Appeals 1903–4* (Macniven & Wallace, Edinburgh; Hodder & Stoughton, London, 1904).
Guthrie	Guthrie, David Kelly, and Guthrie, Charles John, *Autobiography of Thomas Guthrie, D.D.*, two volumes (Daldy Isbister & Co., London, 1874).
Hanna	Hanna, William, *Memoirs of the life and writings of Thomas Chalmers*, four volumes (Sutherland & Knox, Edinburgh, 1849–52).
Henderson	Henderson, George David, *Heritage: a Study of the Disruption* (2nd edition, revised, Oliver & Boyd, Edinburgh and London, 1943).
Hetherington	Hetherington, William Maxwell, *History of the Church of Scotland from the introduction of Christianity to the period of the Disruption in 1843*, two volumes (7th edition, Johnston & Hunter, Edinburgh, 1852).
Inglis	Anonymous [Inglis, John], 'The Present Position of the Church of Scotland' (1840), *Blackwood's Magazine*, 46, pp. 573–91 (Part I) and pp. 799–812 (Part II).
Lethendy Report	Robertson, Charles Gordon (ed.), *Report of the Proceedings of the Court of Session in the Lethendy Case, the Rev. Thomas Clark … against the Presbytery of Dunkeld and the Rev. Andrew Kessen* (Blackwood & Sons, Edinburgh, 1839).
Life of Rainy	Simpson, Patrick Carnegie, *The Life of Principal Rainy*, two volumes (Hodder & Stoughton, London, 1909).
Macfarlane	Macfarlane, James, *The Late Secession from the Church of Scotland* (William Blackwood & Sons, Edinburgh and London, 1846).
Moncreiff	Moncreiff, Sir Henry Wellwood, *The Free Church Principle: its Character and History* (Edinburgh, 1883).

Omond	Omond, George William Thomson, *The Lord Advocates of Scotland: Second Series 1834–1880* (Andrew Melrose Ltd, London, 1914).
Robertson	Robertson, James, *Observations on the Veto Act* (W. Blackwood & Sons, W. Whyte and Co., A. Brown & Co., Edinburgh; L. Smith, Aberdeen; Smith, Elder & Co., London, 1840).
Ross	Ross, Kenneth Rankin, *Church and Creed in Scotland* (Rutherford Studies, Series One, Rutherford House, Edinburgh, 1988).
Stewart and Cameron	Stewart, Alexander and Cameron, John Kennedy, *The Free Church of Scotland: A Vindication* (William Hodge & Co., Edinburgh and Glasgow, n.d. [1910]), reprinted as *The Free Church of Scotland: The Crisis of 1900* (Knox Press, Edinburgh, 1989).
Stewarton Report	Bell, John Montgomery et al. (eds), *Report of the Stewarton Case, William Cuninghame and others … against the Presbytery of Irvine* (Thomas Clark, Edinburgh, Saunders & Benning, London, 1843).
Taylor Innes	Innes, Alexander Taylor, *Chapters of Reminiscence* (Hodder & Stoughton, London, New York, Toronto, 1913).
Turner	Turner, Alexander, *The Scottish Secession of 1843: being an examination of the principles and narrative of the contest which led to that remarkable event* (Paton & Ritchie, Edinburgh; Thomas Murray & Sons, Glasgow, 1859).
Watt	Watt, Hugh, *Thomas Chalmers and the Disruption* (Thomas Nelson & Sons Ltd, Edinburgh, London etc., 1943).
Wilson	Wilson, John, *An Examination of the claims of the Free Church as advanced by the Rev. R. Buchanan, D.D. in his 'Ten Years' Conflict'* (Paton & Ritchie, Edinburgh, 1850).

When citing law reports I have used the standard abbreviations. They are explained in the annual volumes of the *Current Law Case Citator* (Sweet & Maxwell, London and W. Green, Edinburgh), as well as in the *Cardiff Index to Legal Abbreviations*, which is available on the internet.

Table of Cases

References are to pages in the main text where the footnote occurs.
References to the main discussion of a case appear in bold type.

Lecture 1

The Road to the Disruption

Shortly after half-past two in the afternoon of Thursday, 18 May 1843, in St Andrew's Church in Edinburgh, the Marquis of Bute took his place as Lord High Commissioner to the General Assembly of the Church of Scotland.[1] The retiring Moderator, Dr Welsh, led the assembled ministers and elders in prayer. Then – according to a carefully prepared plan[2] – he begged permission to read out a long protest. He began by declaring that, in consequence of certain proceedings affecting their rights and privileges, which had been sanctioned by the government and legislature, 'there has been an infringement on the liberties of our constitution, so that we could not now constitute this court without a violation of the terms of the union between Church and State in this land, as now authoritatively declared.'[3] When he had finished reading, about three-quarters of an hour later,[4] Dr Welsh bowed to the Lord High Commissioner, took his hat and walked out of the church. He was followed by some 200 ministers.[5] Along George Street they went, down Hanover Street and on to the Tanfield Hall in Canonmills,[6] through crowds mostly waving and cheering but just occasionally hissing.[7] When they arrived at the hall at about a quarter to four, many more ministers and elders were waiting to join them. There they set themselves up as the General Assembly of what soon came to be known as the Free Church of Scotland. The famous Dr Thomas Chalmers, economist, social philosopher and reformer, and a mighty preacher, was elected as the first Moderator.

Given the popular excitement, for some ministers at least, 'if it was hard to go out, it was harder to stay in.'[8] Back in St Andrew's Church, though considerably shaken by the size of the exodus, the remaining ministers and elders tried to set about the business of the General Assembly of the Established Church of Scotland as if not too much had happened. They elected Principal M'Farlan as their Moderator and he took the chair 'amid the mingled applause and disapprobation of the audience.'[9] To one

observer looking down on the proceedings from the gallery, however, it was like looking into a grave.[10] The Disruption had finally come to pass.

After the Disruption – 'the most important event in the whole of Scotland's nineteenth-century history'[11] – the new Free Church quickly proved to be a vigorous and hostile rival to the Established Church. With 474 out of 1,195 ministers, including most of the leading figures, eventually signing the Deed of Demission,[12] the Church of Scotland was split in two. So was much of Scottish society.[13] The consequences can still be detected today – if only in the Free Church, United Free Church and Free Presbyterian Church buildings which are dotted over the landscape of Scotland.

The story of that day, of the events leading up to it and of the sufferings endured after it, was one on which Free Church writers loved to dwell. The bookcase of many a Scottish household used to contain a copy of Brown's *Annals of the Disruption*[14] – 'that most sentimental of books'[15] – or of a similar work written in what some might regard as a quietly triumphalist tone.[16] The tale is less familiar today but, even though we have to go back to the time of *Pickwick Papers* and *Oliver Twist*, it is one that should still be told not only to Scots lawyers, but to anyone with an interest in the British constitution. For at the very heart of those events was a series of decisions of the Court of Session and House of Lords in what would nowadays be described as judicial review proceedings. Indeed, the Disruption occurred because of those decisions.

Outwardly, most of the decisions concerned an unpopular system by which patrons – the Crown or local landowners – presented men to become parish ministers without necessarily consulting the wishes of the parishioners. Of course, that specific problem was finally solved long ago by the abolition of patronage.[17] But, as the cases went on, year after year, another general issue, of perennial interest far beyond the confines of the Church, came to dominate them.

When the Church defended the cases, it argued that, under the constitution of the Church of Scotland as enshrined in the Treaty of Union of 1707 and the implementing legislation, in all spiritual matters the Church of Scotland and her courts were not subject to the jurisdiction of the Court of Session or House of Lords. The Church courts were sovereign in their own ecclesiastical sphere and could ignore any decisions of the secular, that is, civil, courts which intruded into that sphere. So, where a statute applied within that ecclesiastical sphere, the civil courts could do nothing to make the Church courts comply with it. The majority of the Court of Session and then the House of Lords rejected that claim. The Government and Parliament backed them. The result was the Disruption, when those

ministers and members who felt unable to accept what they saw as a loss of their 'spiritual independence' from the State courts left the Established Church, while proclaiming that the Free Church was now the true historic Church of Scotland.

It is appropriate to mark the three-hundredth anniversary of the Act(s) of Union by concentrating in this lecture on some of the constitutional aspects of the dispute – in particular, on how the Church reacted to the judgments of the courts and on how those who eventually left the Established Church saw the constitutional position.[18] Nowadays, we tend to think of constitutional disputes as involving some issue as to the powers of the executive or of the legislature. Even today, however, the Church of Scotland has its place in the constitution of the United Kingdom. Make no mistake: the battle which developed all those years ago between the courts and the majority party in the Church was in every sense a constitutional struggle and was regarded as such at the time, even if the two sides saw the issue differently.

For the majority party in the Church, the Court of Session and House of Lords were defying the constitution as laid down in the Act of Union. Lord Moncreiff encapsulated that position when he asked whether the church:

> is not an essential and component part of the constitution of the realm, whose independent powers, judicial and legislative, are even more sacred and inviolable than the powers and jurisdiction of the highest civil and criminal courts of the country. These may be changed or taken away, as they have often been. The others cannot be invaded in any vital point, without a direct breach of what is fundamental and essential in the political state of the United Kingdom.[19]

By contrast, the majority judges and the House of Lords thought that the Church was defying the authority of the law of the land. When the presbytery of Auchterarder complained of the hardship of being held liable in damages for acting according to their consciences, Lord Campbell declared:

> I do not think, my Lords, that where the law is clear, the hardship of being obliged to obey it is a topic that can be listened to in a Court of Justice. There can be nothing more dangerous than to allow the obligation to obey a law to depend upon the opinion entertained by individuals of its propriety, that opinion being so liable to be influenced by interest, prejudice, and passion; the love of power, still more deceitful than the love of profit; and that most seductive of all delusions, that a man may recommend himself to the Almighty by exercising a stern control over the religious opinions of his fellow men.[20]

The resulting clash could be presented to the public in stark terms. For, instance, at one point in 1839, Hugh Miller, the main public apologist for the dominant party in the Church, seemed to warn, or threaten, the judges that they should consider their fate in a revolution that they risked provoking:

> But the aged judges, the wealthy patrons, the delicately nurtured aristocracy of Scotland, the men who have so much to lose, which in a popular convulsion could not fail to be lost, nay, even the more eloquent orators, and more vigorous thinkers of the age, who have yet to give their first proof of military talent – what fate do they augur to themselves![21]

Three years later Dr Chalmers warned the judges that, in trampling on the liberties of the Church courts, they were engaged in 'a sort of genteel chartism' which the multitude below might follow and so embark on a course of anarchy.[22] Addressing a meeting of tradesmen in January 1843, the Rev. Dr James Begg earned loud cheers when he worked himself up to a ringing declaration that 'The foundation principles of the Constitution have been subverted, and, no matter whether that is done by mobs or patrons, by judges or senators, in that consists not only the beginning, but the very essence of Revolutions.'[23] On the other side, a week later, Dean of Faculty Robertson declaimed to the judges of the Court of Session:

> But, my Lords, if there is to be a secession – if they will separate from the State – do not let those parties imagine they can shake the fabric of our glorious constitution. … If they will not read your Lordships' judgments in calm deliberation, let them read them in the imploring looks and the tearful eyes of their wives and children. If, however, it must be otherwise – while I cannot look upon the alternative without distress – I can look upon it without dismay; for I know that not only will the constitution stand unshaken, and that the majesty of the law will not be dethroned, but that there are numbers, equal in learning, in zeal, and in piety, to those who may secede, ready and sufficient to supply the wants of the Established Church of Scotland.[24]

Rather more sedately, John Inglis, the future Lord President of the Court of Session, protested against fallacies couched in loose and popular language being addressed to a portion of the community that 'neither their education nor their mental habits have fitted … to sit in judgment on a question of constitutional law.'[25]

Though largely forgotten by law students and practising lawyers today,[26] this, then, is easily the most important constitutional dispute to have confronted the Scottish courts since the Union.

In order to understand how the constitutional crisis developed, we have

to pay some attention to the actual dispute on patronage which came before the courts. Its origins are to be found in the time when the idea of a Union between England and Scotland was under discussion in Scotland.[27] The Church of Scotland was initially suspicious. It feared that, if Scotland and England were united, this would threaten the recently attained position of the presbyterian church as the Established Church in Scotland. To avoid that danger, the Scottish commissioners were forbidden to discuss the position of the Church when negotiating the terms of Union. In addition, the Scottish parliament passed the Protestant Religion and Presbyterian Church Act 1707[28] ('the Act of Security'), under which 'Presbyterian Church Government and Discipline' was to 'Remain and Continue unalterable.' The terms of that Act and the Establishment which it embodied were to be observed 'as a fundamentall and essentiall Condition' of the Treaty of Union as ratified, confirmed and approved by the Scottish[29] and English[30] parliaments.

Less than five years after the Union, however, the United Kingdom Parliament passed the Church Patronage (Scotland) Act 1711[31] which made a significant change in the government of the Church of Scotland by reintroducing a system of patronage. That is to say, the Crown or a local landowner could nominate a man, who had been licensed by the Church as a preacher, to fill a vacancy for a minister in a parish. In terms of section 1 of the Act, the presbytery was obliged to receive and admit those who were presented in the same way 'as the persons or ministers presented before the making of this act ought to have been admitted.' Although the point was disputed, this was interpreted as being a reference back to a provision in an Act of the Parliament of Scotland, 1592 c. 116, under which presbyteries 'be bound and astricted, to receive and admit quhatsumever qualified Minister, presented be his Majestie, or laick patrones.' In other words, the presbytery could check to see that the person presented was 'qualified' – the term was not defined. But, if he was indeed 'qualified', the presbytery was bound to receive and admit him. No mention was made in the Act 1592 c. 116 of what was to happen if the presbytery failed to carry out this duty. A widely held view, however, was that the only sanction was to be found in the next Act of the same year, c. 117, under which the patron was entitled to retain the fruits of the benefice if the presbytery failed to perform its duty.[32] In 1814 this provision had been amended to give the right to the fruits to the Church Widows' Fund.[33]

The Patronage Act was bitterly resented by the Church and was denounced as being incompatible with the guarantees in the Act of Union. Indeed, each year until 1784, the General Assembly would formally protest about the passing of the 1711 Act. To no avail: the Act

remained on the statute book and, for many years in the later eighteenth century, little attention was paid to the views of the congregations.

One feature of this controversy about the Patronage Act is particularly worth noticing. During the first hundred years after it was passed, the Court of Session dealt with many disputes under the Act. But no one, whether counsel or judge, suggested that the court could solve the problem by simply holding that, since the Treaty of Union had made the government of the Church of Scotland unalterable, Parliament had had no power to pass the Patronage Act and so it was not to be regarded as law. This is a factor to be taken into account when considering the well-known remarks of Lord President Cooper in *MacCormick* v *Lord Advocate*[34] about a possible power in the Court of Session to hold an Act of Parliament invalid because of its inconsistency with a guarantee in the Act of Union.

Lord Cooper famously declared that 'The principle of the unlimited sovereignty of Parliament is a distinctively English principle which has no counterpart in Scottish constitutional law.'[35] He did not deign, however, to explain what the Scottish position was. Despite this, especially in the debates before 1998, supporters of devolution tended to rely on the same idea.[36] It always seemed likely, however, that, on investigation, the actual position regarding sovereignty in pre-Union Scotland would turn out to be quite complex. Thanks to more recent research,[37] we now have a clearer picture and it does indeed appear that the position was by no means straightforward. While Stair considered that the Court of Session had a power not only of interpretation but of derogation of Acts of Parliament,[38] the seventeenth-century judges themselves acknowledged that they 'could not be Judges to annul an Act of Parliament, which was clearly conceived and had no difficulty in the interpretation' because 'it was not within their Judgment to decide, whether it was justly or unjustly Statute.'[39]

But could the judges have annulled an Act of Parliament on the ground that it was inconsistent with some previous statutory provision which was said to be 'fundamentall' or 'unalterable'? In England, the doctrine of the sovereignty of Parliament would have suggested that they could not. When the terms of the proposed Union were under consideration, there was indeed considerable discussion in Scotland as to whether, by declaring a provision to be 'fundamentall', a legislature could prevent its subsequent repeal or alteration.[40] There appears to have been a range of views, among politicians and theorists at least. By its very nature, the issue is not one that practitioners or judges would have had much, if any, occasion to consider in court. But the failure to challenge the Patronage Act suggests that in those days there must have been a settled view among Scottish practitioners and judges that an Act of Parliament could not be challenged

on the ground that, by reason of the Act of Union, it was beyond the powers of Parliament. With the exception of the *Factortame*[41] line of decisions relating to European Community law, the courts have adhered to that position on the sovereignty of Parliament ever since.[42] Of course, in a spirit of 'never say never', some of the speeches in the House of Lords in the first foxhunting case, *R (Jackson)* v *Attorney General*,[43] contain characteristically bold, or cautious, speculations about the possible fate of a provision passed by the House of Commons alone and purporting to extend the life of Parliament, contrary to the Parliament Acts 1911 and 1949. Having easily resisted the temptation to join in those speculations in my speech, I shall equally easily continue to resist it on this occasion.[44]

Back in the eighteenth century, the Church of Scotland was dominated by ministers appointed under the system of patronage who were well educated, rather effective in debate with the rationalist critics of the day, good at composing elegant sermons, and of some social standing – but rather lacking in enthusiasm. They came to be known as 'Moderates'.[45] By the beginning of the nineteenth century a spirit of change was abroad in the Church.[46] The 'Evangelicals', as they were called, thought that a more vigorous, and indeed more popular, approach was needed if the Church was not to haemorrhage members to more dynamic churches outside the Establishment.[47] Until his sudden death in 1831, the Evangelicals were ably led by the Rev. Andrew Thomson, who was a renowned preacher and the first minister of St George's, the great new church standing in Charlotte Square, at one end of Edinburgh's fashionable New Town.[48] After 1831 the leadership of the Evanglicals passed to Dr Chalmers. Year by year, the Moderates and Evangelicals eyed one another warily across the floor of the General Assembly, as the strength of the Evangelical party increased. In 1834 the Evangelicals took control of the General Assembly.

By that time, in the heady atmosphere after the passing of the Reform Act of 1832, opponents of patronage[49] were flooding the new Parliament with petitions demanding its abolition. Taylor Innes captures the mood:

> It was now the third[50] decade of the nineteenth century. All around there was a warm wave of revolution or reform. The Catholics had been emancipated. Parliament had been reformed. The new electorate seemed to have made up its mind that in Scotland, too, there should be no exclusive Church privileges and no Church penalties. In 1833, in Edinburgh alone, 846 persons were prosecuted for a Church tax; and those imprisoned and liberated were carried in triumph to their homes.[51]

Inside the Church the Evangelicals, too, felt that that it was wrong for lacklustre Moderate ministers to be 'intruded' on congregations without

their consent. Those who took this view were known as 'non-intrusionists'.

What was to be done? Some favoured the total abolition of patronage as wrong in principle. Others – conscious, perhaps, that they themselves were the products of patronage[52] – argued that the system was not fundamentally unsound: all that was needed was to find a way for the congregation to express its views about the suitability of the man presented by the patron.

Although for many years the General Assembly had taken a lax view of the relevance of any dissent of the congregation to the induction of a particular presentee, Dr Chalmers and others thought that any problems with the operation of patronage could be solved by the Assembly changing tack and giving weight to parishioners' objections. The perceived difficulty with this proposed remedy was that, with the composition of the Assembly fluctuating from year to year, different Assemblies might take different views and the position might well not settle down for some time. A more decisive solution was needed.[53]

The General Assembly of the Church had power to pass legislation, somewhat in the same way as other corporations,[54] such as local authorities, have powers to pass by-laws. So the Evangelical party finally decided to propose such an Act which would give increased power to congregations to reject presentees. The Act would then be ratified by the Church as a whole and enacted by the General Assembly under the Barrier Act. This course was advocated by Lord Moncreiff, who was not only a Court of Session judge but a prominent Whig, an elder of St George's, and one of the lay leaders of the Evangelical party in the General Assembly. He was, in fact, opposed to the abolition of patronage and saw this kind of legislation as a way to head off demands for the popular election of ministers.[55] By contrast, radical opponents of patronage criticised the idea of such an Act, on the ground that it would be the first measure to have been adopted by the Church which acknowledged the lawfulness of patronage.[56] Subsequently, one strand of criticism was indeed that, by abandoning the Church's traditional opposition to patronage as being fundamentally inconsistent with the parishioners' right of election and by trying, instead, to regulate it, Lord Moncreiff and the other authors of the Veto Act had brought patronage into the realm of ecclesiastical law. They should therefore bear the blame for creating the conflict with the civil law which engulfed the Church.[57]

When Lord Moncreiff and his allies decided to proceed by passing an Act, they were well aware that Moderate opponents would challenge it on the basis that an Act of the General Assembly could not interfere with the rights of patrons and presentees under the ordinary civil law of the land.

The Evangelicals were confident of seeing off the challenge. In part, their confidence was based on the stance of Lord Moncreiff, with his store of learning on ecclesiastical law.[58] His friend, the Lord Advocate, Francis Jeffrey, had also made reassuring noises about the kind of Act they had in mind.[59] So had another of his friends, the Solicitor General for Scotland, Henry Cockburn, who had voted for an earlier version of the Act put forward by Dr Chalmers in 1833.[60] At their instigation, Lord Moncreiff was summoned to London to give evidence to a House of Commons committee on patronage in March 1834. While in London, he stayed with yet another old friend, the Lord Chancellor, Lord Brougham.[61] Jeffrey and Brougham took the opportunity to discuss with Lord Moncreiff what evidence he should give.[62] According to Jeffrey, Lord Moncreiff's evidence, in which he referred to the possibility of the General Assembly legislating on the point, was 'most impressive and apostolic' and had a decisive effect on the Committee.[63]

A couple of months later, meeting in the Tron Church[64] in Edinburgh on 27 May 1834, on the motion of Lord Moncreiff, the General Assembly passed an 'Act on the Calling of Ministers' and, with it, 'terminated the reign of Moderatism in the Church of Scotland.'[65] The Act was given interim effect and, the following year, became a fully fledged Act of the Church by the operation of the Barrier Act. In effect, the Act and the accompanying Regulations meant that, if a majority of male[66] communicant heads of families in a parish objected to the presentee, even without giving reasons, the presbytery was bound to reject him. In this way the male heads of families had a veto on any appointment.[67] Hence the nickname, 'the Veto Act', which stuck, despite the repeated protests of its supporters. Shades of Mrs Thatcher's Poll Tax. Reassuringly for the Evangelicals, both the Attorney General, Sir John Campbell,[68] and Lord Chancellor Brougham[69] went out of their way to express their support for the Act. More ominously, both Lord President Hope and Lord Justice Clerk Boyle voted against it in the General Assembly.[70] Still more ominously, the Lord President's son, John Hope, the Dean of the Faculty of Advocates, had his dissent specially recorded.[71]

Two days after passing the Veto Act, the Assembly went on to deal with another matter that was destined to cause trouble.[72] Scotland was divided up, for both ecclesiastical and civil purposes, into parishes. The ministry of the Church was organised on the basis of these parishes, each parish having a church, a minister of that church, a manse and, in landward parishes, some land, known as the 'glebe', which the minister could cultivate. It was settled that the church, the churchyard, the manse and the glebe were subject to civil, as opposed to ecclesiastical, law. The

heritors (landowners) of the parish paid a duty, known as a 'teind', and the minister was entitled to be paid his stipend out of the teinds of the parish. But, with the growth in population and its movement into the towns and cities, by the beginning of the nineteenth century this traditional parish structure was proving unsuitable. In many areas it would have been simply impossible for the minister to look after all the people in his parish. In theory, the difficulties could have been overcome by asking the Court of Session to reorganise the existing parishes and to create new parishes under the Act anent Plantation of Kirks etc. 1707.[73] But the procedure under the Act required the consent of landowners possessing at least three-quarters of the valued rent of the parish and, in practice, that consent was hard to obtain.

Therefore, when faced with the need for additional church accommodation, some local communities simply raised funds, built a new church and secured the services of a minister whose stipend they also had to pay. Many of these ministers were young and enthusiastic Evangelicals, eager to spread the gospel to people who had previously been beyond the reach of the Church. The Church would recognise these churches as 'Chapels of Ease'. The ministers of Chapels of Ease saw themselves as being at a disadvantage by comparison with parish ministers, however: they had no definite sphere in which to work, had no kirk session and could not sit as members of the presbytery. 'In other words, they were permitted to teach but not to rule.'[74] In an age of Church Extension,[75] these complaints could not be ignored indefinitely. Into this matter, too, party rivalries obtruded. The Evangelicals tended to favour, and the Moderates to oppose, giving full rights to the ministers of the Chapels of Ease because so many of them were Evangelicals who would reinforce the strength of that party in the church courts, especially in the General Assembly. In the 1833 General Assembly the Moderates narrowly defeated a proposal to deal with the problem. It was to be their last great victory.

The following year, the General Assembly, with its new Evangelical majority, passed the so-called Chapels Act,[76] which in effect put the ministers of Chapels of Ease on an equal footing with ordinary parish ministers. They were to be enrolled in the presbytery and to be eligible to sit in all the courts of the Church. Kirk sessions were to be formed and each church was to have a district assigned to it as a parish *quoad sacra* – for ecclesiastical purposes only. For all civil purposes, the old parishes would remain the same. Since it had become clear that the Government was not going to provide the Church with funds to endow new churches, this was the best that could be done.

With the Veto Act and the Chapels Act in place, the stage was set for

the constitutional battles that were to be played out in a society where public interest in Church questions was already intense.[77] The occasion for the first battle, in what was to prove a long war, soon presented itself in a dispute over patronage.[78]

The patron's right of presentation under the Patronage Act was part of the civil law of the land and could be bought and sold with the land to which it was attached. The Veto Act was liable to reduce the value of that right by making the outcome of any presentation less certain. Even after the Act, however, in practice most of the patrons' nominees were inducted. But not all. In September 1834, little more than three months into the new regime, the Earl of Kinnoull presented 'Mr Robert Young, preacher of the Gospel, residing at Seafield Cottage, Dundee' to be the parish minister at Auchterarder.[79] Unfortunately, after Mr Young had preached on two Sundays, only two people signed his call and, when an opportunity was given to the male heads of families to express their view under the Veto Act, 287 out of a possible 330 recorded their dissent from Mr Young's call. After an adjournment for two weeks for reflection, all but one of the opponents adhered to his dissent. In terms of the Veto Act, the presbytery then held that the call was not a good one. Mr Young appealed on certain procedural points to the synod and from there to the General Assembly of 1835. On the motion of Lord Moncreiff,[80] his appeal to the Assembly was, in substance, dismissed. The case was remitted to the presbytery, which proceeded to reject Mr Young. This time, though an appeal to the synod was marked, he did not proceed with it.[81] Before we lose sight of Mr Young as an individual, it is right to mention that, when he was eventually appointed after the Disruption, he proved a successful and respected parish minister of Auchterarder until his death in 1865.[82]

In his appeal to the synod, Mr Young had been represented by George Patton, the future Lord Justice Clerk. Before the General Assembly, Mr Patton remained one of his counsel, but he was led by Thomas Maitland, who later became Lord Dundrennan. At some stage Mr Young's case came to the attention of the Dean of the Faculty of Advocates, John Hope, the ultra-fervent supporter of the Moderates who had spoken and voted against the veto in the General Assembly. Robert Whigham, another advocate and long-time Moderate member of the Assembly, also became involved. Between them, in October 1835, Hope and Whigham raised an action in the Court of Session on behalf of Lord Kinnoull and Mr Young, challenging the decision of the presbytery of Auchterarder to reject Mr Young.[83] The General Assembly backed the presbytery.

In their summons the pursuers sought declarators (that is: declarations) that Mr Young had been validly presented to the parish and that the

presbytery were 'bound and astricted to make trial of the qualification of the pursuer, and are still bound so to do.'[84] The pursuers also included a conclusion (that is, a claim) that, since the presbytery had unlawfully rejected Mr Young, the heritors of the parish should be ordained to pay him the minister's stipend 'in time coming, during the life of the pursuer.'[85] In its defences the presbytery pointed out that no such conclusion could properly be directed against it since the presbytery had nothing to do with the payment of stipend.[86]

Faced with that objection, counsel for the pursuers confined themselves to asking the court to grant a declarator that the presbytery was bound to make trial of Mr Young's qualifications. The presbytery responded by contending that, when not accompanied by the pecuniary conclusion relating to the stipend, this conclusion raised no issue of civil law, but only one of ecclesiastical law.[87] The majority of the court rejected that submission.[88]

Another rather technical point attracted Lord Fullerton and Lord Moncreiff. In their summons the pursuers simply relied on the presbytery's statutory duty under the Act 1592 c. 116 to make trial of Mr Young's qualifications. They did not mention the Veto Act or have a conclusion asking the court to pronounce on its validity.[89] By contrast, the presbytery had, of course, to refer to the regulations made in relation to the Veto Act in order to explain why it had rejected Mr Young and why, in its view, the rejection had been lawful.[90] The pursuers simply argued that this defence was bad since the Veto Act had been *ultra vires* the General Assembly and so could not provide any legal justification for what the presbytery had done. Nevertheless, because the pursuers had not framed their pleadings so as to raise the issue of the validity of the Veto Act, and the General Assembly was not a party to the proceedings, Lord Fullerton and Lord Moncreiff considered that the court should not rule on the validity of the Act.[91] This somewhat over-refined argument, which really ignored the realities of the situation, did not find favour with the majority judges, or indeed with Lord Jeffrey.[92] The House of Lords also rejected it.[93] So the issue of the validity of the Veto Act was in fact determined in the proceedings, even though there was no conclusion in the summons relating to the point and, therefore, no mention of the Act in the court's formal order.[94]

Counsel's arguments before all the judges of the Court of Session took ten days in November and December 1837. The hearing does not appear to have attracted much attention at the time. To those familiar with the ways of modern courts the proceedings are notable for the very few interruptions from the judges. Since Lord Cockburn comments on Lord Jeffrey's usual tendency to intervene during hearings,[95] it may be that,

because all the judges were sitting, they felt the need to exercise restraint if the hearing was not to be interminable.[96]

The argument for the pursuers was essentially simple. Taken in conjunction with the Act 1592 c. 116, the Church Patronage (Scotland) Act 1711 provided that, if, after taking him on his trials, the presbytery found that a presentee was indeed qualified to serve as a minister, then the presbytery was bound to induct him into the charge. It was therefore its statutory duty to take him on trial.[97] In so far as the Veto Act cut across that statutory duty, it should simply be ignored. The Court of Session should accordingly declare that, by refusing to take trial of Mr Young's qualifications, the presbytery had acted illegally and in violation of its statutory duty.

It is important to remember that the pursuers had not proceeded with an appeal against the presbytery's final decision to reject Mr Young as parish minister of Auchterarder. So the case raised a question about the power of the Court of Session in these circumstances to review a decision of the presbytery, as a court. But, strictly speaking, it raised no issue about the power of the Court of Session to review a judgment of the General Assembly, as a court deciding an appeal relating to the induction of a presentee. That question was to come before the Court of Session in later proceedings.[98] On the other hand, the case was treated as raising an issue about the power of the General Assembly, as a legislature, to legislate in relation to the induction of a presentee. In that connection counsel for the Church argued that the Veto Act could not be *ultra vires*, since it had actually done nothing more than the Assembly could have done in a series of decisions in its judicial capacity.[99] To deal with that argument, the judges sometimes strayed into the issue of the Court of Session's power to control the General Assembly in its judicial capacity.[100]

The presbytery's principal defence was radical. While making various points about the proper interpretation of the Patronage Act, the presbytery's main thrust was to challenge the jurisdiction of the Court of Session to deal with the matter. The argument started from the fact that the case concerned the procedure leading to the possible ordination of Mr Young as a minister. Ordination was a spiritual matter and so, the argument ran, everything relating to it lay within the exclusive (spiritual) jurisdiction of the Church courts which, as courts of the Established Church, were an important, distinct and indeed unalterable element in the constitution of Scotland as found in the Act of Union. The General Assembly, at the top of that separate court structure, was just as much a national supreme court in ecclesiastical matters as the Court of Session or House of Lords was in civil matters or the Court of Justiciary in criminal

matters. So, even if the presbytery was bound by the Act 1592 c. 116 'to receive and admit' Mr Young, that statutory obligation related to a spiritual matter within the exclusive jurisdiction of the Church courts. If the pursuers were unhappy with the presbytery's decision to reject Mr Young, their only remedy was to appeal to the synod and then to the General Assembly, whose decision would be final. Even if the Court of Session considered that the decision of any of the Church courts was wrong, it could not interfere to put it right or even to declare that it was unlawful – just as the (civil) Court of Session could not interfere to correct a decision of the (criminal) Court of Justiciary that it thought was wrong. Quite simply, it was no business of the Court of Session.

Andrew Rutherfurd, the talented but haughty Solicitor General for Scotland in Lord Melbourne's ministry,[101] put the point for the presbytery in this way:

> There is no question, my Lords, that in this country the majesty of the law is all in all: the majesty of the monarch is but a reflex of the majesty of the law. But the majesty of the law shall then be best consulted when the different courts of this country keep themselves in the exercise of their powers, within their proper jurisdiction; and do not commit encroachments on the peculiar provinces of each other. … It would be 'confusion worse confounded,' and not only would the majesty of the law be insulted and degraded in such a contest, but law itself would be lost or destroyed, were those courts, which are her authoritative organs, to come to a conflict, which the constitution, not deeming possible, has provided no means of determining, but which could only be settled apparently by the weight of the mace, and the physical force of the officers and apparitors of the court.[102]

So stated, this was a formidable argument and one which the minority judges in the Court of Session accepted and applied, time and again, as the same point came up in case after case.[103] But it was bedevilled by a qualification which greatly complicated matters. As the General Assembly and presbyteries must have known very well when they passed the Veto Act, it did inevitably affect 'in some degree' the civil interests of individuals.[104] In so far as it did so, the Church admitted that the Court of Session had jurisdiction. In effect, therefore, you could have two courts dealing with the same issue, one with its civil and one with its ecclesiastical effects. For the Moderates, John Inglis dismissed the idea that there could be ever be room for a collision of this kind between the Court of Session and the Church courts: 'Collision! This is the collision between a sovereign and his subject, between the law and the lieges, between the judge and the litigant.'[105]

On the Church's approach, however, interpreting and applying a statute

in one way, the General Assembly might authorise someone's induction as the minister of a parish, while, interpreting and applying the same statute differently, the Court of Session might simultaneously hold that he was not entitled to occupy the manse or to cultivate the glebe. The General Assembly would be deciding on 'the spiritualities', the Court of Session on 'the temporalities'. Both decisions would be 'correct' and the Court of Session had no jurisdiction to force the Church courts to apply its interpretation. In theory, therefore, a time could come when, all over Scotland, Established Church manses lay empty and the glebes untended, when presentees idled away their time without a charge, and when the ministers admitted to the charges by the presbyteries could not claim the stipend for carrying out their duties in the parish and would have to be supported from funds raised by their parishioners.[106] It would amount to creeping disestablishment.[107]

There was, of course, a further complication which even the most determined apologists for the doctrine admitted was difficult to resolve: who had the final say on whether some particular matter fell to be regarded as civil or ecclesiastical – the Court of Session or the Church courts?[108]

When the judges came to announce their decision in February and March 1838, the court room was unusually crowded and a number of Edinburgh ministers were there to see the outcome.[109] They had a long wait ahead of them since the judges took six days to deliver their judgments, which ran to about a quarter of a million words.[110] By a majority of eight to five, they found in favour of the pursuers and against the presbytery.[111] By the time the old and frail Lord Glenlee made a special trip to court to give his opinion on 6 March, the Church was plainly in difficulties. The courtroom and its gallery were filled with spectators, including leading clerical figures, eagerly watching the drama unfold. Something of the tension within the court emerges from the different reactions when it turned out that Lord Glenlee was supporting the presbytery. The majority judges suddenly stopped being studiously courteous to him, while Andrew Rutherfurd, the Solicitor General, turned to the bench and looked to Lord Moncreiff, 'with the smallest possible wink – small, yet marked enough to say, "Is that not capital?"'[112]

The majority of the judges rejected the Church's argument on jurisdiction. They held that, since the Veto Act had led to Mr Young's rejection as the parish minister, it had interfered with both pursuers' patrimonial interests – a very elastic concept[113] – and so with their civil rights. This was enough to bring the matter into the jurisdiction of the Court of Session. But, critically, they also held that, where the statute said that the presbytery was bound to take a presentee on trials, the Court of

Session had jurisdiction to decide whether the presbytery had performed that duty and the Church courts had no power to contradict that determination.

The opinion of Lord President Hope may be taken as embodying the majority view. He had to remark, he said,

> that in every civilized country, there *must* be some court or other judicature, by which every other court of judicature may be either compelled to do their duty, or kept within the bounds of their own duty. Without this the greatest public confusion must follow, and often great injustice to individuals.[114]

By passing the Veto Act the Church had purported to give

> supreme and omnipotent control of heads of families over the *civil and patrimonial and parliamentary* rights of the patron and his presentee. It is sometimes said that Parliament is omnipotent; but our Church goes a step farther, and plays viceroy over Parliament itself.[115]

In short, the Lord President is saying that the Court of Session must be able to step in, not only to stop such interference with the civil rights of patrons and their presentees, but also to maintain the authority of Parliament. Already, right at the very outset, he is emphasising the wider, constitutional, significance of the issue which all these Disruption cases raise. That same constitutional dimension is seen in the references that he and other judges make to major English constitutional cases, such as *Burdett* v *Abbott*,[116] *Stockdale* v *Hansard*[117] and *Ashby* v *White*.[118]

In his judgment, Lord Gillies commented:

> If the Church can pass resolutions like that against intrusion, the effect of which, as the defenders say, is to render a political matter an ecclesiastical matter, and to convert the one into the other; and if, in virtue of such resolutions, the Church is entitled to pass laws like the *veto* act, regulating such matters; and if finally these matters are to *take end* in the church courts, their powers are indeed transcendant.[119]

The view of the minority judges on the crucial question of the jurisdiction to control the presbytery can be seen from Lord Jeffrey's declaration that:

> though a court should act *ultra vires*, still if it were acting within its own proper province, or in relation to that class of cases or interests to which it alone was competent, no other court can encroach upon that province, or go beyond its own, either to correct or to declare that excess or illegality – the remedy in such an extremity being in parliament alone.[120]

One legal critic spoke of Lord Jeffrey

> displaying the same ingenuity and brilliancy as a judge, which he has so

> often displayed as a reviewer, in bolstering up an infirm cause. But even his as well as the others' arguments on this head are very similar to those by which the House of Commons and its advocates lately sought, though happily without success, to establish the total exemption of *their* functionaries from the jurisdiction of courts of justice, about as candid, about as rational, and about as constitutional.[121]

The majority judges also resolved the question of *Kompetenz-Kompetenz*, as it is called today in European law circles, against the Church. They held that the Church courts could not determine the extent of their own ecclesiastical jurisdiction. It was for the Court of Session to fix the appropriate dividing line between civil and ecclesiastical matters. Perhaps the point of view of the majority was put most succinctly by Lord Wood in the later *Stewarton* case. He said that the question whether anything ecclesiastical does or does not fall within the independent and exclusive jurisdiction of the Church is itself 'a civil, not an ecclesiastical question – and it is one which the Supreme Court has jurisdiction to entertain and decide.'[122] Just because the Court of Session had no ecclesiastical jurisdiction, it did not follow that it had no jurisdiction to determine whether

> in any matter ecclesiastical in which the Church asserts its power to act and judge, the Church really possesses such power or not. I think that that is a question which legitimately falls within the jurisdiction of the Court.[123]

The opposing view of the Church, that it could determine the scope of its own exclusive ecclesiastical jurisdiction, left it open to the criticism that it was claiming a sacred and unique right:

> that authority, when exercised within the ecclesiastical department as defined by ecclesiastics, is superior to the civil power, even should the exercise of their authority be followed with secular effects of great temporal concern. In regard to the secular evil, they tell their opponents that they must rest without redress, if it arises from an ecclesiastical concern that can be settled only under the jurisdiction of the Church. When contrasted with spiritual interests, which are of importance in the eye of the Church, patrimonial interests are to be set aside and forgotten, as things that were, but now are lost and for ever, at the bidding of churchmen.[124]

When the decision of the Court of Session was finally announced, the leaders of the Evangelical party in the Church professed themselves horrified by the majority judgments. They had assumed that the Established Church of Scotland and her courts were a separate and independent element in the British constitution of 1707. It now turned out that the Acts which she passed and the decisions which her courts reached were

subject to review by the Court of Session if, in its view, they interfered with a civil right. The cry went up: the Court of Session is encroaching on the territory of the Church and her courts and threatening her very spiritual independence. In the General Assembly debate on 23 May 1838, a few months after the decision, Dr Robert Buchanan[125] rallied his troops in colourful language. He referred to the spiritual independence of the Church as being

> inscribed, and that not unfrequently, in characters of blood, on many of the brightest and most memorable pages of our ecclesiastical history. Like some ancient banner which has been borne in triumph through many a hard fought field, it hangs honoured and venerated within our church's armoury. …[126]

A clear warning of troubles ahead was to be found at the end of the resolution which the Assembly passed at Dr Buchanan's instigation: the Assembly would 'firmly enforce obedience upon all office-bearers and members of this church, by the execution of her laws, in the exercise of the ecclesiastical authority wherewith they are invested.'[127] To judge by the language of both sides,[128] the Court of Session and the Church seemed ready for war. As happens in many conflicts, the generals on both sides were soon to become household names in Scotland.

Even this particular battle might not yet be lost for the Evangelicals. The day after the debate on the *Auchterarder* decision, on the recommendation of the Procurator of the Church, Robert Bell, the General Assembly authorised him to appeal to the House of Lords as soon as it appeared expedient to do so.[129] At the same time, Mr Bell reminded the Assembly that 'the funds of the Church were in a very low state, and that it would be necessary to devise some means for raising subscriptions for that purpose.' As their opponents did not fail to point out,[130] despite the outcome of the previous day's debate, by the act of appealing, the Evangelical party might appear to be impliedly recognising the very jurisdiction of the civil courts that they were simultaneously denying. But, for the Evangelicals, the appeal was to be seen as relating only to the temporalities, such as the stipend, which would be divorced from the ministerial office and so 'bereave' the parish of Auchterarder 'of the inestimable benefits of the National Establishment' if the decision of the Court of Session stood.[131]

In marking the appeal, the Church's advisers may have hoped for a favourable reception from Lord Brougham who, when Lord Chancellor, had gone on record as approving the Veto Act.[132] But he was now in the political wilderness and sniping at his former friends. He was scarcely to be

relied on for consistency. In the event, Lord Brougham ditched the Whig companions of his Edinburgh youth, Lord Moncreiff, Lord Jeffrey and Lord Cockburn. Along with Lord Chancellor Cottenham, he resoundingly upheld the majority of the Court of Session. In the course of an extempore speech lasting over three hours,[133] Lord Brougham rejected the presbytery's argument on jurisdiction in summary fashion: '… I have no doubt whatever upon that.'[134] He continued:

> Then it is said, you have no means of carrying into effect the decree of the Court of Session, albeit supported by the authority of the House of Lords, which is a decision of Parliament in its judicial character upon the subject. In other words, although you say the presbytery have acted wrong – although you say that their reason for rejecting is of no avail whatever – although you say the law is contrary to what they have supposed it to be – and although you say … let the presbytery induct immediately, for it has no grounds for refusing – still it is affirmed that the presbytery may persist in refusing, and must prevail. My Lords, it is indecent to suppose any such case.[135]

Lord Chancellor Cottenham was equally clear on the point. If the General Assembly had legislative power to make any regulations it pleased on the admission of ministers and if any appeal from the decisions of presbyteries lay only to the self-same General Assembly, no means would exist of questioning the legality of its enactments. 'This is but a mode of describing pure despotism.'[136] The Church had tried to meet this objection by arguing that under the constitution any remedy lay not with the civil courts but with Parliament. Lord Cottenham demolished that argument:

> Those who contend that there is no remedy for the wrong which has been committed in any existing law, suggest that redress can be obtained only by application to Parliament. But if the right be already established by statute, and if the wrong consist in a violation of the right so resting upon the authority of Parliament, it is not easy to conceive in what manner Parliament may be able hereafter, with more success, to secure the objects of its enactments: certainly not without a more direct and important interference with the powers, legislative and judicial, claimed by the Assembly, than the judgement of the Court of Session can be supposed to effect.[137]

Worse still from the point of view of the Evangelical party in the Church – in a move that seems to have taken even the Moderates by surprise – their Lordships indicated that the only 'qualifications' which the presbytery could take into account when deciding whether to receive and admit a presentee were his 'literature, life and manners'.[138] So it could not apparently consider any other objections to the presentee's suitability for a particular parish – such as an inability to speak Gaelic in a Gaelic-speaking

area. Leading Moderates soon argued that these observations were *obiter dicta* and therefore not binding.[139]

The speeches in the House of Lords ran over from 2 to 3 May 1839. With the General Assembly due to start later in the month, the decision was the main topic of conversation.[140] How was the Assembly to react to this complete rejection of the presbytery's case by 'the supreme court'?[141] 'Coteries of lawyers and divines debated in libraries and drawing-rooms what was to be done.'[142] Back in 1833–4, Dr Chalmers had been doubtful about the wisdom of adopting the Veto Law and had only been persuaded to support the 'blunder', as he later called it, by the advice of Lord Moncreiff and Henry Cockburn.[143] After the decision of the Court of Session in 1838, Dr Chalmers had favoured the Evangelicals defusing the situation by repealing the Veto Act.[144] In the immediate aftermath of the decision of the House of Lords, Dr Chalmers was inclined to maintain that position. But eventually he came to the view that the *obiter* remarks of the Lord Chancellor and Lord Brougham, about the narrow range of qualifications which a presbytery could consider, meant that simply repealing the Veto Act and relying on the presbytery's power to reject unqualified presentees would not solve the problem. His critics claimed that Dr Chalmers' will had been overborne by one of the younger, forceful, Evangelical leaders as late as the Monday before the Assembly began.[145]

At all events, Dr Chalmers submitted to the Assembly a series of resolutions which he protested – perhaps too much – were his own work.[146] The debate on his resolutions and two others took place on 16 May in an atmosphere of great excitement. The Tron Church was crowded, ladies having taken their place in the galleries at five in the morning, even though the debate was not due to begin until noon.[147] It did not finish until two the following morning when Dr Chalmers' resolutions were adopted. His speech, which he read while leaning on a staff,[148] had lasted close on three hours and ended in his near collapse – a sign, perhaps, of the strain he was under.[149]

Dr Chalmers' new, unrelenting, attitude to the courts and the veto came through when he declared that the Church must organise its affairs according to its own statute book:

> Now, it was by the deliberate voice and judgment of the Church that this law [the Veto Law], so obnoxious in other quarters, found its way there; and though it never should be consented to by the State it must continue to be our regulator till rescinded by the same power to which it owes its enactment, and on no other considerations I trust than those of principle and of the public weal. Whether a law is to be established or repealed by us, let me never see the day when we shall be constrained to either the one or

> the other by a force *ab extra*, or by any principle whatever distinct from our own spontaneous views of what is best for the interests of Christ's kingdom.[150]

In other words, the Church should not repeal the Veto Act just because of the judgments of the House of Lords or the Court of Session, but only if Parliament would not legislate to bring it into line with the civil law and the Church itself thought it right to repeal it.[151] When, the following year, it became clear, however, that Parliament was not going to legislate, Dr Chalmers reverted to his original position. He again favoured repealing the Veto Act and leaving it to the presbyteries and the General Assembly to consider the sufficiency of calls on a case-by-case basis.[152]

Though hailed as a 'magnificent oration'[153] and 'a masterpiece'[154] by two of his biographers, Dr Chalmers' marathon speech to the 1839 Assembly struck his opponents and some of his former supporters rather differently – in short, as involving a morally doubtful change of front. In the debate, one of those opponents, Dr Bryce, was brave enough to say that, when he saw how those who had advocated appealing to the House of Lords then hesitated to give effect to its decision dismissing their appeal, 'he felt inclined to doubt whether he was speaking to honest men and clergymen.'[155] For his pains, he was howled down.[156] Dr Cook, the leader of the Moderates, complained that the adoption of Dr Chalmers' motion would stamp the Church as rebels against the law of the land. That was not well received either.[157] One observer acknowledged the great impact of Dr Chalmers' speech on the Assembly, but noted that it had 'little logical texture, and no legal grasp.'[158] Another critic subsequently accused him of 'almost supercilious' neglect of statutes and of treating them as 'the playthings of imagination',[159] while the young Earl of Dalhousie left the Assembly, declaring that Dr Chalmers had gained a victory which, 'though brilliant, has not been, morally, a bloodless one.'[160] In the *Presbytery of Strathbogie* case, the following February, Lord President Hope was able to make the obvious, but still telling, point that, if the judgment of the House of Lords had gone the other way, the judges in the House of Lords 'would then have been Solomon and Daniel in the eyes of the Church courts.' As it was, the Church courts absolutely refused to obey the judgment. In point of 'candour and fairness', the Lord President considered it 'no better than the old shuffle, "Odds, I win – evens, you lose."'[161]

Although one of Dr Chalmers' resolutions instructed the presbytery of Auchterarder to offer no further resistance to the claims of Mr Young or his patron to the emoluments of the benefice, this was really a meaningless concession since 'it [was] in law impossible for any man to possess himself of the emoluments of a benefice without induction by the presbytery'[162] –

and the General Assembly was resisting any idea that Mr Young should be inducted.

With Dr Chalmers signed up and with the Rev. Robert Candlish having stepped into the arena,[163] the dominant party in the Church was now set on a collision course with the civil courts over their respective roles in the constitution. Neither side would readily back down.

On the very day when the General Assembly was debating the resolutions on the *Auchterarder* case, a little further up the High Street the Court of Session was busy administering a new blow in the *Lethendy* case.[164] The atmosphere in which the majority judges felt themselves to be operating comes out when Lord Medwyn complains of how

> in consequence of protection having been afforded, as I humbly think, legally and constitutionally, in support of civil interests, a cry is raised in our land that the civil court is interfering with the independence of the Church; and presbyteries resolve, and prayer meetings are held to pray against such Erastian oppression and invasion of Church rights. Some attempt, I think, should be made to disabuse the public mind from the misconception with which it is poisoned, and the true state of the case should be broadly and plainly stated.[165]

Stripped of detail,[166] the case concerned a situation where there were two rivals for appointment as minister in the united parishes of Lethendy and Kinloch. Under the Veto Act the presbytery of Dunkeld had rejected the first choice, a Mr Clark, when a majority of the male heads of families opposed him. But he obtained an interdict from the Court of Session against anyone else being appointed to the vacancy. Despite this, a new presentation was issued by the Crown in favour of a Mr Kessen. The presbytery was about to induct Mr Kessen when Mr Clark obtained an interim interdict against it doing so. In June 1838 the matter came before the interim body, the Commission of the General Assembly, which ordered the presbytery to proceed with his ordination. Mr Clark obtained further interdicts against Mr Kessen and the presbytery. The matter was again taken to the Commission. It again ordered the presbytery to proceed to Mr Kessen's ordination – without delay. In the face of dire threats from Dean of Faculty Hope about the retribution that awaited them,[167] a majority of the presbytery decided to proceed and did indeed ordain Mr Kessen in defiance of the orders of the Court of Session.

In short, when faced with conflicting orders in the shape of interdicts of the Court of Session and a deliverance of the Commission of the General Assembly, the majority of the presbytery had decided to ignore the orders of the civil court and to obey the order of the Church body. With the

concurrence of the Lord Advocate, Mr Clark raised proceedings (a petition and complaint) against the majority of the presbytery and Mr Kessen for their breach of the interdicts of the Court of Session.

A variety of preliminary arguments having been disposed of,[168] the defence became, classically, one of superior orders:[169] the ministers had disregarded the interdict of the Court of Session in obedience to the orders of their superior in the hierarchy of Church courts, the Commission of the General Assembly.[170] As with all such defences, it presupposed, of course, that there were indeed two separate and legitimate sources of authority – the State, represented by the Court of Session, and the Church, represented by the Commission. The supposed dilemma lay in having to choose between two conflicting orders, each of which they could regard as compelling. But no civil court, however sympathetic to the ministers' predicament,[171] could ever accept that there could be such a rival source of lawful competing orders within the one state. Certainly the Court of Session did not. For Lord Meadowbank, who chose to be as sententious as possible:

> It would be strange, indeed, if those whose pre-eminent duty it is to instruct the people in the duty of subjection to the law, should alone be left at liberty, not only to set its tenets and its courts at defiance, but themselves to proceed with impunity to give resistance of the legal and constitutional orders and appointments of the highest authority in the State.[172]

Even Lord Jeffrey, who was indeed sympathetic to the claims of the Church, accepted that, on the majority view, 'it is quite right that [the court's] authority should now be vindicated, by finding that its violation was unjustifiable, and without warrant of law.'[173] As often happens with the defence of superior orders, there was a suspicion that the ministers were really hiding behind the Commission: the logic of their position was that the Commission, which had ordered them to proceed with the ordination, was the real wrongdoer. Lord Justice Clerk Boyle was 'much afraid, however, that the desire of merely obeying the deliverance of the Commission had not much effect upon the minds of [the] majority.' He surmised that they had voluntarily chosen to act on their own opinion of the law.[174]

The offending ministers and Mr Kessen were ordered to appear before the Court of Session three weeks later. In one of the great set pieces in the Disruption drama – ministers of the Church standing resolutely before judges in their robes of office representing the State and worldly power[175] – they made two statements to the court,[176] the terms of which had already been published. They did not actually apologise. After some debate behind the scenes, the Court decided not to impose any punishment and just to

warn the ministers. A significant factor may well have been that the judges were anxious to avoid raising the stakes by making martyrs out of the ministers.[177] Having warned them, Lord President Hope added a personal address.[178] 'Dreadful' was how Lord Cockburn described it later that day to his friend, Andrew Rutherfurd, by now the Lord Advocate.[179] The Lord President sought to persuade the ministers of their need to submit to civil authority. Warming to his theme, he referred to Christ's appearance before the Sanhedrin when He did not dispute that court's jurisdiction over Him.[180] 'N.B.,' Lord Cockburn said to the Lord Advocate in the same letter, 'He did not say what Christ would have done if interdicted from inducting an apostle.'

Faced with an essentially similar dilemma when a vacancy arose at Marnoch in Aberdeenshire, the presbytery of Strathbogie followed the opposite course. After much toing and froing,[181] at the beginning of December 1839 the majority, comprising seven ministers, decided to disobey the orders of the General Assembly and, instead, to obey the Court of Session and take the presentee, Mr Edwards, on trial.[182] If anything, this caused even greater havoc. Because they had decided to obey the civil courts rather than the General Assembly, a week later the seven ministers were suspended by the Commission of Assembly.[183] Two months after that, the Court of Session set aside their suspension and backed up its order with interdicts that were widely ignored.[184] Dr Chalmers thought that the insurrection of the seven ministers was being orchestrated (by the Dean of Faculty, John Hope) to produce anarchy in the Church. So Strathbogie was 'the arena on which the battle of the Church is to be fought.'[185] For the Moderates, the proceedings taken by the Evangelical majority against the Strathbogie ministers assumed 'a peculiarly serious and alarming aspect to all the clergy who coincided with them in their opinions and principles.'[186] In other words, who's going to be next for such treatment?

Matters dragged on,[187] but eventually in December 1840 the Court of Session ordered the presbytery actually to admit Mr Edwards to the charge.[188] On a snowy day in January 1841, even though they had been suspended by the Assembly, the seven ministers making up the majority of the presbytery proceeded with the induction in the parish church at Marnoch. The scene – humble but dignified country people watching the confrontation with 'the recusant presbyters' before withdrawing silently from the church, never to return – was to become another set piece in the saga of those times.[189] In May of the same year the General Assembly declared the admission of Mr Edwards to have been null and void and directed the presbytery to proceed with the induction of another presentee, the Rev. David Henry[190] – which a minority of the presbytery

did. For the offence of seeking the protection of the Court of Session against the Commission of Assembly, the General Assembly went on to depose the seven ministers from their office as ministers and to declare their churches vacant.[191] At the urging of Dean of Faculty Hope, Moderate colleagues ignored the deposition and quickly joined the deposed ministers in dispensing communion[192] – for which offence they were suspended for nine months by the 1842 General Assembly.[193]

The Court of Session responded to the deposition of the Strathbogie Seven[194] by suspending the General Assembly's sentence and interdicting any steps to fill the purported vacancies in the parishes.[195] Subsequently, by a majority, the Court of Session affirmed its jurisdiction to reduce the decree of the General Assembly deposing the ministers.[196] They also found, unanimously, that, by admitting Mr Henry to the charge in Marnoch, the ministers making up the minority of the presbytery were in breach of interdict.[197] There matters stood when the Disruption brought hostilities to a close.[198]

Whatever the non-intrusionists might say in public, they were aware that their stance and the turmoil it was causing were not going down well with much of enlightened opinion in Scotland.[199] While Dr Chalmers and his colleagues might think that the Church had acted 'with caution and well-weighed consideration in the midst or her embarrassments', as he himself realised, many in society had the honest impression that their style of proceeding had been 'the most wayward and outrageous.'[200] There was a danger that, because of these events, the leaders of opinion in Scotland would become disillusioned with the Established Church and, deeming it valueless, leave for the waiting arms of the Episcopal Church.[201] The press was all but universally hostile – even the radical press, which wanted patronage abolished, denounced the Evangelicals for adopting their belligerent stance from the safety of the Establishment. For the *Glasgow Herald* 'The Church professes obedience to the law, and yet does not obey it.'[202]

On 2 June 1841, a week after the Strathbogie ministers were deposed, more than 700 people – a record number – attended a meeting in the Assembly Rooms in Edinburgh to support them.[203] The Tory Sheriff Anderson, a supporter of the Moderates and future Lord Advocate,[204] mocked the position of the majority in the General Assembly:

> I have heard of opposition to the law, of rebellion against the law, being considered as punishable offences; but it lies with the Church of Scotland in the present day to introduce this new offence into the category of crimes – obedience in matters of civil right to the civil judicatories of the country.[205]

Two days later, a rival meeting in support of the non-intrusionists, chaired by the (seventh) Duke of Argyll and attended by the Lord Provost, attracted a smaller audience. Even at the end, *The Scotsman* noted, the room was not much more than one-third full, 'one half of those present being ladies!'[206] Nevertheless, strong words were spoken, not least by Sheriff Monteith[207] who drew cheers when he declared that, if the Church fell in her struggle with the civil courts of Scotland, she would not fall alone: 'it would only be the commencement' – he said it advisedly – 'of a struggle which would convulse the empire[208] to its upmost limits.'[209]

Really repeating a point made by Sheriff Monteith,[210] *The Witness* newspaper, the mouthpiece of the non-intrusionists, noted that the supporters of the Strathbogie ministers at the earlier public meeting had included known Episcopalians. It also calculated that over 400 of the 766 names in the published list of the ministers' supporters were members of the legal profession. The 'cuckoo cry' of 'the law of the land' would have most influence with them, it said. The fact that lawyers were so prominent in the list showed 'how little [the ministers were] sympathised with by other classes.'[211] But the author – presumably the editor, Hugh Miller – may well have missed the point. The very fact that Episcopalians were sufficiently alarmed to turn out suggests that many informed people with no direct interest in the dispute considered that the General Assembly had threatened the very fabric of the constitution by punishing the ministers for having recourse to the Court of Session and for then obeying the orders of the highest civil court in Scotland. Nor could a cheap jibe diminish the significance of the fact that so many lawyers thought so too.

In May 1842, amidst scenes of great excitement,[212] on the motion of Dr Chalmers, the General Assembly adopted a Claim of Right or, more precisely, a 'Claim, Declaration, and Protest'. It had been drafted by yet another advocate, Alexander Dunlop.[213] Only after many closely printed pages of recitals do we eventually reach a claim as of right, followed by a declaration and then a protest in these terms:

> And they PROTEST, that all and whatsoever acts of the Parliament of Great Britain, passed without the consent of this Church and nation, in alteration of, or derogation to the aforesaid government, discipline, right, and privileges of this Church (which were not allowed to be treated of by the commissioners for settling the terms of the union between the two kingdoms, but were secured by antecedent stipulation provided to be inserted, and inserted in the Treaty of Union, as an unalterable and fundamental condition thereof, and so reserved from the cognizance and power of the federal legislature created by the said Treaty), – as also, all and whatsoever sentences of courts in contravention of the same government,

> discipline, right and privileges, are, and shall be, in themselves, void and null, and of no legal force or effect; and that, while they will accord full submission to all such acts and sentences, in so far – though in so far only – as these may regard civil rights and privileges, whatever may be their opinion of the justice or legality of the same, their said submission shall not be deemed an acquiescence therein, but that it shall be free to the members of this Church, or their successors, at any time hereafter, when there shall be a prospect of obtaining justice, to claim the restitution of all such civil rights and privileges, and temporal benefits and endowments, as for the present they may be compelled to yield up, in order to preserve to their office-bearers the free exercise of their spiritual government and discipline, and to the people the liberties, of which respectively it has been attempted, so contrary to law and justice, to deprive them.[214]

This represents the most extreme statement of the position of the Church. It actually declares that the Acts of Parliament dealing with the government, etc. of the Church which Parliament had passed after the Act of Union, without the consent of 'the Church and nation', are 'void and null, and of no legal force or effect.' The same applies to judgments in contravention of the same government, etc. In other words, the Patronage Act and all the judgments of the Court of Session and House of Lords on the Veto Act are void and have no legal effect. But, even though it makes that claim, the Church does not suggest that the Patronage Act could or would be declared null and void by the Court of Session. Moreover, the Church stops short of drawing the conclusion that it can simply ignore the offending legislation and judgments: it will submit to, but not acquiesce in, the judgments of the civil courts on civil rights and privileges. So, in this version of its stance, the Church does not even accept the decisions of the civil courts on civil matters touching the Church, but looks forward to a day when 'there shall be a prospect of obtaining justice' and the Church will be able to reclaim its civil rights.

Even though, one might think, its extreme language and claims were more likely to alarm than to persuade,[215] the declaration was very much for public consumption and directed, in particular, at the Government and Parliament. Privately, the Evangelical leaders, including the draftsman, did 'not entertain the most remote expectation of the State listening to any, even the most reasonable, demands they might make.'[216] Despite the confident tone of the declaration, the realities of the situation were indeed rather different. In the general election the previous year the Tories had swept to power and Peel was now Prime Minister.[217] The stream of litigations involving the Church continued. In August 1842 the House of Lords again confounded the professed expectations of the non-

intrusionists[218] by holding that the Earl of Kinnoull and Mr Young were entitled to claim damages for the presbytery of Auchterarder's failure to carry out its duty to take Mr Young on trial.[219] The argument of the presbytery, that the only remedy was the withholding of the fruits of the benefice, was all but laughed out of court.[220]

The leaders of the Evangelical party realised that the situation could not continue. The court actions were draining their financial resources and exposing them to the risk of fines and to liability in damages. Enforcing their discipline against ministers who disagreed with them was presenting the Church – and the Evangelical party, in particular – in a very unattractive light. So the Evangelical leaders called a Convocation of sympathetic ministers to reinforce their commitment and to work out a plan of action.[221]

The trouble was that the Evangelicals were divided about how to proceed. Some thought that, if their approaches to the Government and Parliament did not succeed, they should dissolve their union with the State and leave the Established Church. Others, notably the Rev. James Begg, thought that their duty was to remain in the Established Church and – despite all the difficulties – to fight on, by purging the Church, mercilessly, of those who supported Erastian views about the right of the State to control it.[222] This second possible course of action opened up a long vista of tit-for-tat lawsuits between the warring factions. Precisely these two competing views were to surface in the Convocation, which then had to decide between them. It was by no means certain in advance that the bulk of the Evangelical ministers would follow if the leaders decided to leave the Established Church.[223]

The Convocation met in Edinburgh over a seven-day period in November 1842. Only ministers took part. The Convocation adopted two sets of resolutions which were published. But the actual proceedings were kept secret and observers could only guess at the train of the discussions leading to the resolutions.[224] It was not until 1880 that a minute prepared by one of the ministers who was present was published.[225] For a lawyer, at least, it gives an interesting insight into the way the constitution and the guarantees in the Act of Union were regarded. It is all the more interesting because, at the outset, the meeting decided not to admit John Hamilton and Alexander Dunlop, the two advocates who had been the non-intrusionists' most prominent legal advisers. It was felt that there was no want of information on the subject in the group.[226] That was no idle boast: the record of their debate suggests that the participants had a remarkable grasp of law and politics, which would not be easily matched in any legal or other assembly today.

The first task of the meeting was to decide what their real grievance was. Was it non-intrusion or their loss of spiritual independence? Predictably, the answer was: their loss of spiritual independence as a result of the decisions of the Court of Session and now of the Supreme Court (in other words, the House of Lords).[227] They focused on the recent decision of the House of Lords in the second *Auchterarder* case,[228] holding that the presbytery's failure to take Mr Young on trial gave rise to a liability in damages enforceable in the civil courts.[229]

What was their duty in these circumstances? That depended on the status of the decisions of the civil courts. This in turn depended on how you looked at the constitution. On the position adopted by the non-intrusionists, the decisions of the civil courts, interfering with the spiritual matter of ordination, were a violation of the constitutional guarantee in the Act of Union that the government of the Church of Scotland would remain and continue unalterable. Now that these decisions had been taken by the courts, where did that leave the constitutional guarantee?

Note the special nature of the constitutional problem, as the members of the Convocation perceived it. We are used to situations where a legislature or a member of the executive is said to have violated some guarantee in a constitution. As we have seen already,[230] the passing of the Church Patronage (Scotland) Act 1711 was regarded as an example of the use by Parliament of its legislative power in breach of one of the guarantees in the Act of Union. What makes the discussion among the ministers in their Convocation unusual is that they are confronting a very different problem. They are trying to work out what happens if – as they saw it – the judges, who should be the very people to uphold the constitution, themselves violate one of the guarantees which it embodies. Of course, you can say that, once the House of Lords had decided the point, its decision had to be treated as a proper application, rather than as a violation, of the constitution. The attempt of ministers of the Church to indoctrinate 'the rulers' on the interpretation of statutes might therefore appear rather quixotic.[231] But, especially when a distinguished minority of the Court of Session had taken a different view on closely argued grounds, it was understandable that people continued to believe that the victorious view was wrong and that the error should be corrected.

There is nothing inherently improper about such an attitude, which can be compared with the attitude of the government and parliament of Barbados to certain decisions of the Privy Council on the mandatory death penalty. Looking at the decisions on equivalent provisions in other Caribbean constitutions, they foresaw that the Board would rule that the mandatory death penalty was inconsistent with the constitution of

Barbados. They rejected that interpretation and passed an Act amending section 15 of the constitution to reinforce what they saw as the correct position and to try to head off any decision to the contrary.[232]

Some of those present at the Convocation did indeed simply argue that the constitution could not be altered – that, by its very nature, the Act of Security could not be violated – and so the decisions of the courts were not law.[233] They were really following the line so defiantly declared in the Claim of Right six months before. More pragmatic voices, however, replied: 'This is all very well in theory.[234] But, don't argue against the facts: the Act is broken, and we cannot force the State to keep it.'[235]

According to Dr Candlish, the theory that there were co-ordinate courts, civil and ecclesiastical, *was* the constitution. But the decisions of the civil courts had changed this aspect of the constitution. *Prima facie* the civil courts declared the mind of the State and this was, at last, known as a result of the decision of the House of Lords in the second *Auchterarder* case. Now they must go to the legislature and ask for the law, as so declared, to be changed. They should tell the legislators that, if Parliament did not say anything to the contrary, the State would be taken to have spoken through the decisions of the courts of law.[236] Dr Gordon, a former Moderator, took much the same view, arguing that silence on the part of the State, that is, the Government and Parliament, would make law, by carrying you back to the last recorded and unrepealed utterance of the courts.[237]

As anticipated, Dr Begg – who was something of a Scottish nationalist *avant la lettre*[238] – considered that the silence of the Government and Parliament should be seen rather differently.[239] For him the constitution was supreme – above law. The rights in the constitution were rights of subjects which rulers had no right to touch. Under the constitution, the Church was placed outside the power of the civil courts and their duty as ministers was therefore to stand out against the civil courts. As long as the Government and Parliament remained silent on the topic, even if the State threw the weight of the secular arm against the Church, their duty was not to abandon, but to stand by, the Church.[240]

Dr Chalmers also distinguished between current or ordinary law and constitutional law. If they conflicted, and an appeal was made to constitutional law and the State kept silent or, *a fortiori*, gave civil effect to the change made by the ordinary law, then he would defer to the change. But, while deferring, the Church should admonish the State as to her duty. If rules laid down by the courts violated the constitution of a State, there tended to be a strong feeling of sympathy with the resistance of the people to the aggression, and a lively joy if they triumphed. But Christianity

would control these feelings. If the State looked on benignantly at the aggression of the civil courts against the Church courts, then persecution had begun and the rule of Scripture would apply: 'if they persecute you in one city, flee into another.'[241] In other words, if Parliament would not pass legislation to vindicate the ministers' view of the constitution, they should leave the Established Church and set up a new church.

The speakers appear to have proceeded on the basis that the courts were to be treated as the voice of the State for the purposes of interpreting the constitution.[242] But, if the interpretation adopted by the courts really amounted to a change in the constitution, then that change was always subject to the ratification of the other organs of the State – the Government and Parliament. It would only be if they, in effect, adopted the courts' interpretation that this interpretation would become definitive and, in this way, the constitution would actually be changed. But how was one to know if the Government and Parliament had actually approved the change? Did they have to do so positively? Was it enough if, when the matter was drawn to their attention, they did nothing? Or did it have to be drawn to their attention more than once?

The majority view was that once was enough. In other words, if the Church asked the Government and Parliament to legislate to reinstate the previous understanding of the constitutional position and they refused – or even if they simply ignored the request and did nothing – that would be a proper basis for concluding that the constitutional position was indeed as the courts had declared it. That position, with the Church at the mercy of the courts, would be intolerable. The ministers would therefore have to leave the Established Church.

Initially, Dr Begg remained unconvinced that, if there was no response from the Government or Parliament, his duty was to leave, rather than to stay at his post and fight from the inside for the spiritual independence of the Church. Admittedly, if the ministers stayed at their posts, they would have to enforce the discipline of the Church against those who disobeyed the orders of its superior courts on the point.[243] Plainly, even Begg, who spoke ingeniously,[244] recognised that this was a potentially unattractive aspect of his position. Dr Guthrie skilfully exposed the highly undesirable consequences of any attempt to follow that line.[245] Gradually Begg's supporters deserted him until, isolated, he too gave way and agreed that he would have to leave the Established Church if their demands were ignored.

With that, the Convocation had completed its work and, after a meeting in the Evangelical stronghold, Lady Glenorchy's Chapel (then situated near the North Bridge), to announce its resolutions to the public, the members set off back to their parishes to spread the news and to prepare for

the Disruption. Soon some of them would be on the road once more, travelling across Scotland to stir up support[246] – while continuing to draw a stipend as ministers of the very Established Church that they were doing their best to undermine in the event of a parting of the ways.[247] For, as we have seen, they were realistic enough to appreciate that, so long as the Church was perceived to be defying the law of the land, the Government and Parliament were not going to help them. Indeed the whole drift of the proceedings in the Convocation had been to prepare men's minds for expulsion.[248]

January 1843 brought two significant developments. First, as anticipated, Peel's Government firmly rejected the Claim of Right and the other representations made on behalf of the Church.[249] Second, the Court of Session inflicted yet another blow. This time the court struck down the Chapels Act that had purported to put the ministers of Chapels of Ease on a footing of equality with ordinary parish ministers and to provide for *quoad sacra* parishes to be attached to their churches.[250]

The dispute centred on the small town of Stewarton in Ayrshire. So the litigation came to be known as the *Stewarton* case.[251] The problem had begun in August 1839, at a time when the powers of the General Assembly had already been put under scrutiny in the *Auchterarder* and *Lethendy* cases. In terms of an Act of the General Assembly passed earlier that year,[252] the minister, Mr Clelland, and the congregation of the United Synod church in Stewarton were accepted into the Church of Scotland. Mr Clelland was enrolled as a member of the presbytery of Irvine. Steps were also taken towards creating a kirk session and allocating a *quoad sacra* parish to the new church – all as envisaged by the Chapels Act. The patron and the heritors of the parish intimated their opposition and then raised proceedings in the Court of Session to stop these moves and to challenge Mr Clelland's right to sit in the presbytery. As usual, the proceedings were long and complicated. During them, a rival congregation succeeded in its claim to the church building and Mr Clelland demitted the charge and left for England. Another minister, Mr Latta, was chosen to succeed him, but in March 1841 the court granted an interim interdict against the presbytery admitting anyone to the new parish and against receiving him as a member of the presbytery. The General Assembly of that year appointed a special commission to which the presbytery was to apply for direction and advice. In the meantime, Mr Latta had died. On 29 June 1841, despite the interdict, the presbytery decided to go ahead with the procedure for admitting a new minister, if the special commission agreed.

Because of its importance, the Lord Ordinary reported the case to the Court, which ordered that a hearing should be held before all the judges.

That hearing did not begin until 21 June 1842,[253] a few weeks after the General Assembly which had adopted the defiant Claim of Right.

As usual, the first line of the presbytery's defence was a denial of the jurisdiction of the Court of Session. Its written case on the point was drafted by Alexander Dunlop, the author of the Claim of Right, in his capacity as junior counsel for the presbytery. Characteristically, he had put the point in strong terms – so strong indeed that, to some of the judges, part of what he said seemed disrespectful to the court.[254] The matter was raised by Lord President Boyle at the conclusion of Mr Rutherfurd's submissions for the presbytery on 28 June but, at the suggestion of Lord Justice Clerk Hope, consideration of the point was postponed.[255] At a special hearing convened later in the week, Rutherfurd appeared and, having assured the judges that no disrespect had been intended, read out a minute explaining the position of the presbytery. Dunlop then addressed the judges and confirmed that no disrespect had been intended: he had merely sought to ensure that nothing was said that would compromise the presbytery's position that only the Church courts had jurisdiction in the matter.[256] The terms of the minute did not completely satisfy the judges and Rutherfurd had to put in a further minute withdrawing the two offending paragraphs in the presbytery's case. With that, the judges were content.[257]

At the end of the hearing in presence on 28 June, the Lord President had indicated that, since the consulted judges could not, at that stage of the session, form their opinions on the merits of such an important case, 'the Court were under the painful necessity of delaying to give judgment till next session.'[258] When the court reassembled in November after its four-month vacation, however, there was still no sign of a judgment. With the Convocation imminent, there had already been mutterings about the court's delay in giving judgment.[259] More delay was to come. Lord Gillies had resigned during the vacation and his replacement, Lord Wood, was installed on the day the Convocation ended. The Lord President announced that arrangements would have to be made to secure his views on the case.[260] So it was only on Friday, 20 January 1843 that the court finally gave judgment.[261] Not unexpectedly,[262] by a majority of eight to five,[263] it came down against the Chapels Act.[264]

Predictably, the majority of the judges rejected the presbytery's argument on jurisdiction and, equally predictably, the minority accepted it. For most of the judges it meant going over much the same ground as in the previous cases.[265] The non-intrusionists' old foe, John Hope, now Lord Justice Clerk Hope, must have relished the opportunity, however, to expound his version of the pro-jurisdiction argument in typically vigorous terms.[266]

The presbytery could, and did, emphasise how the Chapels Act should

be seen as dealing only with internal church affairs and as explicitly recognising that the new parishes were *quoad sacra tantum* – for ecclesiastical purposes only. The chink, or indeed hole, in the presbytery's armour was that the ministers became members of the presbytery and that body dealt with certain matters that were undoubtedly civil rather than ecclesiastical: church buildings, manses, glebes and schoolmasters.[267] So the Church was claiming the right to alter the constitution of a body which had this role in civil matters. That might well be thought to give an entrée to the Court of Session. The fact that the Church had deliberately ignored the mechanism provided by Parliament for establishing new churches and altering parishes, and had only recently come up with the idea of *quoad sacra* parishes, was another potentially tricky aspect of its position.[268]

There were difficulties on the other side too. In particular, even supposing the Chapels Act was, in principle, open to attack in the Court of Session, it was far from clear that the patron and heritors had any very real civil interest which would give them a title and interest to mount that attack. As Lord Cockburn put it, no party had shown how he could lose one sixpence by what had been done.[269] The patron's civil right was to appoint a minister for the whole parish and, at most, it could be argued that, if a new *quoad sacra* parish were created, that would affect his civil right by cutting down the area for which he was appointing. As for the heritors, the argument was that they had a civil interest in being under the discipline of the minister and kirk session of their parish church, rather than under a different minister in a different church. To be frank, that interest does not look very civil. In any event, it was far-fetched to suggest that anyone was going to be prevented from continuing to attend the parish church if they wanted to. Nevertheless, the majority accepted versions of these arguments.[270] The minority picked them apart.[271]

The decision constituted another severe setback for the Evangelical party. Indeed its potential effects ran wider and deeper than the *Auchterarder* cases. Within a few days Dr Candlish had denounced the decision as containing 'nothing but the naked assertion of jurisdiction by the civil courts in matters which are wholly ecclesiastical.'[272] At the heart of the decision lay a rejection of the Church's claim to spiritual independence from the civil courts and, by January 1843, that was all that really mattered. Those who were going to leave the Church were confirmed in their intention to do so. As, indeed, they were when, in March, both Houses of Parliament declined to intervene to help the Church, even though a majority of the Scottish MPs had voted in favour.[273] When the Evangelicals first appealed to the House of Lords in the

Stewarton case and then withdrew the appeal, their opponents thought that this might be a device to create more confusion over the status of ministers of Chapels of Ease as commissioners to the forthcoming General Assembly.[274]

At last, in May, that long-awaited General Assembly came round and most of the ministers who had attended the Convocation, and others too, left the Established Church. Although their departure was portrayed at the time, and subsequently, as a triumphant moment, the Rev. William Cunningham was certainly not wide of the mark when he said to a Glasgow audience a few weeks later, 'It is true that in a certain sense we have been beaten in this controversy' but added that 'neither have our opponents gained their leading object.'[275] Subsequently, that most cerebral of Free Church lawyers, Taylor Innes, even expressed the view that 'in not sitting still until they were driven out by the sword, the Disruption Fathers committed the same mistake as did James VII and II.'[276] At the time, however, it did not seem to those who went out that they had made a mistake. Rather, when, Sunday by Sunday, large open-air congregations gathered in glorious summer weather, they felt that God's grace was at work in the land.[277]

In rather a nice *Nachspiel*, during that same summer of 1843, Parliament passed the Benefices (Scotland) Act 1843. It regulated the exercise of patronage by giving presbyteries power to act on objections to the qualifications of the patron's presentee. In its terms the Act purported to be declaratory of the existing law.[278] The peers who had delivered judgment in the *Auchterarder* appeals protested that the law in the Bill was actually completely different from the law as established by the House of Lords in its judicial capacity.[279] They therefore moved, unsuccessfully, to have the declaratory words omitted.[280] In the end, Lord Cottenham and Lord Campbell entered a protest against the Third Reading.[281] But the Bill became law and ushered in an era of comparative peace in the Established Church.

In conclusion, I return briefly to the Convocation in November 1842. To judge by the way that the Act of Union has been approached since their day, it could be said that the ministers made a pretty good shot at assessing its significance. In particular, they rightly saw that, although, in their view, the Court of Session had actually stripped away the guarantees in the Treaty of Union, they could not say that the Treaty had been formally repealed. Nor could they ask Parliament to re-enact it. Most importantly, 'You cannot well ask Parliament to pass a law promising not to violate it in future.'[282] The ministers' conclusion was that, to regain their freedom, they had to set up a church that was not subject to the particular laws that the

Court of Session had enforced against the Established Church. That did not mean, of course, that the new church would be beyond the reach of the civil law. As the Free Church was to be reminded in the *Cardross* litigation,[283] that was very far from the case. Indeed, some sixty years later, the constitutionalist minority in the Free Church was to use the civil law of the land in a daring and successful strike against the new United Free Church.[284]

The members of the Convocation were right, however, to see the Act of Union as a statute apart, because of the guarantees for Scotland that it contains. These are certainly standards by which actions of the executive, the legislature and the courts can be judged. Parliament is therefore understandably reluctant to be seen to meddle with the Act.[285] As Dr Chalmers indicated, and others after him have also thought, an action which violated one of those guarantees might well be expected to meet with popular opposition. Of course, some of the provisions, such as those on the oaths to be taken by professors in the universities, came to seem outdated and their repeal was generally welcomed. But in other cases, even if – as the majority of the Convocation clearly thought – Parliament could alter the guarantees in favour of Scotland in the Act of Union, there would be a political price to pay for making an unwelcome alteration in them. It is significant that, since the Disruption, the Scottish courts have rarely been called upon to apply those guarantees and have, in fact, never done so.[286] Despite this, in practice, 300 years on, the guarantees still remain effective to prevent various constitutional changes which would not be supported by public opinion in Scotland.

Notes

1. The minister of St Andrew's was not, however, present: Macfarlane, pp. 135–40.
2. For the preparations, see Watt, pp. 290–5; Hetherington vol. 2, pp. 521–2; Turner, pp. 349–52. The aim was to take action before disputes about the roll of commissioners – especially the inclusion of ministers of *quoad sacra* parishes – could arise. Turner was originally a supporter of the non-intrusionist cause, but abandoned it and became one of the 'Forty Thieves'. For the emergence of that party, see Henderson, pp. 89–90. Turner is duly recorded in the Second Class in J. McCosh, *The Wheat and the Chaff Gathered into Bundles* (James Dewar, Perth, 1843), p. 54. McCosh lists the way the ministers of the Church went at the Disruption and singles out for particular attention those, like Turner, in the Second Class, who deserted the non-intrusionist cause and remained in the Establishment. Hetherington was a stout ally of Dr Candlish.
3. *Proceedings of the General Assembly of the Free Church of Scotland at Edinburgh, May 1843* (John Grey & Son, Edinburgh, 1853), p. 12. The text of the Protest was largely the work of Alexander Dunlop: Hetherington vol. 2, p. 522.
4. *The Times*, 22 May 1843, p. 7.

5. *The Scotsman*, 20 May 1843, p. 2; Buchanan vol. 2, pp. 593–608; Bryce vol. 2, pp. 358–70; Turner, pp. 352–6; Hetherington vol. 2, pp. 522–6; T. Brown (ed.), *Annals of the Disruption* (McNiven & Wallace, Edinburgh, 1876–84), Chapter IX; J. Dodds, *Thomas Chalmers: A Biographical Study* (William Oliphant & Co., Edinburgh, 1870), pp. 267–75; D. Macleod, *Memoir of Norman Macleod D.D.* (Daldy, Isbister & Co., London, 1876), pp. 197–8, reproducing two letters of the Rev. Norman Macleod, to his sister, Jane, dated 18 May 1843; W. Arnot, *Life of James Hamilton D.D., F.L.S.* (James Nisbet & Co. London, 1870), pp. 219–27; A. Beith, *Memories of Disruption Times* (Blackie & Son, London, Glasgow and Edinburgh, 1877), Section V (containing some telling detail, such as Lord Advocate McNeill changing back into mufti and watching events from a window: see p. 179); Sir John H. A. Macdonald, *Life Jottings of an old Edinburgh Citizen* (T. N. Foulis, London, Edinburgh and Boston, 1915), pp. 63–7. According to the *Caledonian Mercury*, 20 May 1843, p. 2, there were cheers mingled with a few hisses when the ministers emerged, but 'along the line of procession, which was crowded by no means densely, there were no expressions of applause or the reverse.' See also p. 64 below.
6. An award-winning building, Tanfield House, at present owned by Standard Life, now stands on the site. A plaque records the events of 1843. The hall, which had been built as a gas works, was used for the annual General Assembly of the Free Church until 1856.
7. Hilton points out that the walk-out from St George's fits into a series of 'theatrical' events that were typical of the age: B. Hilton, *A Mad, Bad, and Dangerous People? England 1743–1846* (Clarendon Press, Oxford, 2006), p. 34.
8. Macleod, *Memoir of Norman Macleod D.D.*, p. 188. Macleod was another of the Forty Thieves.
9. The opposition was due to his support for the Strathbogie ministers: *The Scotsman*, 20 May 1843, p. 2; *Caledonian Mercury*, 20 May 1843, p. 4 ('amidst cheers and hisses on the part of the audience'). See also Beith, *Memories of Disruption Times*, pp. 188–9. The hitch is airbrushed out of the accounts in Bryce vol. 2, pp. 363 and 370, and Turner, p. 365, who refers to 'the venerable father whom the unanimous Assembly called to occupy their chair.' On the Strathbogie ministers, see pp. 24–5 and 77–9.
10. Referred to by C. N. Johnston (later Lord Sands), 'Doctrinal Subscription in the Church of Scotland' (1905) 17 Juridical Review 201, at p. 208. Something of the atmosphere of the 'residual' Assembly comes over in the letters of the Rev. Norman Macleod to his sister, dated 23, 25 and 27 May 1843, and in his Journal entry dated 2 June 1843: Macleod, *Memoir of Norman Macleod D.D.*, pp. 198–200 and 200–3, respectively.
11. M. Fry, *Patronage and Principle: A Political History of Modern Scotland* (Aberdeen University Press, Aberdeen, paperback edition, 1991), p. 52.
12. The signing ceremony took place on Tuesday, 23 May and is immortalised in the famous, if somewhat idealised, painting by David Octavius Hill, *The First General Assembly of the Free Church of Scotland; signing the Act of Separation and Deed of Demission – 23rd May 1843*. For the story of the picture, including an account of the Disruption, see J. Fowler, *Mr Hill's Big Picture: The Day that Changed Scotland Forever – Captured on Canvas* (Saint Andrew Press, Edinburgh, 2006). See also Arnot, *Life of James Hamilton D.D., F.L.S.*, pp. 225–7. Ministers and elders who were not present in Edinburgh at the time or who changed their minds and decided

to join the Free Church, after all, signed subsequently.

13. For the impact in the rest of Britain, see O. Chadwick, *The Victorian Church*, Part I (A. & C. Black, London, 3rd edition, 1971), pp. 224–6; S. J. Brown, *The National Churches of England, Ireland, and Scotland, 1801–1846* (Oxford University Press, Oxford, 2001), pp. 357–62.
14. Brown (ed.), *Annals of the Disruption* (n. 5).
15. Henderson, p. 114.
16. The self-congratulatory attitude of many Free Churchmen in the years after the Disruption infuriated their counterparts in the Established Church: see, for instance, Wilson, pp. 246–8.
17. Church Patronage (Scotland) Act 1874.
18. See, more generally, M. Fry, 'The Disruption and the Union', in S. J. Brown and M. Fry (eds), *Scotland in the Age of the Disruption* (Edinburgh University Press, Edinburgh, 1993), p. 31.
19. Auchterarder Report vol. 2, p. 329.
20. *Ferguson* v *Earl of Kinnoull* (1842) 1 Bell 662, at p. 733; 9 Cl. & F. 251, at pp. 324–5.
21. H. Miller, *The Whiggism of the Old School, as exemplified by the Past History and Present Position of the Church of Scotland* (Edinburgh, 1839), p. 29.
22. 24 May 1842, *Proceedings of the General Assembly of the Church of Scotland 1842*, pp. 120–1.
23. J. Begg, *Reply to Sir James Graham's Letter; being the Substance of an Address delivered in Roxburgh Church on Thursday Evening, 19th January 1843 at the Request of the Edinburgh Tradesmen's Association for Advancing the Interests of the Church of Scotland* (J. Johnstone, Edinburgh, 1843), p. 8. Watt, pp. 276–9, makes the point that the more flamboyant orations of this kind were not typical. The Court of Session delivered judgment in the *Stewarton* case the following day. See p. 33.
24. *Speech of the Dean of Faculty, in the Court of Session, on the hearing in presence of the whole court, in conjoined actions of reduction and suspension, of the sentence of deposition, The Presbytery of Strathbogie against the Rev. Dr Gordon and Others January 26, 1843* (W. Blackwood & Sons; Alex Macredie, Edinburgh, 1843), p. 13. *The Scotsman*, 28 January 1843, p. 4, gives a slightly different version of the passage, which the Dean may have revised for publication. One of the copies of the speech in the British Library has the manuscript comment on the title page: 'as wretched a harangue as was ever ventured on.'
25. Inglis, p. 573.
26. J. D. B. Mitchell, *Constitutional Law* (2nd edition, W. Green & Son, Edinburgh, 1968), p. 257, refers to the matter in a single sentence. See also the short accounts in *The Laws of Scotland: Stair Memorial Encyclopaedia* vol. 3 (1994), paras 1634 and 1636 (P. H. Brodie and Lord Mackay of Clashfern); vol. 5 (1987), para. 691 (Lord Murray). There is, of course, an authoritative account of the subject in F. Lyall, *Of Presbyters and Kings: Church and State in the Law of Scotland* (Aberdeen University Press, Aberdeen, 1980), Chapter III, and a shorter account in D. M. Walker, *A Legal History of Scotland Vol. VI: The Nineteenth Century* (Butterworths, Edinburgh, 2001), pp. 218–24.
27. For a recent account of the events leading to the Union, see M. Fry, *The Union: England, Scotland and the Treaty of 1707* (Birlinn, Edinburgh, 2006). The position of the Church is considered, in particular, at pp. 233–41.
28. c. 6.

29. Union with England Act 1707.
30. Union with Scotland Act 1706, section IV.
31. On the dating of this Act see Lyall, *Of Presbyters and Kings: Church and State in the Law of Scotland*, p. 199.
32. In particular, this was the view of Lord Kames, *Historical Law-Tracts* (Bell & Bradfute and John Fairbairn, Edinburgh, 4th edition, 1817), pp. 240–1, a passage which was much quoted.
33. Scottish Ministers' Widows' Fund Act 1814 (54 Geo. 3, c. clxix).
34. 1953 S.C. 396. Much of the opinion – in particular the idea that the court should regard a statute as impossible to construe, rather than look at the relevant White Paper – has a distinctly antique appearance.
35. 1953 S.C. 396, at p. 411.
36. See, e.g., S. Tierney, 'Scotland and the Union State', in A. McHarg and T. Mullen, *Public Law in Scotland* (Avizandum, Edinburgh, 2006), p. 25, at pp. 39–41.
37. J. D. Ford, 'The Legal Provisions in the Act of Union' (2007) 66 Cambridge Law Journal 106. See also J. Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Clarendon Press, Oxford, 1999), pp. 165–73; C. Kidd, 'Sovereignty and the Scottish constitution before 1707' 2004 Juridical Review 225. For a full discussion of the background, see J. D. Ford, *Law and Opinion in Scotland during the Seventeenth Century* (Hart Publishing, Oxford and Portland, OR, 2007).
38. *Institutions of the Law of Scotland* 1.1.16; Ford, 66 Cambridge Law Journal 106, at p. 137.
39. *Earl of Rothes* v *Gordon of Hallhead and Cushny* (1622) Mor. 1 Brown's Supp. 4; *Town of Edinburgh* v *College of Justice* (1678) Mor. 3 Brown's Supp. 257, at p. 262; Ford, 66 Cambridge Law Journal 106, at pp. 136–7.
40. Ford, 66 Cambridge Law Journal 106, at pp. 128–39.
41. *R* v *Secretary of State for Transport ex pte Factortame Ltd (No 2)* [1991] 1 A.C. 603.
42. Indeed, in *Ferguson* v *Earl of Kinnoull* (1842) 1 Bell 662, at p. 721; 9 Cl. & F. 251, at p. 311, Lord Campbell explicitly held that 'we must consider [the 1711 Act] binding, although it has been said to be *ultra vires* of the British Parliament.' For the position adopted by the Church in the Claim of Right in May 1842, see pp. 26–7.
43. [2005] UKHL 56; [2006] 1 A.C. 262.
44. See J. Allan, 'The Paradox of Sovereignty: *Jackson* and the Hunt for a New Rule of Recognition?' (2007) 18 King's Law Journal 1.
45. For a fuller description of the Moderates, see Henderson, pp. 37–40; D. A. Mackinnon, *Some Chapters in Scottish History* (R. W. Hunter, Edinburgh, 1893), Chapter VII.
46. This period is beautifully described in Henderson, Chapter III. An interesting sketch of the period (albeit from a staunchly pro-Establishment standpoint) is to be found in Macfarlane, pp. 4–20. See also Brown, *The National Churches of England, Ireland, and Scotland 1801–1846*, pp. 59–61.
47. In these respects, the Evangelicals' criticisms of the Moderates were not dissimilar to the Tractarians' criticisms of the English High Church clergy: Hilton, *A Mad, Bad, and Dangerous People?*, pp. 472–3.
48. Thomson was the composer of, *inter alia*, the rousing and much-loved tune 'St George's Edinburgh', named after his church and used as a setting for 'Ye gates, lift up your heads on high', the version of Psalm 24 vv. 7–10 in the Scottish Metrical Psalter of 1650.

49. For the views of the Secretary of the Anti-Patronage Society, see J. Bridges, *Patronage in the Church of Scotland Considered* (John Johnstone, Edinburgh, Whittaker & Co., James Nisbet & Co., London, 1840).
50. Actually, the fourth decade.
51. A. Taylor Innes, *The Law of Creeds in Scotland* (2nd edition, William Blackwood & Sons, Edinburgh and London, 1902), p. 69. See also Cockburn Journal vol. 1, pp. 58–9, entry for 4 April 1834. For the wider picture, see Chadwick, *The Victorian Church* Part I, pp. 60–100 and 142–58; Hilton, *A Mad, Bad, and Dangerous People?*, pp. 524–32.
52. A vigorous and amusing attack based on this difficulty for non-intrusionist ministers was launched by Dr Lee in the Presbytery of Glasgow on 16 December 1840: R. H. Story, *Life and Remains of Robert Lee D.D.* (Hurst & Blackett, London, 1870) vol. 1, pp. 27–35.
53. Hanna vol. 3, pp. 350–2; Buchanan vol. 1, pp. 240–2.
54. *Cruickshank* v *Gordon* (1843) 5 D. 909, at p. 919 per the Lord Ordinary (Cuninghame). In *Percy* v *Board of National Mission of the Church of Scotland* [2005] UKHL 73; 2006 S.C. (H.L.) 1, at p. 29, para. 117; [2006] 2 A.C. 28, at p. 63, para. 117, Lord Hope of Craighead comments that the Church is not a body that has been incorporated by statute and goes on to say that 'its status in law is that of a voluntary association.' But the weight of authority is to the effect that the Established Church is, at the least, a common law corporation. In addition to the passage from Lord Cuninghame's opinion, see Bankton, *An Institute of the Laws of Scotland* 1.2.25: 'The established church is likewise a great corporation. …' In *Earl of Kinnoull* v *Gordon* (1842) 5 D. 12, at pp. 62–3, Lord Fullerton repeatedly refers to the 'corporate character' of the Church and to the Church as 'an incorporated body'. See also *Cuninghame* v *Presbytery of Irvine* (1843) Stewarton Report, p. 70, per Lord Meadowbank and Lord Murray. Much of the argument of Inglis in his articles on the position of the Church is based on the proposition that the Church '*is in law an incorporation*' (emphasis as in the original) and that the Church is 'nothing but an incorporation, however harsh the phrase may sound': Inglis, p. 577. In Cockburn Journal vol. 2, p. 158, Lord Cockburn remarks that the Church has no 'corporate' property, but the fact that the Church did not hold property did not mean that it was not a corporation. In the first *Auchterarder* case, Lord Moncreiff asks rhetorically whether 'a church so formed and consolidated equally by statutes and by the usage of centuries … is not something more than a mere corporation with power to make bye-laws …': Auchterarder Report vol. 2, p. 329. In the same case Lord Cockburn also rejected the notion that the Court of Session could control the Church, as it could control a corporation in the admission of candidates, 'Because, in the *first* place, I really do not think that the Church of Scotland is a mere corporation …': Auchterarder Report vol. 2, p. 410.
55. His attitude can be seen in his evidence to the House of Commons Committee in March 1834. See, for example, *Minutes of Evidence taken before the Select Committee on Church Patronage, Scotland*, 26 March 1834, pp. 189–90, Questions 1330, 1331 and 1332. In the first *Auchterarder* case he spoke of 'the deep conviction which I had formed, of the extreme inexpediency and danger of the measure of abolition demanded of Parliament': Auchterarder Report vol. 2, p. 276. His son, Sir Henry Wellwood Moncreiff, rather plays down this aspect in Moncreiff, pp. 314–25.
56. See, e.g., Turner, p. 169 n.

57. Wilson, *passim*.
58. Macfarlane, p. 59.
59. Letter to Dr Chalmers dated 13 May 1833: Hanna vol. 4, pp. 116–17. Jeffrey got into difficulties with other MPs of his own party who thought him obdurate and conservative in Church matters: I. G. C. Hutchison, *A Political History of Scotland 1832–1924* (John Donald, Edinburgh, 1986), p. 34. For his attitude, see also the letter of Lord Cockburn to Lord Murray, 22 April 1841: A. Bell (ed.), *Lord Cockburn: Selected Letters* (John Donald, Edinburgh, 2005), p. 167.
60. Moncreiff, pp. 233–4.
61. Moncreiff, p. 260.
62. Letter of Jeffrey to Cockburn, 22 March 1834: Adv. Ms. 9.1.10 f. 835 at f. 838r, National Library of Scotland.
63. Letter of Jeffrey to Cockburn, 27 March 1834: Adv. Ms. 9.1.10 f. 840r, National Library of Scotland.
64. The General Assembly met there from 1830 to 1840, to the growing displeasure of the Kirk Session: D. Butler, *The Tron Kirk of Edinburgh or Christ's Kirk at the Tron: A History* (Oliphant, Anderson & Ferrier, Edinburgh and London, 1906), pp. 288–91 and 333–8.
65. Hetherington vol. 2, p. 394
66. Lord Brougham drew attention to the sex discrimination: *Presbytery of Auchterarder* v *Earl of Kinnoull* (1839) Macl. & Rob. 220, at pp. 294–5; 6 Cl. & F. 646, at p. 701. See also Macfarlane, p. 54*, and A. Gordon, *The Life of Archibald Hamilton Charteris D.D., LL.D.* (Hodder & Stoughton, London, New York and Toronto, n.d. [1912]), p. 126 n. 1. There was also discrimination against single men: Cunningham vol. 2, p. 485 n. 1.
67. Especially in the North of Scotland, where comparatively few men were communicants, the measure could work capriciously. See Turner, pp. 182–4.
68. The Attorney General was speaking, the day after the vote in the General Assembly, at the hustings in the Edinburgh by-election prompted by Jeffrey's appointment to the bench following the death of Lord Craigie on 1 May 1834. See *The Scotsman*, 28 May 1834, p. 2. The fact that the Attorney General had expressed that view at the time did not prevent him subsequently accepting the brief for the pursuers in the first *Auchterarder* appeal to the House of Lords. As a judge, he upheld the decision of the First Division in the second *Auchterarder* appeal to the House of Lords in August 1842: *Ferguson* v *Earl of Kinnoull* (1842) 1 Bell 662, at pp 719–35; 9 Cl. & F. 251, at pp. 308–26.
69. House of Lords, 23 July 1834. See, e.g., Turner, pp. 170–1; Hanna vol. 3, pp. 361–2, noting that Dr Chalmers had been informed, and believed, that the Veto Law had been submitted to Lord Brougham and had received his imprimatur. It would not be surprising if Lord Moncreiff had sent a copy of his proposed law to his friend, the Lord Chancellor, or if he had told Dr Chalmers what had happened.
70. Cunningham vol. 2, pp. 458–60; J. Hope, *A Letter to the Lord Chancellor on the Claims of the Church of Scotland in regard to its Jurisdiction and on the Proposed Changes in its Polity* (William Whyte & Co., Edinburgh, John Murray, London, 1839), p. 55.
71. See, for instance, Bryce vol. 1, pp. 25–6
72. Buchanan vol. 1, pp. 268–77 and 316–48; Macfarlane, Chapter II; Wilson, Chapter V.
73. 1707 c. 10.
74. Buchanan vol. 1, p. 271.

75. On the significance of Church Extension for the whole matter, see D. Chambers, 'The Church of Scotland's Extension Scheme and the Scottish Disruption' (1974) 16 Journal of Church and State 263.
76. Its official title was 'Declaratory Enactment as to Chapels of Ease'. The text is reproduced in the Stewarton Report, Appendix, p. iii. The Act was opposed by, *inter alios*, Dr Chalmers and another leading Evangelical, Dr Gordon: Cunningham vol. 2, p. 464.
77. See Hutchison, *A Political History of Scotland 1832–1924*, pp. 15–25 and 37–48.
78. This, the first, *Auchterarder* case is treated in all the accounts of the Disruption crisis. See, for instance, Buchanan vol. 1, Chapter VIII and vol. 2, pp. 1–60; Bryce vol. 1, Chapter III and pp. 84–100; Macfarlane, Chapter IV; Bayne, Chapters XII–XV; Hetherington vol. 2, pp. 398–407.
79. Auchterarder Report vol. 1, Appendix, p. 35; Respondents' Case, Appendix, p. 15. For the suggestion that the Earl of Kinnoull actually had no right to make the presentation because he had never completed the necessary conveyancing procedures to give him a good title, see Gordon, *The Life of Archibald Hamilton Charteris*, pp. 128–9.
80. Hetherington vol. 2, p. 399.
81. One might have supposed that the failure to exhaust the mechanisms for appeal in the hierarchy of Church courts would have been an objection to the proceedings in the Court of Session, but that point does not seem to have been much pressed – perhaps because, as Lord Gillies noted, the presbytery had simply failed to perform a ministerial duty and so there was not really any exercise of judgment, against which to appeal: Auchterarder Report vol. 2, 43. The point was taken successfully by the defenders in *Lang* v *Presbytery of Irvine* (1864) 2 M. 823. The case is notable for Lord Deas ruffling Lord Ardmillan's Free Church feathers, at pp. 838–9.
82. He was ordained on 4 August 1843. For the outline of his career, see H. Scott, *Fasti Ecclesiae Scoticanae* (new edition) vol. 4 (Oliver & Boyd, Edinburgh, 1923), p. 260. According to A. G. Reid, *The Annals of Auchterarder* (D. Philips, Crieff, 1899), p. 290, 'He was an excellent scholar, an able and evangelical preacher, and a good and honourable man, the sole and only objection which could be brought forward against him was that his discourses were read.' The fact that he was slightly lame and had a slightly contorted hand may also have counted against him: Cunningham vol. 2, p. 467.
83. The summons was signeted on 5 October 1835: Auchterarder Report vol. 1, Appendix, p. 12.
84. Auchterarder Report vol. 1, Appendix, p. 10.
85. Ibid. vol. 1, Appendix, p. 11. To judge by the terms of his dissent to the Veto Act, the Dean seems, at that stage, to have harboured a belief that, though rejected under the Act, a presentee would be effectively presented to the benefice and would have 'a clear right to the stipend and all other rights appertaining thereto': Buchanan vol. 1, p. 316. It soon became clear, however, that the presentee had no right to the stipend unless he was actually admitted as minister of the parish.
86. Ibid. vol. 1, Appendix, p. 18. In fact, £1730 6s 5d, or nine-and-a-half years' stipend of Auchterarder, was paid to the Ministers' Widows' Fund: Gordon, *The Life of Archibald Hamilton Charteris*, p. 132 n. 2.
87. Auchterarder Report vol. 1, pp. 145–6 (Mr Bell), 344–7 (Solicitor General).
88. Ibid. vol. 2, p. 20, per Lord President; pp. 45–7, per Lord Gillies; pp. 76–7, per

Lord Justice Clerk; p. 112, per Lord Meadowbank; pp. 131–2, per Lord Mackenzie; pp. 445–9, per Lord Cuninghame; *contra*, pp. 240–52, per Lord Fullerton; pp. 291–3, per Lord Moncreiff; pp. 394–5, per Lord Jeffrey; p. 397, per Lord Cockburn.

89. They referred to the veto of dissents in article 11 of the revised condescendence: ibid. vol. 1, Appendix, p. 21.
90. Statement 5 in the Statement of Facts for the presbytery, quoting the minute of its proceedings: ibid. vol. 1, Appendix, p. 22.
91. Ibid. vol. 2, pp. 252–6, 258, 272–3, per Lord Fullerton; pp. 286–93, and 293–5, per Lord Moncreiff.
92. Ibid. vol. 2, pp. 394–5, per Lord Jeffrey. For the majority, see the passages cited in note 88 above.
93. Macl. & Rob. 220, at pp. 347–9, per Lord Cottenham LC, and pp. 350–1, per Lord Brougham; 6 Cl. & F. 646, at pp. 752–3, per Lord Cottenham LC, and pp. 755–6, per Lord Brougham.
94. For the interlocutor of the Court of Session, see Auchterarder Report vol. 2, pp. 450–1; for the order of the House of Lords affirming that interlocutor, see Macl. & Rob. 220, at p. 351; 6 Cl. & F. 646, at p. 756.
95. Lord Cockburn, *Life of Lord Jeffrey with a Selection from his Correspondence* (Adam & Charles Black, Edinburgh, 1852) vol. 1, p. 386.
96. The hearing in the *Stewarton* case, where the Dean of Faculty spoke over most of three days, is also remarkable to modern eyes for the lack of interruptions from the judges. The speeches of counsel are fully reported in *Stewarton Case. Report of the Pleadings by Patrick Robertson, Esq., Dean of Faculty, and Andrew Rutherfurd Esq., Advocate, in the Process of Suspension and Interdict, William Cuninghame, Esq., and Others, Heritors of the Parish of Stewarton, against the Presbytery of Irvine. June and July 1842. Taken in short-hand by Simon Macgregor* (W. P. Kennedy, Edinburgh, 1842). To judge by the available reports, the hearing in presence in the third *Auchterarder* and *Strathbogie* cases on 24 and 25 January 1843 also seems to have comprised set-piece speeches by the two counsel: *Speech of the Dean of Faculty, in the Court of Session, on the hearing in presence of the whole court* (n. 24 above); *The Scotsman*, 28 January 1843, p. 4; *Caledonian Mercury*, 26 January 1843, p. 2.
97. Looking back, Lord Cockburn rightly saw that, in the first *Auchterarder* case, 'a very large field of historical and other matter was at last all superseded by a single clause in an act, binding and astricting presbyteries to receive and admit qualified persons presented by patrons – this reduces the question to a mere point of statutory construction': Stewarton Report, p. 129.
98. Especially, in the last phase of the *Strathbogie* litigations, just before the Disruption: *Cruickshank* v *Gordon* (1843) 5 D. 909. See p. 25 and p. 53 n. 261.
99. See, for instance, Auchterarder Report vol. 2, pp. 343–5, per Lord Moncreiff, and pp. 390–1, per Lord Jeffrey. This argument harks back to Dr Chalmers' preference for dealing with the question by the use of the Assembly's judicial powers: Hanna vol. 3, pp. 350–2. See pp. 8 and 20.
100. E.g., Lord Fullerton, Auchterarder Report vol. 2, pp. 270–2; Lord Moncreiff, pp. 344–7; Lord Glenlee, pp. 358–9; Lord Jeffrey, pp. 389–91; Lord Cockburn, pp. 413–14.
101. The Solicitor General was not appearing in his official capacity, but simply as counsel for the presbytery. Until after the Second World War, Law Officers were entitled to accept instructions in cases not involving the Crown and to earn fees for such work.

See J. Ll. J. Edwards, *The Law Officers of the Crown* (Sweet & Maxwell, London, 1964), pp. 98–118. A Law Officer's actions as counsel for other parties did not, of course, bind the Government. Nevertheless, in a case, like the first *Auchterarder* case, which gave rise to issues of importance for the Government, the practice could lead to potential difficulties.

102. Auchterarder Report vol. 1, pp. 385–6. By 'apparitors' Rutherfurd means officials responsible for enforcing the orders of the court.
103. In particular, the jurisdiction issue was treated in great detail, but with increasing impatience on the part of the majority, in the *Culsamond* and *Stewarton* cases.
104. Dr Candlish admitted this in his speech to the 1839 General Assembly: *Report of Speeches of the Rev. Dr Burns, Rev. Robert S. Candlish and Alexander Earle Monteith, Esq., in the General Assembly on Wednesday, May 22, 1839 in the Auchterarder Case* (John Johnstone, Edinburgh, 1839), p. 42.
105. Inglis, p. 579.
106. Even as late as two months before the Disruption, this argument was still in play, but was very firmly rejected by the majority judges, Lord Cuninghame's treatment being particularly trenchant: *Cruickshank* v *Gordon* (1843) 5 D. 909, at pp. 968–9.
107. Cf. XX, 'The Scotch Church Question: Letter II', *The Times*, 22 May 1843, p. 7.
108. The non-intrusionists' argument is set out very clearly in the speech of Sheriff Monteith in the General Assembly debate on 22 May 1839: *Report of Speeches of the Rev. Dr Burns, Rev. Robert S. Candlish and Alexander Earle Monteith, Esq., in the General Assembly on Wednesday, May 22, 1839 in the Auchterarder Case*, pp. 17–34. The opposing thesis is equally clearly stated in the *Memorial submitted to Her Majesty's Government by a Committee appointed at a Meeting of Ministers, Elders and others, Members of the Church of Scotland, held at Edinburgh, 12th August 1840* (William Blackwood & Sons, Edinburgh and London, 1842), pp. 29–32. The memorial, dated 12 February 1842, was signed by Dr Cook, but was actually composed by John Inglis: S. Halkett, J. Laing, *A Dictionary of the Anonymous and Pseudonymous Literature of Great Britain* (William Paterson, Edinburgh, 1883) vol. 2, p. 1594. See further below, p. 65.
109. *Caledonian Mercury*, 1 March 1838, p. 3.
110. See Auchterarder Report vol. 2. An abbreviated report of the judgments, with some of the supporting material, is to be found in *Earl of Kinnoull* v *Presbytery of Auchterarder* (1838) 16 D. 661.
111. The majority comprised Lord President Hope, Lord Gillies, Lord Justice Clerk Boyle, Lord Meadowbank, Lord Mackenzie, Lord Medwyn and Lord Cuninghame; the minority comprised Lord Fullerton, Lord Moncreiff, Lord Glenlee, Lord Jeffrey and Lord Cockburn. Lord Gillies gave judgment after the Lord President because, although the Lord Justice Clerk was present at the start of proceedings, he was not feeling well and left the court. He was back in court the following morning when he read his judgment: *Caledonian Mercury*, 1 March 1838, p. 3.
112. Guthrie vol. 2, pp. 9–10.
113. Just how elastic quickly became apparent, e.g. in the *Culsamond* case, *Middleton* v *Anderson* (1842) 4 D. 957.
114. Auchterarder Report vol. 2, p. 4. See pp. 114–16 below.
115. Ibid. vol. 2, p. 12.
116. (1811) 14 East 1; 104 E.R. 501; see Auchterarder Report vol. 2, pp. 5–6, per Lord President.

117. *Stockdale* v *Hansard* (1837) 7 Car. & P. 731; 172 E.R. 319. See, for example, Auchterarder Report vol. 2, p. 6, per Lord President; pp. 36–7, per Lord Gillies; p. 424, per Lord Cuninghame. The second, fundamental, decision in *Stockdale* v *Hansard* (1839) 9 Ad. & E. 1; 112 E.R. 1112, was given on 31 May 1839, just a fortnight after the critical debate in the General Assembly on the judgment of the House of Lords in the first *Auchterarder* case. Consistently with his stance on the Church courts, Lord Jeffrey considered that the House of Commons, rather than the courts, should determine any disputed question about privilege: undated letter from Jeffrey to Mr Empson, in Lord Cockburn, *Life of Lord Jeffrey with a Selection from his Correspondence* vol. 2, pp. 353–68, with a specific reference to the dispute over jurisdiction with the General Assembly, at pp. 361–2. The *Stockdale* case was clearly very much in the air: in 1842 Andrew Rutherfurd used it as an analogy when defending the way that the presbytery had put its case on jurisdiction in the *Stewarton* case: *Stewarton Case: Report of the Pleadings by Patrick Robertson, Esq., Dean of Faculty, and Andrew Rutherfurd Esq., Advocate*, p. 90; *The Scotsman*, 2 July 1842, p. 3.
118. (1703) 2 Ld Raym. 938. See Auchterarder Report vol. 2, p. 6, per Lord President, and vol. 2, pp. 34–6, per Lord Gillies.
119. Auchterarder Report vol. 2, p. 42 (emphasis in the original).
120. Ibid. vol. 2, p. 380. For a detailed analysis of this important aspect of Lord Jeffrey's influential opinion, see Robertson, pp. 238–46.
121. S, 'Church of Scotland Question' (1840) 24 Law Magazine and Quarterly Review of Jurisprudence 131, at p. 160, referring to the *Stockdale* v *Hansard* case. See n. 117 above. For Lord Cockburn's understanding of Lord Jeffrey's approach, see his *Life of Lord Jeffrey with a Selection from his Correspondence* vol. 1, pp. 390–1.
122. Stewarton Report, p. 72.
123. Ibid., p. 73. See also *Clark* v *Stirling*, Lethendy Report, p. 147, per Lord Medwyn.
124. Wilson, p. 201.
125. Even to his opponent, Dr Bryce, writing after the Disruption, Dr Buchanan was 'one of the most talented and distinguished of the seceding clergy': Bryce vol. 2, p. 391; also vol. 2, p. 145. Dr Buchanan took the lead because Dr Chalmers, who was concentrating on Church Extension matters, had not been a commissioner to the General Assembly since 1833. On his work on Church Extension, see, e.g., Watt, Chapter 11.
126. Buchanan vol. 1, p. 471.
127. Ibid. vol. 1, p. 478.
128. For examples of the judges' language, see pp. 71–4 below.
129. In a debate on a reference from the Presbytery of Auchterarder on 24 May 1838, the day after the big debate on the independence of the Church: *The Scotsman*, 26 May 1838, p. 3.
130. Bryce vol. 1, pp. 90–1. The point was also made, in an article favourable to the non–intrusionists, in *The Times*, 10 May 1839, p. 4.
131. Chalmers, *What ought*, p. 9. This, at least, is the retrospective rationalisation by Chalmers, who was not a member of the Assembly which voted to appeal.
132. See p. 9 above. See also R. Rainy, J. Mackenzie, *Life of William Cunningham, D.D.* (T. Nelson & Sons, London, Edinburgh and New York, 1871), p. 131.
133. *The Times*, 10 May 1839, p. 6. The report records that a number of gentlemen had assembled below the Bar and a considerable number of Scotch Peers attended to hear the outcome of the case.

134. *The Presbytery of Auchterarder* v *Earl of Kinnoull* (1839) Macl. & Rob. 220, at p. 307; 6 Cl. & F. 646, at p. 713.
135. Macl. & Rob. 220, at p. 308; 6 Cl. & F. 646, at p. 714.
136. Macl. & Rob. 220, at pp. 339–40; 6 Cl. & F. 646, at p. 745.
137. Macl. & Rob. 220 at p. 341; 6 Cl. & F. 646, at p. 746. See also *Cruickshank* v *Gordon* (1843) 5 D. 909, at p. 1001, per Lord Mackenzie. For a contrary view, see *Cuninghame* v *Presbytery of Irvine* (1843) Stewarton Report, p. 180, per Lord Jeffrey.
138. Macl. & Rob. 220, at pp. 270–1, per Lord Brougham, and at pp. 321 and 331, per Lord Cottenham LC; 6 Cl. & F. 646, at p. 676–8, per Lord Brougham, and at pp. 726 and 736, per Lord Cottenham LC.
139. Bryce vol. 1, p. 98. Robertson, pp. 257–8, considered that they were contrary to the universal views of the Bench and Bar.
140. 'In city streets, men who had known each other from childhood paused to speak, with eager sympathy upon the subject. In remote country manses, by the farmer's ingle, round the peasant's fireside, Scotland's great concern was the theme of conversation. …': Bayne, p. 121, doubtless with some of the exaggeration to be expected in a highly partisan work.
141. It is as well to remember that the name 'Supreme Court' is not so much a 'cool' symbol of the twenty-first century as a throwback to the nineteenth, when Lord President Hope would declare that 'the House of Lords is the Supreme Court in this country': *Edwards* v *Cruickshank* (1840) 3 D. 282, at p. 308.
142. Cunningham vol. 2, p. 479.
143. Hanna vol. 3, pp. 350–2.
144. Lord President Boyle did not fail to advert to Dr Chalmers' position at this time in *Middleton* v *Anderson* (1842) 4 D. 957, at p. 981.
145. Macfarlane, pp. 63–5: '*Dr Cunningham got round Dr Chalmers*' (emphasis in the original); Cunningham vol. 2, p. 479 n. 2. In his not unamusing book Macfarlane, who left the Relief Church for the Established Church in his youth, shows all the zeal of the convert – not to mention a penchant for composing epic similes that could have served as a model for Arnold's *Sohrab and Rustum*.
146. Watt, p. 177, is probably wrong just to take Dr Chalmers' words at face value as excluding any other input.
147. Cunningham vol. 2, pp. 479–80.
148. Ibid., p. 480.
149. Hanna vol. 4, p. 106.
150. Ibid. vol. 4, pp. 109–10. Bayne, p. 124, says that 'all the genius and all the heart of Chalmers glowed and throbbed in his speech on the occasion.'
151. Chalmers, *What ought*, pp. 13–14. For Lord Cockburn's reaction to the debate, see his letter to Andrew Rutherfurd, the Lord Advocate, 23 May 1839: Bell, *Lord Cockburn: Selected Letters*, p. 155, at p. 156.
152. Chalmers, *What ought*, pp. 46–7. The Church should not be deterred from 'the path of consistency and honour' by the predictable clamour of the Tory and Radical press. For Dr Chalmers' own explanation of how his views developed in response to events, see his letter to Andrew Johnston, 2 May 1843: W. Hanna, *A Selection from the Correspondence of the late Thomas Chalmers, D.D., LL.D.* (Thomas Constable & Co., Edinburgh; Hamilton, Adams & Co., London, 1853), pp. 414–15.
153. Hanna vol. 4, p. 106.
154. Watt, p. 180.

155. It is right to recall that, not being a member of the General Assembly in 1838, Dr Chalmers had not himself voted in favour of an appeal.
156. Buchanan vol. 2, p. 53; Bryce vol. 1, pp. 89–90.
157. Bryce vol. 1, p. 90.
158. Cunningham vol. 2, p. 481.
159. Macfarlane, p. 66. He describes the speech, at p. 65, as 'laboured and yet most energetic'.
160. Macfarlane, p. 67†. About a week later, the Rev. James Robertson of Ellon, the thinking man's Moderate, had the impression that, though Dr Chalmers, 'who understands little of the ways of men', still gloried in his triumph, more judicious friends were beginning to feel themselves in rather awkward circumstances: letter to his wife, dated 25 May 1839, reproduced in A. H. Charteris, *Life of the Rev. James Robertson D.D., F.R.S.E.* (William Blackwood & Sons, Edinburgh and London, 1863), p. 79. A trifle optimistic.
161. *Presbytery of Strathbogie* (1840) 2 D. 585, at p. 607.
162. John Inglis in *Memorial submitted to Her Majesty's Government by a Committee appointed at a Meeting of Ministers, Elders and others, Members of the Church of Scotland, held at Edinburgh, 12th August 1840*, p. 18. See, more generally, the discussion at pp. 15–19.
163. Following the death of the Rev. James Martin in May 1834, Candlish became minister of St George's, Edinburgh, where Lord Moncreiff was one of his elders. His speech, late in the evening, marked the beginning of his rise as a Church leader. The scene is well described in Bayne, pp. 127–32. Candlish had been specially asked by Dr Buchanan to take part in the proceedings: Candlish Memorials, pp. 77–9. For his speech, see *Report of Speeches of the Rev. Dr Burns, Rev. Robert S. Candlish and Alexander Earle Monteith, Esq., in the General Assembly on Wednesday, May 22, 1839 in the Auchterarder Case*; Candlish Memorials, pp. 80–5.
164. *Clark* v *Presbytery of Dunkeld* (1839) Lethendy Report.
165. Lethendy Report, pp. 145–6.
166. For the detail, see Buchanan vol. 2, pp. 80–98; Cunningham vol. 2, pp. 468–9, 477–8, and 486 (putting the various stages of the case into the context of the other events); Bayne, pp. 162–8; Turner, pp. 211–17 with Note B; Hetherington vol. 2, pp. 406–9. The proceedings are fully reported in the Lethendy Report, and, in an abridged form, as *Clark* v *Stirling* (1839) 1 D. 955.
167. Buchanan vol. 2, pp. 88–90; Rainy, Mackenzie, *Life of William Cunningham*, pp. 123–4; Watt, pp. 186–7.
168. See *Clark* v *Stirling* (1839) 1 D. 955, at pp. 969–75; Lethendy Report, pp. 21–38.
169. See D. Daube, 'The Defence of Superior Orders in Roman Law' (1956) 72 Law Quarterly Review 494–515, reprinted in D. Cohen and D. Simon (eds), *David Daube: Collected Studies in Roman Law* (Vittorio Klostermann, Frankfurt am Main, 1991), pp. 579–601.
170. Subsequently, in the *Culsamond* case, in the course of the reclaiming motion before the First Division, the court raised the issue of the status of the Commission as a court: *Middleton* v *Anderson* (1842) 4 D. 957, at pp. 969–72 and 972–3.
171. In the first *Auchterarder* case Lord Fullerton had already expressed sympathy with the members of the presbytery of Auchterarder who were facing a judgment finding them wrong for doing what the superior ecclesiastical courts had required them to do: Auchterarder Report vol. 2 p. 251.

172. Lethendy Report, p. 85.
173. Ibid., p. 184.
174. Ibid., p. 71.
175. A. Dunlop, *An Answer to the Dean of Faculty's 'Letter to the Lord Chancellor'* (1st edition, John Johnstone, Edinburgh, November 1839, 3rd edition, 1840), pp. 118–19; Buchanan vol. 2, pp. 94–7; Brown, *Annals of the Disruption*, pp. 32–3. Many of the leading figures in the Church – such as Guthrie, Cunningham and Candlish – were present in court to support the ministers: Guthrie vol. 2, p. 12.
176. One for the majority of the presbytery, the other by Mr Kessen: Lethendy Report, pp. 207–8.
177. Cockburn Journal vol. 1, pp. 233–4. Cf. a letter from Cockburn to the Lord Advocate, Andrew Rutherfurd, 23 May 1839: Bell, *Lord Cockburn: Selected Letters*, p. 155, at p. 156. He says that in the robing room on 22 May several of the judges tried to persuade the court 'to abstain from calling the Revd Gents to the bar – chiefly because it *provoked* them to be offensive, and so to make bad worse. For which reason (I suppose) Gillies and Meadowbank and all the rest were clear that this was the true course.' In the interest of the authority of the court, the view of the majority was surely correct.
178. Lethendy Report, pp. 211–17. It provoked an anonymous pamphlet, actually written by the Rev. Robert Buchanan: *The Presbyteries of the Church of Scotland Threatened with Imprisonment in the discharge of their official duty in the Address from the Lord President of the Church of Scotland; with an answer to the same in two letters to his Lordship by a Minister of the Church of Scotland* (W. Collins, Glasgow, 1839). Its tone can be gauged from the assertion at p. 30: 'My Lord, I venture to affirm that a doctrine so monstrous was never propounded from the Bench since the days of the Stuarts.'
179. Letter from Cockburn to Andrew Rutherfurd 14 June 1839, Adv. Ms. 9687 f 128 at 129r, National Library of Scotland. His public judgment in his *Journal* vol. 1, p. 234, is rather gentler. Alexander Dunlop thought that the Lord President's manner was kindly: *An Answer to the Dean of Faculty's 'Letter to the Lord Chancellor'*, p. 118. For John Inglis, the Lord President's address was 'solemn and most impressive': Inglis, p. 575.
180. Lethendy Report, p. 216.
181. For the complicated details, see Buchanan vol. 2, pp. 98–140, 225–58, 294–323 and 367–416; Bryce vol. 1, pp. 101–13; Cunningham vol. 2, pp. 486–90 and 496–500; Hetherington vol. 2, pp. 409–15; 417–26, 428–32 and 470–2; Bayne, Chapters XXI and XXII; *Our church heritage; or, The Scottish churches viewed in the light of their history* (Nelson, London, 1875), Chapter IX; Brown, *The National Churches of England, Ireland and Scotland, 1801–1846*, pp. 307–10.
182. For a suggestion that the opposition to Mr Edwards was really based on hostility to his wife among the wives of other ministers in the presbytery, see A. J. Campbell, *Two Centuries of the Church of Scotland 1707–1929* (Alexander Gardner Ltd, Paisley, 1930), p. 246 n. 4.
183. Bryce vol. 1, pp. 115–31.
184. *Edwards* v *Cruickshank* (1840) 2 D. 1380. For the interdict proceedings, see pp. 77–9 below. For an assessment of the whole situation at about this time, by a legal commentator who is hostile to the Evangelical position, see S, 'The Church of Scotland Question' (1840) 24 Law Magazine and Quarterly Review of Jurisprudence 131, esp. at pp. 162–5.

185. Chalmers, *What ought*, p. 18.
186. *Memorial submitted to Her Majesty's Government by a Committee appointed at a Meeting of Ministers, Elders and others, Members of the Church of Scotland, held at Edinburgh, 12th August 1840*, p. 25.
187. Bryce vol. 2, Chapters III and V and pp. 95–108.
188. *Edwards* v *Cruickshank* (1840) 3 D. 282.
189. Buchanan vol. 2, pp. 304–22; Brown, *Annals of the Disruption*, pp. 22–4; Henderson, pp. 82–3; Watt, pp. 216–17. Bryce vol. 2, p. 93, by contrast, dismisses the episode in a single sentence.
190. Bryce vol. 2, p. 94.
191. Buchanan vol. 2, pp. 367–408; Bryce vol. 2, pp. 120–66. The presentee, Mr Edwards, was deprived of his licence: Buchanan vol. 2, pp. 408–10.
192. Charteris, *Life of the Rev. James Robertson*, pp. 138 and 143.
193. *Proceedings of the General Assembly of the Church of Scotland 1842*, 30 May 1842, pp. 252–8; Buchanan vol. 2, pp. 429–47 (events surrounding the Commission in August 1841) and p. 523; Bryce vol. 2, pp. 164–5, 225 (August Commission) and 273–5.
194. Brown, *The National Churches of England, Ireland and Scotland, 1801–1846*, p. 308.
195. See *Cruickshank* v *Gordon* (1843) 5 D. 909, at pp. 913–15. The respondents, who had not appeared, subsequently raised an action of reduction of the decrees pronounced in the suspension proceedings: *Dewar* v *Cruickshank* (1842) 4 D. 1446.
196. *Cruickshank* v *Gordon* (1843) 5 D. 909; *Caledonian Mercury* 11 March 1843; Cockburn Journal vol. 2, pp. 6–9. The oral arguments of counsel, which were also intended to cover the third *Auchterarder* case, are reported in *The Scotsman*, 25 January 1843, p. 3, and 28 January, p. 4; *Caledonian Mercury*, 26 January 1843, p. 2. The Dean of Faculty's speech was printed in *Speech of the Dean of Faculty, in the Court of Session* (p. 38 n. 24 above). See also p. 29 n. 229 below. The Court of Session had interdicted the commissioners elected by the minority of the presbytery of Strathbogie from sitting in the General Assembly of 1842: *Majority of Presbytery of Strathbogie* v *Minority of Presbytery* (1842) 4 D. 1298. The interdict was, in effect, ignored: *Proceedings of the General Assembly of the Church of Scotland 1842*, 27 May 1842, pp. 216–20 and 227.
197. *Edwards* v *Leith* (1843) 15 Scottish Jurist 375.
198. For the sequel to *Edwards* v *Leith*, when only fines of £5 were imposed, but the ministers were found liable in expenses, see *Caledonian Mercury*, 27 May 1843, p. 3 (giving the Lord President's remarks); Cockburn Journal vol. 2, pp. 28–9. Two of the minority, the Rev. Harry Leith, Rothiemay, and the Rev. William Duff, Grange, actually remained in the Establishment at the Disruption: McCosh, *The Wheat and the Chaff*, pp. 90–1.
199. For a description of the reaction, from a non-intrusionist standpoint, see Bayne, pp. 200–1.
200. Chalmers, *What ought*, p. 11.
201. Robertson, p. 215 (seeing events from a Moderate standpoint).
202. As reported in *The Scotsman*, 20 December 1839, p. 3, at the time of the ministers' suspension: the *Glasgow Herald* thought that the presbytery should have released itself from the obligation to the law by withdrawing from the Establishment altogether.
203. This was just one of a number of such meetings throughout the country: Hetherington vol. 2, p. 430.

204. He was Sheriff of Perth and then became Solicitor General when Peel came to power in 1841. Subsequently, he was Lord Advocate for three months in 1852, before being appointed to the bench as Lord Anderson and dying the following year: Omond, pp. 161–2. Although not listed in the Session Cases report, when Solicitor General in 1843, he was actually one of the counsel for the seven Strathbogie ministers in their action to have their deposition by the General Assembly set aside: *Cruickshank* v *Gordon* (1843) 5 D. 909. He did not need to speak after Rutherfurd chose not to develop the argument on jurisdiction: *The Scotsman*, 25 January 1843, p. 3.
205. *The Scotsman*, 5 June 1841, p. 3.
206. *The Scotsman*, 5 June 1841, p. 3.
207. See Disruption Worthies vol. 2, pp. 413–18.
208. By 'the empire', the speaker is referring to the United Kingdom. The usage, current in the period, is not well identified in *The Oxford English Dictionary* s.v. empire, II.5.b.(b). See, for instance, *Ferguson* v *Earl of Kinnoull* (1842) 1 Bell 662, at p. 733; 9 Cl. & F. 251, at p. 324, where, speaking of certain Acts of Parliament regulating and protecting the rights of patrons, Lord Campbell says 'It is surely for the Supreme Court of this empire to put a construction upon these Acts' – clearly referring to the House of Lords' jurisdiction in the United Kingdom. Similarly, in *Earl of Kinnoull* v *Ferguson* (the third *Auchterarder* case) 6 December 1842, *The Times*, 20 December 1842, p. 3, the Lord Ordinary (Cuninghame) refers to an argument that the English courts have the right to interpret statutes touching ecclesiastical affairs, 'solely because the King is the head of the church in that part of the empire, while, it is added, that every such right of the Sovereign over the Scottish church was cut off by statute at the Revolution.' When Turner, p. 3, says that the shock of the Disruption 'was felt throughout the empire', he too is referring to the United Kingdom. The same usage is reflected in references to the 'imperial' Parliament or legislature (cf. Stewarton Report, p. 69, per Lord Meadowbank) and to 'imperial' legislation.
209. *The Scotsman*, 5 June 1841, p. 3.
210. No student of psychology will be surprised to note that Mr Monteith had started life as an Episcopalian and had converted to the Church of Scotland under the influence of Dr Chalmers' teaching: Disruption Worthies vol. 2, pp. 415–16.
211. See the report in *The Scotsman*, 5 June 1841, p. 3.
212. Henderson, pp. 91–2.
213. On Dunlop, see p. 66. For Dr Chalmers' view of the line to take, emphasising the spiritual independence issue rather than non-intrusion, see Hanna vol. 4, pp. 280–91; Moncreiff, pp. 101–4. Chalmers was conscious, however, that opponents could represent the claim for spiritual independence as a claim for power for ecclesiastics, rather than for ordinary people: letter of 19 February 1842 to Lord Lorne (the future eighth and first Duke of Argyll), in W. Hanna (ed.), *A Selection from the Correspondence of the late Thomas Chalmers, D.D., LL.D.*, pp. 386–95. In January 1842 the Marquess of Lorne, then aged eighteen, had published anonymously *Letters to the Peers from a Peer's Son, on the Duty and Necessity of an Immediate Legislative Interposition on behalf of the Church of Scotland, as determined by Considerations of Constitutional Law* (William Whyte & Co., Edinburgh, 1842).
214. *Claim Declaration and Protest by the General Assembly of the Church of Scotland* (1842). See Watt, pp. 253–62. Turner, pp. 189–90, makes the valid point that the document was so elaborate and the time for its consideration so short that most of the members of the Assembly who supported it could not possibly have mastered the detail. Of

course, even today, this would be equally true of most MPs and peers and of the legislation they pass.

215. For a hostile commentary see A. Macgeorge, 'The Church in its Relation to the Law and the State', in R. H. Story (ed.), *The Church of Scotland Past and Present* (William Mackenzie, London, n.d., but apparently 1891) vol. IV, p. 1, at pp. 108–15.
216. Letter from Dr Guthrie to his brother, Provost Guthrie: Guthrie vol. 2, p. 44.
217. When Peel formed his Conservative ministry in August 1841, this opened the way for the Tory Lord President Hope to resign, for the Tory Lord Justice Clerk Boyle to become Lord President and for the Tory Dean of Faculty Hope to replace him as Lord Justice Clerk. For Parliament's general attitude to Church matters, see Chadwick, *The Victorian Church* Part I, pp. 222–4; Brown, *The National Churches of England, Ireland, and Scotland, 1801–1846*, Chapter 5.
218. How they could genuinely have entertained any such expectations after the unanimous and straightforward decision of the First Division is, to say the least, a mystery: *Earl of Kinnoull* v *Ferguson* (1841) 3 D. 778. If even Lord Fullerton could not support its position, the presbytery was doomed.
219. *Ferguson* v *Earl of Kinnoull* (1842) 1 Bell 662; 9 Cl. & F. 251. The perceived significance of the decision is brought out very clearly in Turner, pp. 291–308.
220. Lord Cuninghame later said that the dictum of Lord Kames, which had been cited in support of that argument, had been 'exploded': *Cruickshank* v *Gordon* (1843) 5 D. 909, at p. 916. For the modern context, see Sir William Wade, C. Forsyth, *Administrative Law* (9th edition, Oxford University Press, Oxford, 2004), pp. 774–7.
221. Apparently, the idea was first suggested by Dr Chalmers' son-in-law and biographer, Dr William Hanna, in September 1842, after the second *Auchterarder* decision. See the letter of Dr Chalmers to the Rev. John Mackenzie (also a son-in-law) dated 19 September 1842: Hanna vol. 4, pp. 306–7.
222. See the letter dated 21 October 1842 from Dr Guthrie to the Rev. James McCosh reproduced in Guthrie vol. 2, pp. 40–1. Guthrie knew McCosh from the time when they were both ministers in the presbytery of Arbroath: Disruption Worthies vol. 2, p. 343.
223. Letter from Dr Guthrie to Provost Guthrie: Guthrie vol. 2, p. 43.
224. Bryce vol. 1, pp. 310–15; Turner, Chapter XIII; Hanna vol. 4, pp. 309–18, with Appendix D, pp. 551–64. Macfarlane, pp. 110–18, provides a very hostile commentary.
225. Candlish Memorials, pp. 219–59 (notes of the Rev. James Henderson, St Enoch's Church, Glasgow); Arnot, *Life of James Hamilton D.D., F.L.S.*, pp. 210–12; Mrs A. Fleming, *Autobiography of the Rev. William Arnot and Memoir by his daughter, Mrs. A. Fleming* (3rd edition, James Nisbet & Co., London, 1878), pp. 153–8. See Ross, pp. 132–3. Bayne, Chapter XXXI, gives a full account based on Dr Henderson's notes. It is pretty clear that Dr Henderson did not like the interventions by Henry Moncreiff. Forty years later, in a very defensive passage, Moncreiff challenged the accuracy of his record: Moncreiff, pp. 330–3.
226. Candlish Memorials, p. 221.
227. Indeed Dr Chalmers tried to exclude any criticism of patronage: Guthrie vol. 2, p. 46, letter dated 19 November 1842 from Dr Guthrie to Patrick Guthrie.
228. *Ferguson* v *Earl of Kinnoull* (1842) 1 Bell 662; 9 Cl. & F. 251.
229. Mr Young had already embarked on the third *Auchterarder* case, *Earl of Kinnoull* v *Ferguson*, 6 December 1842, *The Times*, 20 December 1842, p. 3, judgment of the Lord Ordinary (Cuninghame); Opinions of the consulted judges in *Earl of Kinnoull* v

Ferguson 7 March 1843, Session Papers vol. 388, No. 172, Advocates Library; (1843) 5 D. 1010, judgment of the First Division in accordance with the opinions of the majority of the consulted judges. According to the *Caledonian Mercury*, 11 March 1843, p. 3, having first given judgment in the *Strathbogie* case, the court then dealt with the third *Auchterarder* case. The Lord President simply said, 'All I have to say in this case is that I entirely concur with the opinion of the Lord Justice Clerk.' Lord Mackenzie was of the same opinion, while Lord Fullerton and Lord Jeffrey both agreed in the opinions of the minority of the consulted judges. The court held that the action at the instance of the patron and presentee – concluding for a declarator that the members of the presbytery who were willing to obey the law, though a minority, might effectually take the pursuer on trial, and if found qualified, admit and receive him in the benefice, and for interdict against the interference of the majority – was competent and relevant.

230. Above, pp. 5–6.
231. So *The Glasgow Chronicle*, as reproduced in *The Times*, 25 October 1842, p. 3, commenting on the circular summoning the Convocation.
232. Constitution (Amendment) Act 2002. Lord Nicholls of Birkenhead expressly recognised that this was a legitimate step for the legislature to take, even though he considered it to be profoundly regrettable: *Matthew* v *State of Trinidad and Tobago* [2004] UKPC 33; [2005] 1 A.C. 433, at p. 471, paras 72–3.
233. Hetherington vol. 2, pp. 494–5.
234. Candlish Memorials, p. 243, Dr Candlish.
235. Ibid., pp. 223–4, Dr Guthrie commenting on the argument of Mr Smith.
236. Ibid., pp. 243–4.
237. Ibid., p. 244.
238. As is obvious, for instance, from the tone of J. Begg, *A Violation of the Treaty of Union* (Johnstone, Hunter & Co., Edinburgh, 1871), tracing the present social ills in Scotland to the Church Patronage (Scotland) Act 1711 passed by the 'English' Parliament, which had led to the presbyterian church in Scotland becoming divided and so unable to deal effectively with poverty and education.
239. Some criticism of this account of his stance is to be found in T. Smith, *The Memoirs of James Begg D.D.* (James Gemmell, Edinburgh, 1885, 1888), vol. 1, pp. 411–12.
240. Candlish Memorials, p. 237.
241. Ibid., p. 245. The quotation is from Matthew 10:23: 'But when they persecute you in this city, flee ye into another: for verily I say unto you, Ye shall not have gone over the cities of Israel, till the Son of man be come.' Using the quotation in this context was not a novelty: cf. the letter from Dr Guthrie to Provost Guthrie before the Convocation: Guthrie vol. 2, p. 43.
242. See, however, the subsequent observations of Lord Moncreiff: Stewarton Report pp. 108 and 126–7, and Lord Cockburn, p. 134.
243. Candlish Memorials, pp. 235–6.
244. Fleming, *Autobiography of the Rev. William Arnot*, p. 157.
245. Guthrie vol. 2, pp. 48–50.
246. Beith, *Memories of Disruption Times*, Section II, gives a good idea of what these efforts involved. See also Guthrie vol. 2, pp. 52–3; Rainy, Mackenzie, *Life of William Cunningham D.D.*, pp. 187–9; D. Paton, *The Clergy and the Clearances: the Church and the Highland Clearances 1790–1850* (John Donald, Edinburgh, 2006), pp. 146–51.
247. Bryce vol. 1, pp. 307–9; Turner, pp. 344–9.

248. Guthrie vol. 2, p. 52, letter from Dr Guthrie to his sister, Clementina, dated 26 November 1842.
249. Buchanan vol. 2, pp. 563–71; Bryce vol. 2, pp. 322–4.
250. See pp. 9–10 above.
251. *Cuninghame* v *Presbytery of Irvine* (1843) 5 D. 427; fully reported in the Stewarton Report. Wilson, Chapter VI; Buchanan vol. 2, pp. 553–64; Turner, pp. 339–42; Watt, Chapter 20; Macleod, *Memoir of Norman Macleod D.D.*, pp. 186–7, and 191–7, reproducing a letter dated 18 February 1843 from the Rev. Norman Macleod to the Rev. A. Clerk and another undated letter from him to his sister, Jane. Bryce vol. 2, pp. 352 and 380, mentions the case only *en passant*.
252. Act anent Reunion with Seceders, reproduced in the Stewarton Report, Appendix, pp. iv–v.
253. The Dean addressed the court on 21, 22 and 23 June. Andrew Rutherfurd completed his speech in a single day, 28 June. The speeches of counsel are fully reported in *Stewarton Case. Report of the Pleadings by Patrick Robertson, Esq., Dean of Faculty, and Andrew Rutherfurd Esq., Advocate* (n. 96 above). The projected hearing cast a long shadow beforehand: *Wilson* v *Presbytery of Stranraer* (1842) 4 D. 1294.
254. The offending passages in the presbytery's case were quoted by the Dean in his speech: *Stewarton Case. Report of the Pleadings*, pp. 11–12, and are reprinted in the Stewarton Report, Appendix, p. i.
255. *Stewarton Case. Report of the Pleadings*, pp. 85–88.
256. Ibid., pp. 88–93; *The Scotsman*, 2 July 1842, p. 3. The terms of the minute are reprinted in the Stewarton Report, Appendix, pp. i–iii.
257. See *Report of the Pleadings*, pp. 93–94; interlocutor of 15 July 1842, reproduced in Stewarton Report, Appendix, p. iii.
258. *Report of the Pleadings*, p. 94.
259. See the letter from 'A Churchman', *The Scotsman*, 2 November 1842, p. 3.
260. *The Scotsman*, 26 November 1842, p. 3. Lord Gillies died on Christmas Eve.
261. The following Tuesday, the court began the hearing in presence, before the Whole Court minus the Lord Justice Clerk, in both the third *Auchterarder* case and the Strathbogie ministers' action for reduction of their deposition by the General Assembly. Appearing for the Church, Andrew Rutherfurd acknowledged that the judgments in the *Stewarton* case meant that 'it were now idle and useless to be repeating, to any extent., the general statements formerly and ineffectually made …': *The Scotsman*, 25 January 1843, p. 3; *Caledonian Mercury*, 26 January 1843, p. 2. The report of his somewhat defeatist submissions suggests that he, at least, realised that the legal position of the Church was now virtually hopeless.
262. See, for example, *Memorial submitted to Her Majesty's Government by a Committee appointed at a Meeting of Ministers, Elders and others, Members of the Church of Scotland, held at Edinburgh, 12th August 1840*, p. 34 (saying, on behalf of the Moderates – before the case had even been argued – that it seemed to be very generally anticipated that the decision would be adverse to the pretensions of the Church).
263. The majority comprised the Lord President, the Lord Justice Clerk, Lord Medwyn, Lord Meadowbank, Lord Murray, Lord Wood, Lord Cuninghame and Lord Mackenzie; the minority comprised Lord Moncreiff, Lord Fullerton, Lord Jeffrey, Lord Cockburn and Lord Ivory.
264. With the departure of Lord Gillies and the arrival of Lord Jeffrey, the disposition of forces in the First Division was now even, with the Lord President and Lord

Mackenzie on the one side, Lord Fullerton and Lord Jeffrey on the other. But the actual decision was given in terms of the opinion of the majority of all the judges: Stewarton Report, p. 184.

265. Some spectators at the hearing thought that they detected a hint that Lord Jeffrey had seen reason to change his mind about the (first) *Auchterarder* case and would not be going any further in supporting the Church's position: *The Scotsman*, 25 January 1843, p. 2; Macfarlane, p. 56*, at p. 57. Significantly or not, that part of his remarks is not fully reproduced in the version revised by him for publication: Stewarton Report, p. 180.
266. Stewarton Report, especially at pp. 52–6.
267. Lord President Boyle, Stewarton Report, p. 143; Lord Justice Clerk Hope, p. 62; Lord Meadowbank, p. 69; Lord Wood, pp. 74–5; Lord Cuninghame, pp. 83–5; *contra*, Lord Moncreiff, pp. 116–17 and 120–1.
268. For example, Lord Medwyn, Stewarton Report, pp. 45–8; Lord Justice Clerk Hope, pp. 60–1; Lord Meadowbank, pp. 68–9; *contra*, Lord Moncreiff, pp. 121–3; Lord Fullerton, p. 172; Lord Cockburn, p. 133. See Wilson, pp. 159–61.
269. Stewarton Report, p. 131.
270. Lord Justice Clerk, Stewarton Report, pp. 57–8; Lord Murray (doubtful), p. 71; Lord Wood, pp. 74–5; Lord Meadowbank, pp. 74–5.
271. Lord Moncreiff, Stewarton Report, pp. 117–19; Lord Fullerton, pp. 170–1. Lord Cockburn puts his points with particular gusto: pp. 130–2.
272. In a speech to the presbytery of Edinburgh on 25 January 1843 about the position of the ministers of *quoad sacra* parishes on the presbytery: *The Scotsman*, 28 January 1843, p. 4.
273. Buchanan vol. 2, pp. 572–82; Bryce vol. 2, pp. 336–8 and 340–52.
274. Charteris, *Life of the Rev. James Robertson*, p. 168. The appeal would have suspended the effect of the Court of Session decision.
275. On 14 June 1843: Rainy, Mackenzie, *Life of William Cunningham, D.D.*, p. 200.
276. Lord Sands, *Dr Archibald Scott of St George's Edinburgh and his Times* (William Blackwood & Sons, Edinburgh and London, 1919), p. 27 n. 1.
277. See, for example, Rainy, Mackenzie, *Life of William Cunningham D.D.*, pp. 200–1.
278. Inglis had foreseen the dilemma of anyone asking for such legislation: Inglis, p. 811.
279. Committee Stage, 26 June 1843, Hansard's Parliamentary Debates, 3rd Series, vol. 70, columns 367–82.
280. Further debate in Committee, 11 July 1843, ibid., columns 906–9; Third Reading debate, 17 July 1843, ibid., columns 1202–6.
281. Ibid., column 1206.
282. Bayne, p. x, Preface to First Edition (1893).
283. *MacMillan* v *General Assembly of the Free Church of Scotland* (1859) 22 D. 290; (1861) 23 D. 1314; (1862) 24 D. 1282; *MacMillan* v *Free Church of Scotland* (1864) 2 M. 1444.
284. *Free Church of Scotland* v *Lord Overtoun* (1904) 7 F. (H.L.) 1; [1904] A.C. 515, discussed at pp. 98–107 below.
285. For instance, the provisions on the appointment of Writers to the Signet as judges of the Court of Session were still-born, but remain on the statute book to this very day.
286. On the other hand, Article XIX of the Treaty was invoked in the English High Court in *R (on the application of Greenpeace)* v *Secretary of State for Scotland*, unreported, Crown Office transcript 24 May 1995. Popplewell J. held that, by reason of Article

XIX as enacted in the Union with Scotland Act 1706, he had no jurisdiction to entertain an application for the judicial review of a decision by the Secretary of State for Scotland to grant a licence to Shell UK to dispose of an old oil platform in deep water. The same applied to the related decision of the Chief Inspector of the Industrial Pollution Inspectorate in Scotland. The Scottish Office solicitors had been somewhat apprehensive about taking the point and 'going nuclear' by invoking the Act of Union. A cautionary note on Article XIX was sounded in *Tehrani* v *Secretary of State for the Home Department* [2006] UKHL 47; 2007 S.C. (H.L.) 1, at p. 30, para. 101 and p. 31, para. 105; [2007] 1 A.C. 521, at p. 554, para. 101, and p. 555, para. 105, per Lord Rodger of Earlsferry, who had been Lord Advocate in May 1995.

Lecture 2

A War and its Warriors

'Open war is now waged between the Church of Scotland and the courts of civil law in that country.' A trifle wordy perhaps, and certainly not to be mistaken for a classic *Sun* headline, but it is nevertheless quite a dramatic opening. Not my own, I hasten to add, but the first words of a pamphlet[1] published in 1841 in an attempt to explain the warfare engulfing the courts and the Established Church in Scotland to bewildered MPs and others in England. Though different in style, it bears some resemblance to a modern newspaper headline after the Government has lost a court case. Old style or new style, the media like to portray the courts as doing battle with the Government or some other powerful body such as the Church.

In some quarters the courts acquire a certain kudos from their supposed role in taking on the executive. In an era when the Whips leave little room for independent action by MPs, it is sometimes argued that the courts are the only effective opposition which can control an arrogant government. For instance, in a leading article in July 2006, *The Independent* said:

> This expanded role for the judiciary is something we should welcome. Judges are becoming a greater influence in checking our elected rulers. As the executive grows increasingly powerful and careless with our civil liberties this can only be a good thing.[2]

Having seen the position from both sides, I would reject the idea that the courts have any such 'expanded role' if it means that they are doing anything more than deciding the issue between the parties in the case according to the law, whether it is ancient common law or, say, the Human Rights Act 1998. After all, judges are just as human as politicians. In judicial review they might err in giving either too much leeway to the decisions of a popular, newly elected government, or too little to those of a government that had been in power for a long time and had run out of public affection.[3] All that unelected judges would, or should, ever be doing

is deciding a case between two parties, one of which happens to be the government.

At first sight, one might indeed say that, before the Disruption, all that the Court of Session and the House of Lords were doing was deciding the string of cases involving the Church that were brought before them. Sometimes the pursuer would be a man who had wanted to be a minister but who had been rejected by the presbytery and was now suing it for damages.[4] Sometimes the pursuer would want to stop a rival from being appointed as the minister of a parish.[5] Sometimes the patron and heritors would want to stop the presbytery dividing the parish for which the heritors paid teinds.[6] Or else a minister who had been convicted of theft by his presbytery now sought suspension and reduction of his conviction on the ground that the composition of the presbytery had been unlawful.[7] In the heated atmosphere of the times,[8] as the 1830s gave way to the 1840s, pursuers brought all these and other issues involving the Church before the Court of Session. When the court decided the issue against the presbyteries concerned, its decision could be – and very often was – portrayed as an attack by the judges on the Church. You would readily guess, for instance, that John Hamilton, the pamphleteer who said that open war was being waged between the courts and the Church, was a supporter of the non-intrusionist majority who were at pains to portray the situation in that way.

For their part, the judges who made up the majority in the Court of Session in the various cases were at equal pains to portray themselves as simply performing their traditional role of ensuring that everyone – including any presbytery – complied with the law of the land. So, when Mr Edwards raised an action with a conclusion that the presbytery of Strathbogie should be ordained to admit and receive him as minister of the parish church of Marnoch in Aberdeenshire, and the minority of the presbytery defended the action on the ground that the Court of Session had no jurisdiction to deal with such an essentially spiritual or ecclesiastical matter, the First Division repelled that plea.[9] They stressed that they were only doing what they would do with anyone else who failed to perform his duty. To ram home the point, in words which deserve to be much better known, Lord President Hope took the example of the Crown itself:

> With regard to our jurisdiction, and the jurisdiction of the supreme courts in every civilized country with which I am acquainted, I have no doubt. They have power to compel every person to perform their duty – persons whether single or corporate; and, in our noble constitution, I maintain – though at first sight it may appear to be a startling proposition – the law can compel

> the Sovereign himself to do his duty, ay, or restrain him from exceeding his duty. Your Lordships know that the Sovereign never acts by himself, but only through the medium of his ministers or executive servants; and if any duty is refused to be done by any minister in the department over which he presides, or if he exceed his duty to the injury of the subjects, the law gives redress. In England the Court would proceed, according to the nature of the case, by injunction or *mandamus*, or a writ of *quo warranto*. In this country a person would proceed by action or by petition; and, if he was right, a decree would be passed and would be enforced by ordinary process of law. If it be necessary for a man to declare his rights against the Crown, he brings his action against the Officers of State representing the Crown; for there is no officer, be he high or low, civil or ecclesiastical, that the law will not compel to do that duty which the law imposes on him. Your Lordships know that there are some actions which cannot be brought on in this country without the concourse of her Majesty's Advocate, and you will find more than one case in the books where her Majesty's Advocate was called upon to show cause why he refused his concourse; and if he could not show good cause, either they compelled him to give concourse, or they allowed the action to go on without him. It is impossible to suppose that there can be any duty imposed upon any person, single or corporate, which he can refuse to discharge; or, at least, if he refuses, the Court has power to compel him to discharge it.[10]

So far as remedies against the Crown are concerned, the references to English law may paint an unduly rosy picture of the situation in England – if we remember the minefield through which, a century-and-a-half later, the House of Lords had to tiptoe to reach a somewhat similar conclusion in M v *Home Office*.[11] But, for Scots Law, the passage is a classic exposition of the power of the Court of Session to compel the Crown to do its duty, or to restrain the Crown from exceeding its duty. Indeed it is the very fact that, in the Lord President's eyes, the jurisdiction is both startling and well settled that makes it, for him, such a powerful basis for his argument that the presbytery, too, must be subject to the jurisdiction of the court. Unfortunately, the Crown Proceedings Act 1947 appeared to remove part of the court's power over the Crown. Happily, in *Davidson* v *Scottish Ministers*[12] the House of Lords was able to find a way through the Act and so to restore the power of the Court of Session to a state in which it might almost deserve Lord President Hope's approval.

Why, then, did observers think that there was a war between the courts themselves and the Church?

Today, when a government sustains a series of defeats before the courts, it is generally because those representing some group – say, asylum-seekers or women employees claiming equal pay – are engaged in a sustained

campaign against a position which the government, or indeed successive governments, feel obliged to defend. The battle is between the group concerned and the government. But members of the group raise a number of judicial review or similar proceedings in the hope that, if not all at once, at least by stages, the courts will be able to give them the victory over the government that they cannot win by themselves.[13]

On one level, the position was the same in the Disruption cases. They were the product of a struggle between two factions in the Church, the Moderates and the Evangelicals. Instead of confining their struggle to the Church courts, leading members of the Moderate faction quite deliberately chose to take various matters in the dispute to the civil courts. In that way they hoped to win a victory that would inevitably elude them in the Church courts now that the Evangelicals were in the majority in the General Assembly. So the Court of Session had to decide between one party, backed by the Moderates, and another – in practice, a presbytery, which was itself one of the Church courts[14] – backed by the Evangelical majority in the General Assembly. If that had been all that there was to it, then talk of a 'war' between the Court of Session and the Church would have been just the same kind of media hype as we encounter today. In fact, there was actually much more to the dispute.

Today, when the Government or the Scottish Executive lose a case in the Court of Session or elsewhere, they may not like the result, but they accept the authority of the courts of the land and comply with the decision.[15] In an extreme case they may, of course, quite legitimately legislate to reverse it.

The position of the majority party in the Church could not have been more different.[16] They considered[17] that the Church courts had exclusive jurisdiction in ecclesiastical matters and that, consequently, the Court of Session had no jurisdiction at all in those matters. The General Assembly said as much, both in its great debates on spiritual independence and when dealing, as a court, with, say, the Strathbogie ministers. Often, as Lord Fullerton noted,[18] the Church liked to base this position on what he called 'theological dogmas' – and others called 'pompous pratings'.[19] These were to the effect that Christ alone was the Head of the Church, including the Church of Scotland as the Established Church, which was not, therefore, subject to the authority of the State in ecclesiastical matters. Indeed that belief underlay the entire position of the Evangelicals and drove their actions. Before the Court of Session, however, the representatives of the Church were careful not to base their claim to exclusive jurisdiction on that theological belief. Rather, the Solicitor General emphasised[20] that the Church of Scotland, as a national establishment, was dependent on the

State and derived its privileges and immunities from the State. Therefore, it was in a mass of legislation and decisions of the Court of Session from before the Reformation onwards that the legal basis for the exclusive jurisdiction of the Church courts in ecclesiastical matters was to be found.[21] Hence the need for the judges to examine the history of the Church from the time of the Reformation, at least. Hence, also, the interminable judgments, especially of Lord Medwyn and Lord Moncreiff, as they crawl through that history, not year by year but – it often seems – minute by minute.[22]

Even though the claim to exclusive jurisdiction was based on ordinary legal materials, it inevitably meant that the Church, as represented by the majority party, did not simply disagree with the decisions of the Court of Session: it regarded the Court of Session as attacking it – in effect, as invading its territory, attempting 'to break into the precincts of the Church, and to desecrate [its] sanctuary.'[23] Conversely, the Court of Session saw the Church as claiming a right to invade *its* territory and as defying *its* authority. It was this stand-off which gave the dispute its wider constitutional significance for most members of the public.

Writing more than forty years later, when he was the Grand Old Man of the Free Church, Lord Moncreiff's son, Sir Henry Wellwood Moncreiff Bt, suggested – presumably, humorously, though with him it is hard to tell – that the majority judges who failed to uphold the Church's argument on the independence of its courts in ecclesiastical affairs had been infected by an inveterate hereditary disease of English Erastianism which made them unable to see how a church could both be established and yet enjoy spiritual independence.[24] Happily for them, he supposed that the minority judges had been inoculated against this disease by an exposure in early life (that is, during their education in England) to English conceptions. But, in reality, as Sir Henry's own detailed analysis shows, the Church's argument ultimately rested on the idea that the Church derived its powers from God, not from the State – a religious, rather than a legal doctrine.[25] For the Moderates, John Inglis protested against any idea of an 'undefinable, but inherent and indefeasible authority, derived from the Saviour Himself as Head of the Church, in the exercise of which all considerations of expediency and all reverence for civil government must be abandoned and forgotten.'[26]

It was this confrontation over jurisdiction which made talk of a 'war' between the Court of Session and the Church rather more appropriate than in the case of modern disputes between the courts and the executive.

The so-called 'war' went on for more than six years – from the time

when Lord Fullerton, as Lord Ordinary, heard the first *Auchterarder* case argued 'at great length' in December 1836 before reporting it to the First Division,[27] until it spluttered to an end with the last gasp of the *Strathbogie* litigations on 26 May 1843, eight days after the Disruption.[28] In the *Culsamond* case[29] in March 1842, Lord President Boyle attempted to dispel any idea of a contest between the Court of Session and the Church:

> As to the childish idea that this court is in collision with, or, by the judicial determinations it is called upon to pronounce, is entering into competition with the General Assembly as to jurisdiction, or is anxious to interfere in such questions as the present, and the many others which have been raised since 1834 …, I shall only say, and I believe I speak the unanimous sentiments of the court, that nothing has been more contrary to its wishes than to have been called upon to adjudicate in any one of them. Let the Church only confine itself to matters that are truly of an ecclesiastical nature … and there will neither be applications made for the protection of the civil power, nor any interference whatever on the part of this court, which can possibly be construed into an attempt to encroach upon the privileges of the Church or any of its courts.

This was a cry from the heart. The Lord President was glad of an occasion to make the point again in February 1843, when the First Division dismissed an action on the ground that the matter was completely within the presbytery's jurisdiction: 'The judgment to be pronounced must satisfy all reasonable men that the Court does not interfere with the Church courts when not imperatively called on to do so.'[30] In their quieter moments even some of the Evangelicals would concede that the judges were only doing their job: the judges' province was 'to give sentence on every question which comes before them; and we must presume that every sentence of theirs rests on their own conscientious views of law and equity.'[31]

Despite the protestations on both sides, the clash over jurisdiction made it look like a war. Moreover, the more enthusiastic and romantic members of the Evangelical party were only too keen to see themselves as heroic figures from Covenanting times:

> We had nought else to do but to pluck the old weapons from the dead men's hands and when the State came down on us in its pride and power, man once more the moss-grown ramparts where our fathers had bled and died. The rust was rubbed from the old swords. …[32]

In truth, some of the language used by the judges did nothing to spread peace. For example, at the start, in the first *Auchterarder* case, Lord Meadowbank dared the General Assembly to do their worst. Referring

to the confrontations between Parliament and the English courts over parliamentary privilege, he said:

> No man, nor any body of men, however elevated, have ever yet resisted the law with impunity. We have seen that both Houses of Parliament, the Lords and the Commons of England, having found the arm of the law too powerful for their resistance, were compelled to yield to its omnipotence – and I cannot say that I have much apprehension of all that the General Assembly could do in such a case, under whatever leaders she may think fit to proceed to battle.[33]

Even Lord Fullerton, a star among the minority judges, who supported the Church's position whenever possible, used military language. Dismissing an argument on jurisdiction which was based on the Church courts' lack of any power to enforce their judgments, he said:

> It is true we have artillery strong enough, in the shape of interdicts, and diligence, and fine, and even imprisonment; and the Church courts are now despoiled of the weapons of offensive warfare, once strong enough in their hands. But what is that to the purpose in a question of right? The defensive armour of argument, reason, and justice, at least, are at their command; and I trust those are the arms by which every judicial contest in this court is, and ever will be decided.[34]

The reaction of the prototypical modern judge – whose main duty, many appear to think, is to express dismay if the parties have been remiss enough not to settle their dispute without troubling the courts – may well be to ask whether all these battles, all these judgments and all these legal expenses were really necessary. If it had arisen today, surely, he would suggest, the dispute could have been resolved by the modern miracle of mediation? Happily not. The crucial dispute was about jurisdiction and, for that reason alone, it was unavoidable.

In the first *Auchterarder* case, speaking for the presbytery, but really for the General Assembly, the Solicitor General made this plain. Referring to the Veto Act, he said:

> Whether [the Church] acted wisely or not, is not here the question; nor is this the place to entertain such discussion. She will vindicate her own proceedings to public opinion, she will vindicate her proceedings before the legislature of the State if called upon to do so; but she denies she is under any necessity to defend herself in this court; and the presbytery of Auchterarder will not betray her interest or her rights, by entering into a defence, even before this high tribunal, in a matter as to which, however deep and sincere the respect she feels for your Lordships, she must disclaim its authority.[35]

This was, indeed, the only position which the Church could take since, if its stance was correct and the Church courts had exclusive jurisdiction in ecclesiastical matters, it was its duty to vindicate that jurisdiction by refusing to countenance the jurisdiction of the Court of Session. Either the Church courts had exclusive jurisdiction or they did not. Therefore, for the Church to acquiesce in the jurisdiction of the Court of Session, to any extent, necessarily amounted to abandoning its entire position, that the Church courts alone had jurisdiction.[36] As Dr Chalmers put it, on jurisdiction 'the Church could not, without the surrender of a great and essential principle, recede from her position by a single hair-breadth.'[37] This was why, every time the Church at any level was represented in one of the long series of cases before the Court of Session, its counsel had to renew the battle over jurisdiction.[38] It was not an issue that could be settled by an adjustment of the parties' positions. Indeed the majority party in the Church quite often tried to avoid any suggestion that they recognised the authority of the Court of Session by simply not defending actions brought against the representatives of the Church. A decision in undefended proceedings did not count as a *res judicata* and so did not prevent the Church from re-opening the point if it arose subsequently.[39]

Although the original *casus belli* was the Veto Act, this was a minor matter compared with the question of jurisdiction – or, as the Church called it, the 'spiritual independence' of the Church from the dictates of the State courts in ecclesiastical matters. Dr Chalmers described the veto as 'a mere bagatelle and dust in the balance' by comparison with the spiritual independence of the Church.[40] When the Church's Claim of Right was being drafted for presentation to Parliament in the spring of 1842, Chalmers insisted that the emphasis must be on spiritual independence, rather than on the Veto Act, since he thought that the complexities of the dispute about that Act would make little impression outside Scotland.[41] But it seems clear that everyone realised that, if the Veto Act were challenged, the question of the respective jurisdictions of the civil and ecclesiastical courts would immediately arise. Indeed, in its defences as originally drafted in the first *Auchterarder* case, the presbytery mentioned that, in certain circumstances, it might have been its duty to the court 'to have respectfully declined your Lordships' jurisdiction.'[42] After the position changed when the pursuers revised their condescendence, the first plea-in-law for the presbytery was indeed to the effect that the Church courts had exclusive jurisdiction.[43] Writing in March 1835, when the Auchterarder dispute was still going through the Church courts, Lord Cockburn referred to doubts which Lord Advocate Jeffrey had expressed in a letter to him in 1833 and added, 'The collision on which

Jeffrey speculates between the civil and ecclesiastical courts was always foreseen, and is now about to take place.'[44]

The dispute began in the Church courts – the presbytery, the synod and the General Assembly. These courts – in particular, the General Assembly – were familiar territory to a circle of advocates who would regularly appear there as counsel for parties to a dispute, even though, unfortunately, their clerical clients were notoriously bad payers.[45] But, in addition, many of the most active non-clerical members of the General Assembly were advocates and other lawyers. Both the Evangelicals and the Moderates could count a number of advocates among their most devoted supporters. So, when the struggle over the Veto Act moved from the General Assembly to the Court of Session, it was really continued by many of the people who had already been fighting one another in the General Assembly. The difference was that they were now acting as advocates in the civil court. What was probably inevitable, but is certainly more surprising to modern eyes, is that many of the judges who were called upon to decide the case in the Court of Session had also been involved previously with the issue, whether in the General Assembly or as Law Officers.

First, the advocates. In the first two *Auchterarder* cases, and in the *Lethendy* and *Strathbogie* cases, on the Moderate side, we have the Dean of the Faculty of Advocates, John Hope, who had been the Tory Solicitor General for Scotland until 1830, when the Whigs came to power and Henry Cockburn succeeded him.[46] There was more than a suspicion that the Dean was, in effect, the mastermind behind the action by the Earl of Kinnoull and Mr Young. Certainly, he was an implacable opponent of the Veto Act. Not only had he spoken and voted against it in the 1834 General Assembly, but, as already noted,[47] he had also had his dissent and the reasons for it specially recorded. In the court vacation of 1839, after the House of Lords had delivered its judgment in the first *Auchterarder* case, the Dean published a repetitious and highly contentious pamphlet, running to some 290 closely printed pages, in the guise of *A Letter to the Lord Chancellor*.[48] If Lord Chancellor Cottenham had bothered to open his letter, he would have found the Dean trampling over the whole subject and hammering away, yet again, at the Evangelicals' case. Curiously enough, shortly before he went on the bench as Lord Justice Clerk in October 1841, the Dean was criticised by his own side for entering into secret, but unsuccessful, negotiations with the Evangelicals' Dr Candlish in an attempt to resolve the whole dispute.[49] On the afternoon of the Disruption – the climax of the drama which he had done so much to produce – there Lord Hope was in St Andrew's Church, watching events from a place close to the Lord High Commissioner.[50]

With the Dean in the first *Auchterarder* case was Robert Whigham,[51] also already very much a veteran of the fight against the veto. A member of the General Assembly since 1817, he regularly spoke on the Moderate side in debates, not least on the subject of patronage and the Veto Act. In April 1834 he had told the House of Commons Committee on Patronage that in his view the existing system of patronage worked well and that he knew of no possible alternative scheme that did not appear 'to be so very dangerous to the establishment of the Church of Scotland, patronage being one of the connecting links between the two ranks of society.'[52]

Also appearing from time to time on the Moderate side – for instance, driving through the snowy wastes of Aberdeenshire 'to a scene of unparalleled ecclesiastical desolation' when Mr Edwards was inducted into the parish of Marnoch in January 1841 – we find none other than young John Inglis.[53] At first sight, not so much the future Lord President, perhaps, as the dutiful son of the late Dr John Inglis, the leading Moderate and advocate of church establishment[54] who had died in January 1834, just as the patronage issue was hotting up. In 1839 the son published two articles in *Blackwood's Magazine*[55] on 'The Present Position of the Church of Scotland'. In them he set out the Moderate case in the plain style that, many years later, was to be the hallmark of his judgments as Lord President. He pleaded, in particular, for 'an end to mystification' on the legal position of the Church. He was also the draftsman of the memorial, signed by Dr Cook, denouncing the non-intrusionists' position, which the Moderate party presented to Peel's government in February 1842.[56]

The publication of the memorial led to a dramatic episode when the leading Evangelical, the Rev. William Cunningham, was reported as having said, in a speech in Belfast, that Inglis' *Blackwood's* articles were 'characterised by the same gross ignorance and reckless mendacity which characterises this memorial.' When this came to their notice, both Cook and Inglis threatened to sue Cunningham for libel. Indeed, on 24 March Inglis commenced proceedings for damages of £1,000 in the Court of Session. Cunningham then completely withdrew the allegations and, less than a week later, Inglis dropped his action.[57] Perhaps nothing, his sanctimonious biographer tells us,[58] rejoiced Lord President Inglis' heart in his declining years so much as the part he had taken in vindicating the position of the Kirk as an establishment.

If there was no lack of commitment on the part of the counsel for the Moderates, much the same can be said of the Evangelical side. Naturally, once the General Assembly had decided to back the Presbytery of Auchterarder, it was to be expected that the Procurator of the Church, Robert Bell, would enter the lists. As legal adviser to the whole of the

General Assembly, the Procurator did not make stridently partisan speeches. And indeed he did not ultimately leave the Established Church at the time of the Disruption but continued in his post as Procurator. Nevertheless, he must have been sympathetic to the supporters of the Veto Act, for he was very much involved with the family of Lord Moncreiff who had moved its adoption. His daughter, Isabella, was married to Lord Moncreiff's third son, James – who appeared for the Evangelicals in many of the cases and was eventually to become Lord Justice Clerk Moncreiff.[59] Indeed, Mr Bell being a widower, the couple lived with him.[60]

Number two for the presbytery in the first *Auchterarder* case was the Solicitor General, Andrew Rutherfurd, who was to become a fixture in the Evangelicals' legal team. He was the son of a minister of St Giles'[61] and an intimate friend of Lord Cockburn. His later speeches in Parliament and elsewhere show that he, too, was sympathetic to the non-intrusionists, though anxious lest their supporters should overstep the mark.[62] At the Disruption, he joined the Free Church.[63]

Last but not least in the team comes Alexander Dunlop, who would certainly have kept his seniors up to the mark. He is the Dunlop who achieved a certain immortality among Scots lawyers by giving his name to one of the series of reports of Court of Session cases. More importantly, he was the leading and ubiquitous legal figure on the non-intrusionist side of the fight. Tireless and ascetic, if there was a pamphlet to be composed, or a motion to be proposed, or a resolution to be drafted, or a speech to be made, Dunlop was your man.[64] Brevity was not, I fear, one of his virtues: his *Answer to the Dean of Faculty's 'Letter to the Lord Chancellor'* ran to 198 pages, and his heavy hand lies behind many of the Church's wordy pronouncements. Having burned his professional boats over the Disruption, he was lucky enough to marry money in the shape of the daughter of a West India merchant, 'as Free as he is'.[65] He changed his name to Murray Dunlop and ended up as a respected Liberal MP.

Given all this background, it is not surprising that counsel's speeches in the first *Auchterarder* case mention their previous involvement before the case came to court. For instance, at one point Mr Whigham refers to 'Some of my friends who have taken a part in the discussion elsewhere' – alluding to speeches by the Procurator and Mr Dunlop in the General Assembly.[66] The Procurator returns the compliment by mentioning part of Mr Whigham's evidence to the House of Commons Committee and his speech in the General Assembly of 1834.[67] Occasionally – and improperly, by modern standards at least – counsel let slip their own personal opinion on the issues before the court. For example, early on in his address,[68] the Procurator says that he would belie his own opinion if he admitted any

jurisdiction in the Court of Session to control the Church courts.[69] No rebuke comes from the judges. They were probably too familiar with the personal views of all of the counsel for this breach of good practice – if it was one – to be of any real significance.

More importantly, perhaps, the counsel and parties in the case must have been only too well aware of the views of many of the judges.

Take the Dean's father, Lord President Hope, and his colleague, Lord Justice Clerk Boyle.[70] When Mr Whigham was giving his evidence against the veto to the House of Commons Committee in 1834, he was actually asked if it was a matter of notoriety that the two heads of the Court were of the same view as him as to the veto.[71] Their attitudes were indeed scarcely a state secret.

In Church circles Lord President Hope was remembered – and not with affection – for a supposedly Erastian speech on the relationship between the Church and the State which he had made in the General Assembly in 1826[72] when successfully opposing proposed Church legislation to prevent parish ministers from holding University chairs. The Lord President had not scrupled to say that such an Act would be *ultra vires* and, if the Church sought to invoke the assistance of the civil courts to enforce it, this

> must necessarily bring the question of competency before the civil court, which has, and which must have power to keep all other jurisdictions within the bounds of their legal powers, and thus a most unpleasant collision would arise between the civil and ecclesiastical authorities.[73]

The Lord President went on to trawl through the statutes relating to the Church. In particular, he observed that the Act 1579 c. 69 signified in the most distinct terms, both to the Church and to the people, that 'the Kirk had no power and no jurisdiction, but what it derived from the authority of the legislature.'[74]

The Lord President was answered on this occasion by none other than Mr James Moncreiff, who in due course was to become Lord Moncreiff. He, too, adopted a line that was to find an echo in his judgment in the first *Auchterarder* case. He accepted that the establishment depended for its existence on the provisions of the system of government derived from the will of the people:

> But it is quite another thing to say that all the powers of this Church, established under such a government, are derived solely from the express enactments of Acts of Parliament, in which particular things are committed to the Church – or that the measure of these powers is to be restrained within the limits of such express civil enactments. This would be, in other words, to say that the Church courts may, indeed, have certain powers as a

> part of the civil government; but that, as the judicatories of the ecclesiastical establishment properly considered, and independent of any special statutes, they have no power at all.[75]

In reality, the two lines of thought that were to run through the Disruption cases are already discernible in these speeches of Lord President Hope and James Moncreiff in 1826.

In the General Assembly of 1832 Lord Justice Clerk Boyle spoke in the debate on the overtures on calls. Some of the overtures were to the effect that, before any presentee could be settled, he should have a concurrence of the majority of heads of families. The Lord Justice Clerk declared that 'In this there would be an open violation of the rights of patrons.'[76] On this occasion he had the misfortune to have his speech analysed in a maiden speech by the Rev. James Begg[77] which so pleased the Moderator, Dr Chalmers, that for an instant he clapped his hands with delight.[78] In 1833, in the debate on Chalmers' precursor to the Veto Act, the Lord Justice Clerk[79] went out of his way to express his 'most unqualified dissent' from Lord Moncreiff's exposition of one particular point of law.[80] He went on to say that he believed, in conscience, that conferring a power of veto 'would be destructive to the National Church'.[81] The following year, like the Lord President, the Lord Justice Clerk voted against Lord Moncreiff's Veto Act.[82]

One does not know quite where to begin with Lord Moncreiff. The son of a revered leader of the Evangelical party in the Church, Sir Henry (Harry) Moncreiff,[83] he was plainly a popular figure among the Evangelicals in the General Assembly. Leaving aside his speech in the debate in the General Assembly in 1826,[84] Lord Moncreiff's views on the expediency of legislation along the lines of the Veto Act were on public record from his contributions to debates in the Assembly and from his evidence to the Commons Committee in 1834.[85] In 1833 he had been one of the people who influenced Dr Chalmers, against his better judgment, to support the idea of a Veto Act. He had moved the Act in the General Assembly of 1834 and had moved the rejection of Mr Young's appeal in the Assembly of 1835.[86] Quite a track record.

Alongside Lord Moncreiff sat two close friends whose position on the veto was also well known. As Lord Advocate, Jeffrey had appeared to support the idea of a veto and, along with Lord Brougham, he had discussed Lord Moncreiff's evidence on patronage before he gave it to the Commons committee.[87] Similarly, as Solicitor General, Lord Cockburn had been favourably disposed to the idea of a veto and had been party to persuading Dr Chalmers that a Veto Act would be valid and was therefore the best way forward.[88] In 1834 he supported the Veto Act.[89]

The Lord President, the Lord Justice Clerk and Lord Moncreiff had been active members of the General Assembly throughout much of their adult lives, when the lines of battle were drawn between the Evangelicals and Moderates. So too had Lord Gillies[90] and Lord Meadowbank,[91] both on the Moderate side. As advocates, used to speaking in public and familiar with the law and the workings of courts, the judges would have been very much at home in the General Assembly, whether as a forum for debate, as a legislature or as a court. They had not seen any need to abandon their membership of the Assembly once they had gone on the bench – nor to withdraw from the more controversial aspects of its deliberations. So they argued and voted – and, no doubt, plotted and schemed – on the hot issues of the day. Indeed Lord Moncreiff had still been doing battle with Mr Whigham in the 1837 General Assembly, just six months before the Court of Session heard the first *Auchterarder* case.[92] But, eventually, due to the Disruption controversy, all the judges felt compelled to give up sitting in the Assembly, 'partly by the insolence of understrappers in their own profession, and partly by the unhappy agitations and violence which [had] ensued.'[93] Lord Moncreiff was very much alive to the delicacy of his position as a judge when giving evidence to the Commons Committee on Patronage about the power of the General Assembly to pass a measure like the Veto Act.[94] By contrast, it does not seem to have occurred to him that he would be in an even more delicate situation if he were to move the adoption of the Veto Act itself, well knowing that it was likely to be challenged in the Court of Session.[95] When that eventuality arose, there he was, judging the validity of his very own Act.[96]

Despite the judges' known previous involvement in the veto issue, there was no motion that any of them should not sit on the first *Auchterarder* case. The doctrine of declinature *ratione suspecti iudicis* was, of course, a well established part of the common law of Scotland, though the recognised reasons for declining appear to have been quite circumscribed.[97] We do not know whether counsel on either side ever contemplated making a motion for any of the judges to withdraw. I would guess not. After all, there was little to choose between the two sides. If the Lord President, Lord Justice Clerk and Lord Meadowbank had to step down, what about Lords Moncreiff, Jeffrey and Cockburn? If you actually supposed that the judges would decide on the basis of their previous utterances and in breach of their judicial oath, then, in order to get rid of the likely supporters on the other side, you would have to risk losing one or more of your own likely supporters. And, again on that questionable supposition, you might have reckoned that your best hope of success lay in your supporters winning over

one or more of the uncommitted judges. In such a situation a declinature motion would have been a very doubtful tactic.

In any event, I suspect that any such motion would have failed. Even today, in a small jurisdiction such as Scotland, it quite often happens that a judge has some, more or less remote, involvement with a case that comes before him. All the more so, in the confined milieu of Edinburgh in those days 'where everyone knew everyone else and much of their business besides.'[98] A supposed reason for a judge not to sit might therefore be fairly easy to concoct. But it is the judge's duty to sit, unless, as a matter of law, he cannot properly do so. The fact that it is a matter of duty is important since, strange to relate, judges might otherwise seek to excuse themselves in order to get out of a long or potentially controversial case. In the Disruption cases, it would have been particularly important to ensure that, if possible, all the judges took their fair share of the inevitable burden of work and of public criticism and contributed to making any decision by the court as authoritative as possible.

Despite being anything but an impartial observer,[99] Lord Cockburn – who was in a position to know – considered that all the judges had acted conscientiously.[100] Which is exactly what one would expect. That said, it is hard to suppose that judges with so obvious a previous involvement in the veto question would be able to sit today.[101] This is one respect in which I believe the cases would have been handled differently nowadays. Indeed, the issue of declinature would rarely arise in that form, since modern ideas prevent judges from pursuing any but the most innocuous outside activities. Since the *Pinochet* case[102] the judges have, if anything, become even more cautious.

Holding office as Lord Advocate and taking part in debates in Parliament was once the accepted route to high judicial office in Scotland. We have now reached the position where it actually risks becoming a disqualification from taking a full part in the work of the court. For instance, in 2001, as one of three judges in an Extra Division, Lord Hardie interpreted a provision in the Scotland Act on which, as Lord Advocate, he had spoken for the Government when the Bill was before the House of Lords. In reality, his position was little different from that of Lord Jeffrey or Lord Cockburn in the first *Auchterarder* case. Yet, in the particular circumstances, in *Davidson* v *Scottish Ministers (No 2)*,[103] the House of Lords held that, because of Lord Hardie's prior involvement, the decision of the Extra Division must be set aside on the ground of apparent bias. In a subsequent case,[104] Baroness Hale of Richmond and I urged caution in going too far down that line. I was conscious, of course, of my previous role as Lord Advocate and of the implications for holders of that office or any

similar office, if they were to continue to be eligible for appointment to the Bench. As a former Law Commissioner, Baroness Hale was equally conscious of the role that she and other judges who had been commissioners had played in developing policy and framing reforming legislation on a whole range of topics. If you were not careful, you would make it impossible for judges to decide cases in those very areas of the law where their previous experience might mean that they would have a potentially informed contribution to make.[105]

While the judges with a previous involvement in the veto issue did not feel obliged to stand down, they might have been expected to be particularly careful about the way in which they formulated their judgments. Today, even where no question of a conflict of interest arises, judges in any high-profile constitutional case are aware that every word in their judgment will go round the world on the internet and will be scrutinised and analysed by all kinds of experts. They choose their language with particular care. It is perhaps worth remembering that, when the Disruption cases began, the modern series of Court of Session reports had been going for only about fifteen years. Like previous reports, many of the early reports in the series were very brief and were really intended as an adjunct to the Session Papers. It was not so long, indeed, since the work of the Court of Session had been conducted almost entirely in writing, with the decisions of the judges having to be worked out from their interlocutors.[106] So it was a comparative novelty for the judges to have to reckon with their reasons being fully reported, far less being reported – as happened in four of the cases[107] – in special volumes which went on sale to the general public. The judges of those days may therefore have been less aware that, in choosing their language, they needed to bear in mind its possible impact on those outside the court room.[108]

Whatever the reasons, it is pretty clear that, even at the outset and before their patience was sorely tried, the judges sometimes used language which caused real offence and so made their judgments even less palatable to the losing side. For instance, in the first *Auchterarder* case, when dismissing any argument against the Court's jurisdiction based on the doctrine of Christ's Headship of the Church, Lord President Hope accepted what was said about the position of the Church of England and added: ''But that our Saviour is the Head of the Kirk of Scotland in any *temporal* or *legislative* or *judicial* sense, is a position which I can dignify by no other name than absurdity.'[109]

Even if the law was right, the Lord President's language was offensive and provocative.[110] It was also gratuitously so, since the Solicitor General had made it quite clear that he was not basing his argument on the

theological proposition of the Headship of Christ, but on statutes and case law.[111] In the General Assembly later that year, Dr Buchanan was reported[112] as saying that

> He would undertake to say that language so extraordinary had never before been heard in the Court of Session; and he would add, with the utmost deference, that he believed more serious damage to the interests and well-being of the National Establishments in general, and of ours in particular, had arisen from such sentiments, coming from such a high quarter, than all the hostilities of their enemies during the controversy which had existed for six years, had been able to accomplish (hear, hear).

When he came to write up the events of those times, Dr Buchanan contented himself with the milder comment that the Lord President spoke 'with less perhaps of decorum than of dogmatism.'[113] At the very least, the use of such language can only have served as a reminder that the Lord President might not be bringing an entirely fresh mind to the question.

Similarly, in November 1842, the Lord Ordinary, Lord Cuninghame, was probably less than wise to describe the position of the General Assembly in the *Strathbogie* dispute as involving a 'preposterous – if not a blasphemous – abuse of language.'[114] At the hearing of the reclaiming motion (appeal), Andrew Rutherfurd concluded his address by describing Lord Cuninghame's remark as 'an imputation quite intolerable to the parties and of the injustice of which, on their part, he did complain, and of which he trusted that they would hear no more.'[115] Two months later, in the third *Auchterarder* case,[116] just before the Disruption, Lord Justice Clerk Hope said of one particular aspect of the defenders' case that 'to lawyers this matter is very plain' and 'to every man of common sense it will be equally plain' but that 'in the extraordinary notions advocated by the defenders (giving them full credit for sincerity)', the point would be lost sight of.[117]

To modern eyes, it is surprising enough that the Lord Justice Clerk felt able to give any opinion at all in a case that was just an extension of the two earlier cases in which he had represented the same pursuers against the same defenders.[118] But the practice then was different. Shortly after his elevation to the bench, Lord Justice Clerk Hope had found himself sitting in a case where he had previously acted as counsel. The Court unanimously concurred in holding that 'no ground thence arose for his declining himself.' Lord Meadowbank recalled that, on the promotion of Lord President Blair of Avontoun in 1808, 'it had been ruled by the whole Judges that his having been counsel in most of the cases which were about to be advised was no disqualification in reference to his judging in those

cases.'[119] Nevertheless, the circumstances in the third *Auchterarder* action surely called for peculiar restraint, rather than exuberance, from the Lord Justice Clerk in describing the defenders' position. Meanwhile, the pursuers' position was causing equal pain to Lord Cockburn. He betrayed his feelings when he ended his short opinion in a sentence of which John McEnroe might have been proud: 'My only difficulty is in believing that the pursuers are serious.'[120]

In the House of Lords, if anything, Lord Brougham did even worse. Amazingly, in the first *Auchterarder* appeal, which could not have been more important, he actually departed from what he said was his usual practice of writing down his judgment[121] and delivered an extempore speech of more than three hours. Today the speeches of the Law Lords are all written in advance and are adopted by their authors, without being read out, in a special sitting of the House at which, usually, the only members present are the Law Lords and a bishop. By contrast, Lord Brougham was delivering a speech in circumstances where 'a number of gentlemen' had assembled below the bar and various Scottish peers were present to hear the outcome.[122] In the normal way, he would almost certainly be rather more conscious of the effect of his words on his audience in the House than on those who would eventually read a shorthand report of his speech. This may help to explain how he felt able to compare the right of a congregation to call their new minister with the formal presentation of the Sovereign to the people for their approval at a coronation. It was 'a decent and convenient solemnity', but their rejection would have 'no more weight than the recalcitration of the champion's horse in Westminster Hall during the festival attending the great solemnity.'[123] The deliberate equiparation of what many in the Church regarded as a vital part of the procedure leading to the solemn rite of ordination with a piece of empty ceremonial involving a horse at a banquet may have seemed a good idea to Lord Brougham at the time.[124] But the inevitable effect of such language was to reinforce the impression among the non-intrusionists that the judges had failed to appreciate the significance of their case. It certainly did nothing to assist the Moderates.

A twentieth-century critic, broadly sympathetic to the position of the Evangelicals, described Lord Brougham's reasons as 'a mixture of irritating irrelevancies, fancied analogies, non-existent cases, wrapped up in a mush of sentiment and threats.'[125] Lord President Boyle, on the other hand, described both speeches in the House of Lords as 'luminous'.[126] But the truth is that there was a significant difference between the two speeches. Even at the time, some, at least, of the Evangelicals could see it: addressing the Court of Session on behalf of the Church in 1843, Andrew Rutherfurd

referred to the Lord Chancellor's 'well-considered and admirable speech'.[127] Happily, also, the same modern critic, who criticised Lord Brougham so strongly, accepted that Lord Cottenham's speech was 'quite on another plane' from Lord Brougham's. He had obviously taken care to marshal his arguments and to express them as clearly as possible.[128] Which is, simply, the least that can be expected of a judge deciding any case, far less one of such enormous importance.

I suspect that judges today would be more conscious of the impact of their comments outside the courtroom and so more circumspect in their language. It is easier, of course, to choose calm and appropriate language when you yourself feel calm and at ease. From the very outset, however, the old judges must have felt that both they and their court were under siege. Not only had they been dragged into a bitter dispute between two rival factions in the Church, but the predominant party in the Church was refusing to recognise their jurisdiction while its counsel were issuing threats about what would happen if the judges found against it.

One way counsel made the point, in suitably coded language, was as part of the argument on jurisdiction: the court would be stepping outside its jurisdiction if it pronounced an order to which it could not give effect. So, in the first *Auchterarder* case, the Procurator, Robert Bell, submitted on behalf of the Church that, whatever might be the judges' opinion as to the propriety of what the Church had done in enacting the Veto Act,

> I trust you will never submit to hazard the dignity of this court, by pronouncing a judgment which you cannot enforce; and which, for any thing you can know, may be contemned by the party against whom it is proposed to direct it.[129]

When it came to his turn, Solicitor General Rutherfurd declared:

> [A] court of law will not duly consult its own dignity, and will not much exercise the respect due to its proceedings, especially when engaging in a collision of jurisdictions, such as that which unquestionably exists here, if it do not calculate beforehand, and see the way, clearly, to the final extrication of the case by the constitutional assertion of its power.[130]

Having listed a number of remedies which, he claimed – wrongly, as it turned out – the court could never contemplate granting, the Solicitor General ended with two rhetorical questions:

> Is this a state of things in which the Supreme Court of the country should legally engage? Is this a conflict and collision between high constitutional authorities, to which a wise man would commit himself without seeing his course clearly and distinctly to the end?[131]

Just to make sure that the judges kept the point in mind when deliberating on their decision, the Solicitor General returned to the theme at the very end of his speech:

> It is impossible to look without deep concernment to the possible conflict of jurisdiction which may ensue, and to the consequences which may be the result of that conflict to the interest of the Church, and of the State, as well as to the interest of the more immediate parties, who will be placed in a state of the most painful and inextricable embarrassment, from the impossibility of giving effect to your decree, if it should be pronounced in favour of the pursuers, without incurring the censure of their ecclesiastical superiors – a consequence the most painful and intolerable.[132]

How, then, was the court supposed to react when all these hypothetical complications were pointed out? What weight could the judges properly give to them?

While carefully describing their stance as unattractively as possible, Lord Brougham simply pretended that, somehow or other, counsel had completely misrepresented the position of the Evangelical ministers, who would actually be the last people on earth to resist the judgments of the Court of Session and House of Lords:

> I have declared my inviolable respect for the kirk and General Assembly, but any want of respect that I could show towards them, any irreverence, any mockery of them, any slander that I could bring against them, any attempt to revile them, or to hold them up to hatred and to scorn, would be a mere jest compared to the attempts that are made by some who take an opposite view of the case, and who, without meaning, God knows, any more than I do, any the least disrespect, think they are taking the best means for establishing their privilege by holding out indications that the Assembly will pursue its own course; that the Assembly will disregard the authority of the law; that an assembly of Christian ministers will be parties to the fomenting of discords; that the last thing the ministers of peace are mindful to promote is the peace of the church of Christ committed to their care; and that the only thing they now think of is the victory of them, the churchmen, the pastors of Christ's flock, over the judges, over the supreme judges of the land, and over the law of the land itself – a victory to be won by setting up acts of their own, which they have not title to pass, against Acts of King, Lords and Commons, the statute law of the realm.
>
> My Lords, I defend the Assembly against the arguments and the threats of their advocates. I protest on the part of the Assembly, as a body of Christian men, of whom the bulk are Christian ministers, against the imputation thus thrown out against them by this course of defending them, and I say that my hopes of them, my confident expectations of what will be their conduct, are wholly the reverse of those prospects thus held out; that

> it was an injudicious line of argument on their behalf, an argument which I am morally certain would be repudiated and spurned by the Assembly itself. My Lords, that Assembly will do its duty, will show its veneration for the established authority of the law, will rest satisfied with having entered its protest and indicated upon its records its own opinions; but will, with the inferior judicature, the presbytery, render a willing and respectful obedience to the law of the land as pronounced by the Court of Session, and as affirmed by your Lordships.[133]

Magnificent stuff, but utterly unhelpful because untrue: 'Lord Brougham, notwithstanding his big talk, knows better.'[134]

Of course, if the extreme consequences of granting a declarator convinced the judges that the Court of Session could not have jurisdiction to do so, then they would dismiss the action and their problems would be at an end. But if – as the majority actually thought – the court had jurisdiction, then the judges had no option but to exercise that jurisdiction and, depending on their view of the merits, to grant the decree of declarator which the pursuers sought. As the House of Lords recalled in the *Tehrani* case,[135] unless a plea of *forum non conveniens* is made out, a court is duty-bound to exercise its jurisdiction if a party calls on it to do so and there is a live issue to be decided.[136] This is the judicial equivalent of the cab-rank rule for counsel: a court cannot pick and choose, but is bound to consider the case that is put in front of it and to give judgment according to the view that it reaches.

To do anything else would be a dereliction of the judge's office, as Lord Brougham pointed out:

> If it were just as clear that the judgment we are about to give would be resisted, as I know it to be demonstrably certain that it will be cheerfully obeyed, still it is the office of your Lordships to pronounce your opinion upon the question of law brought before you; and you would betray your duty most grossly if you were to suffer yourselves to be diverted from pursuing the course of your duty by any fear of other persons still more scandalously betraying their duty both as ministers and as subjects, and still more flagrantly violating the law.[137]

Likewise, a judge cannot decline to grant a remedy to which the pursuer is entitled just because the defender points to various potentially awkward consequences that may ensue if the pursuer later asks for more. That would be too like applying Cornford's Principle of the Wedge, 'that you should not act justly now for fear of raising expectations which you are afraid you will not have the courage to satisfy.'[138] I suspect that Cardinal Newman's words of submission, 'One step enough for me', are, in general, a sound

guide for judges. It is hard enough to get that one step right without trying to foresee the implications of all the other steps that may or may not follow, depending on events over which the judge will usually have no control whatever. But, as Lord Cockburn pointed out, without himself being able to resolve the dilemma for the majority, such a course is potentially hazardous:

> The defenders endeavour to alarm us, by shewing how they may set our judgment at defiance; and the pursuers try to allay the alarm by assuring us that the Church will speedily yield. This is a matter which concerns the court more deeply than some of your Lordships seem to be aware. No doubt it is our duty to declare the law, and the duty of all to obey it. I cannot doubt that the Church will obey it, both from inclination and necessity. But it is also the duty of a Supreme Court to avoid every collision, through which it cannot see its way. Its dignity must necessarily be put in jeopardy by its exposing itself to a conflict in which it cannot explain how it is to prevail. This, I fear, is the position in which this court is about to place itself. It is about to enter upon an untried voyage without a compass or a star. From the moment that a judgment shall be pronounced in favour of the pursuers, the civil and the ecclesiastical authorities *are* in a state of legal collision. Yet it is disclosed that no one, either at the bar or on the bench, can tell us what is to come next.[139]

The position would have been difficult enough for the court if the point had arisen in only one case, say, the first *Auchterarder* case. But that was very far from so. According to official figures supplied to the House of Commons, as at June 1842, there were no fewer than twenty-five separate actions on patronage pending before the Court of Session, though many of them involved the same parties.[140] There were another thirteen cases arising out of the dispute over *quoad sacra* parishes, where essentially the same jurisdiction issue arose.[141] Some of the second group of actions were particularly unmeritorious since they concerned ministers who had been found guilty of theft or immorality by their presbytery and now sought to challenge that decision, not on its merits, but on the ground that the presbytery should not have included ministers of *quoad sacra* parishes.[142] Again, it would not have been so bad if the pursuers in all these different actions had wanted nothing more than the declarator sought by the pursuers in the original *Auchterarder* case. But, as the Solicitor General had anticipated, fairly soon their demands escalated and the judges were forced to confront exactly the kinds of questions which he had foreseen.

Some of these demands did indeed turn out badly for the court.[143] In particular, when, in December 1839, the Commission of Assembly suspended the seven Moderate ministers in the presbytery of Strathbogie

who had defied the commands of the General Assembly, prominent Evangelical ministers were despatched to take over their duties in the parishes.[144] Moderate critics accused them of gallivanting in other ministers' parishes while leaving their own flocks untended.[145] The suspended ministers went to the Court of Session and asked the court to suspend their suspension and, in the meantime, to interdict the Evangelical ministers from preaching in the churches, churchyards or schools in their parishes. The respondents did not lodge answers and the court granted the interim interdicts.[146] Since all the property concerned was admittedly subject to the civil law, the Evangelical ministers obeyed the interdicts and betook themselves, instead, to the wintry market places and open fields.[147] A couple of months later, in February 1840, still with no answers from the respondents, the Court of Session granted an unopposed decree of suspension of the ministers' suspension and, in addition, granted the interdicts to their full extent so as, in effect, to prevent the Evangelical ministers from doing anything at all in the parishes. When, in May, the General Assembly took the same line as the Commission, the Court of Session followed the same two-stage procedure, first pronouncing limited interim interdicts[148] and later following them up with perpetual interdicts to the full extent.[149]

Strictly speaking, of course, the court was merely giving practical backing to its decree reinstating the Strathbogie ministers, which should have freed them from interference in their parishes by other ministers.[150] But there seems to have been a widespread view[151] that, though unopposed, these interdicts were a step too far: they were open to being represented as stopping ministers of the Established Church from preaching the gospel in the Strathbogie parishes when any chartist or infidel was free to spread his message there.[152] In the hope of martyrdom at the hands of overbearing judges, the very high-profile Evangelical ministers concerned took a delight in publicly trampling the interdicts underfoot and in preaching in defiance of them.[153] '[T]he haughs and holms of Bogie rang with such eloquence as they had never heard since they emerged from the primeval sea.'[154] Dr Guthrie exclaimed: 'What madmen these ministers were to crave and serve this interdict! It is the best pocket-pistol I ever carried.' He hoped that the Strathbogie ministers would complain of the breaches to the court – while adding quickly that 'it were wrong to court the personal glory' of any suffering in prison.[155] To their opponents, the Evangelical ministers were deliberately defying the law 'and all the while roaring for sympathy as if they were innocents.'[156] They were cheated of their crowns of martyrdom, however, since the petitioners never brought proceedings for breach. While this was, undoubtedly, a wise exercise of discretion on

their part, it left the Court of Session looking foolish and impotent. A famous cartoon of the time, with the title of 'The Reel of Bogie',[157] portrays Lord President Hope brandishing a sword, while various ministers, including Dr Chalmers and Dr Candlish, whirl round furiously to the delight of the opponents of the Established Church. Like many modern politicians, Dr Chalmers was vain enough to be pleased with his portrayal and liked to show the cartoon to his students.[158]

As they said, so far from being the masters of events, the judges of the Court of Session were really only reacting to the cases which came before them and to the submissions which were made to them. By sustaining the jurisdiction of the civil court in the first *Auchterarder* case, the Court of Session and the House of Lords had opened a door for the Moderates. The Moderates did not hesitate to use it to press home their advantage – not with any desire to embarrass the Court of Session, but because they saw it as a way to inflict damage on their opponents. If they could not defeat the Evangelicals in the General Assembly, the Moderates could certainly tie them up in decrees, damages and expenses,[159] while, every time the Evangelicals defended themselves, they forced the majority of the court to repeat that very view on jurisdiction which was anathema to them.

To an outsider, it might indeed have looked as if, through the stream of decisions, the court was pursuing a preconceived plan of attack on the Evangelical majority in the Church. Similarly, today, when the House of Lords takes decisions against the Government, first, say, on the detention of the Belmarsh detainees[160] and then, say, on the admissibility of evidence extracted by torture,[161] it is easy for some sections of the media to portray the House as pursuing a predetermined line which shows too little understanding of the need for the Government to be able to take firm action to deal with terrorists. Looking at the same decisions, others in the media may praise the House for pursuing a course of vindicating the human rights of terrorist suspects in the face of the allegedly illiberal policy of the Government. The truth is more mundane. The House considers these questions only because they have been raised by the parties and the points of law are of general public importance. When the cases arise, while the judges must have regard to previous decisions and all the various human rights and other arguments, they reach their own individual judgments on them. The House has no predetermined strategy of any kind. The outcome of the case on the exclusion of evidence obtained by torture illustrates the point. All seven Law Lords held that evidence obtained by torture should be excluded, but the House divided very sharply on the formulation of the test to be applied. It is noteworthy that the three in the minority were actually the most senior judges, Lords Bingham, Nicholls

and Hoffmann, who would, one imagines, have set the predetermined policy, if one had existed. In truth, however, there was no such policy. On the contrary, no one knew the outcome until all the speeches were in.

In much the same way, I am sure the old Court of Session judges were following no predetermined agenda. But, after their decision in the first *Auchterarder* case had been confirmed by the House of Lords, the line was set. In the later cases the judges rarely changed sides – and then only because one of the minority judges was unable to escape the binding effect of a previous decision.[162] Even so, their judgments are no mere formalities: on the contrary, they are formulated for the occasion and display the hallmarks of their individual authors. Indeed, the judgments are all more personal in tone and structure than Court of Session judgments today. Moreover, as year succeeds year and still the cases come, the pertinacity of the judges is remarkable. The Episcopalian Lord Medwyn's enthusiasm for researching the by-ways of ecclesiastical history only seems to increase.[163] How his brother judges must have dreaded having to wade through his latest discoveries. … Moreover, when you have read your way through the Lord President and two other judges in the First Division pounding away, yet again, at the Church's defences, you know, as they knew, that there, sitting off to one side, will be the clever and learned Lord Fullerton – 'Fully' to his friends[164] and very much a judges' judge – waiting for his turn. He too does not tire; he too never gives up. Though only too well aware that he is yet again in a minority and that what he says cannot affect the outcome, he constantly refines and refurbishes his arguments. It is a performance to be savoured.[165]

Of course, we can wonder at some of the judges sitting in these cases, given their previous involvement in the issues. Of course, by modern standards, their judgments often seem impossibly long. Of course, we can criticise some of the language that they used. Of course, we can debate their reasoning or question their dicta. Of course, in hindsight, not all of their decisions were wise. But never forget: the Disruption cases represent the most sustained challenge to its authority which the Court of Session has ever faced. In that crisis for the court, the integrity of the judges was unquestionable and the intellectual level of many of their judgments was enviably high. Above all, we can only admire the way the judges, whether in the majority or minority, refused to be swayed by the pressures on the court. Criticise them we may, but, if ever a similar challenge presents itself, we shall have every reason to be proud if the judges of the Court of Session acquit themselves as well as their predecessors in those far-off days.

Notes

1. J. Hamilton, *A Remonstrance respectfully addressed to the Members of the Legislature and others in relation to the Scottish Church Question* (Bell & Bradfute, Edinburgh; Ridgway & Son, J. Nisbet & Co., L. & G. Seeley, London, 1841), p. 1. Hamilton was qualified as an advocate and, along with his friend Alexander Dunlop, acted as a highly influential backroom adviser of the non-intrusionist party: Disruption Worthies vol. 1, pp. 295–300. Unlike most non-intrusionist activists, such as Dunlop, Hamilton was a strong Conservative in politics: Rainy, Mackenzie, *Life of William Cunningham*, p. 139.
2. 5 July 2006.
3. I am not aware of any statistical evidence to show that this actually happens, however.
4. *Ferguson* v *Earl of Kinnoull* (1842) 1 Bell 662; 9 Cl. & F. 251.
5. *Clark* v *Presbytery of Dunkeld* (1839) Lethendy Report.
6. *Cuninghame* v *Presbytery of Irvine* (1843) Stewarton Report.
7. *Livingstone* v *Proudfoot* (1849) 6 Bell 469. In the light of the *Stewarton* case, the problem was that the presbytery included ministers of *quoad sacra* parishes. See also *Campbell* v *Presbytery of Kintyre* (1843) 5 D. 657, at p. 663, where the pursuer founded on the fact that the General Assembly and its Commission contained *quoad sacra* ministers and there had been a slight involvement of the Commission ('the disease with which these bodies were infected being contagious' was Lord Jeffrey's sardonic summary of the pursuer's argument).
8. Both Lord Cockburn and Lord Fullerton thought that the scheme for *quoad sacra* parishes would not have been questioned in quiet times: Stewarton Report, pp. 133 and 172, respectively.
9. *Edwards* v *Cruickshank* (1840) 3 D. 282.
10. (1840) 3 D. 282, at p. 306.
11. [1994] 1 A.C. 377.
12. [2005] UKHL 74; 2006 S.C. (H.L.) 41.
13. The same approach can be adopted by companies: 'Skilled corporate litigators think ahead like pool players: they argue for their clients on narrow grounds hoping for incremental victories that turn into much bigger ones later': R. Dworkin, 'The Supreme Court Phalanx', *New York Review of Books*, 27 September 2007.
14. In the third *Auchterarder* case, *Earl of Kinnoull* v *Ferguson*, 6 December 1842, *The Times*, 20 December 1842, p. 3, the Lord Ordinary (Cuninghame) emphasised that the Church courts appeared as parties in the Court of Session. Often, the presbytery was split and the Church supported the Evangelical faction.
15. Hence, for example, the need for Parliament to restrict the availability of interdicts and orders for specific performance in private law proceedings against the Crown: section 21(1) of the Crown Proceedings Act 1947. The assumption is that, otherwise, the Crown would have to comply with such orders – which might be obtained as of right – however inconvenient they might be.
16. Cunningham vol. 2, p. 472.
17. In practice, the majority of the General Assembly determined its stance – when exercising a deliberative rather than a judicial function.
18. *Middleton* v *Anderson* (1842) 4 D. 957, at p. 1029.
19. XX, 'The Scotch Church Question: Letter II', *The Times*, 22 May 1843, p. 7.
20. Lord Mackenzie makes specific reference to this in *Middleton* v *Anderson* (1842)

4 D. 957, at p. 1010; Taylor Innes, *The Law of Creeds in Scotland*, p. 73 n. 3. In his speech in the hearing in presence in the *Strathbogie* case, Rutherfurd stressed that 'nothing was claimed by the Church which statute did not give. If he had at any period been compelled to state otherwise, he could not have appeared at the bar to maintain so preposterous a doctrine': *Caledonian Mercury*, 26 January 1843, p. 2.

21. Auchterarder Report vol. 1, p. 348; similarly, in the last stages of the war, Rutherfurd emphasised the point in his remarks on the *Strathbogie* case in the hearing in presence on 24 January 1843: *The Scotsman*, 25 January 1843, p. 3.
22. The position was, of course, taken to be the same in the *Stewarton* case: see, for instance, Stewarton Report, p. 53, per Lord Justice Clerk Hope; p. 133, per Lord Cockburn; p. 138, per Lord President Boyle; p. 160, per Lord Mackenzie; and p. 164, per Lord Fullerton.
23. Sheriff Monteith, 4 June 1841, as reported in *The Scotsman*, 5 June 1841, p. 3. The report gives 'his' sanctuary, but the word must have been 'its' or 'her'.
24. Moncreiff, p. 170. Why Sir Henry, whose mother was English and related to various Anglican clergymen (including Sir Henry's brother, George), should himself have escaped the hereditary disease he does not explain.
25. Moncreiff, pp. 179–81. Although he suggests that the law of Christ must ultimately prevail, he recognises that, if there is an irreconcilable difference, there remains no room for a scriptural connection between a particular church and the State.
26. Inglis, p. 576.
27. Interlocutor of 21 December 1836: House of Lords Appeal Papers, p. 38, Advocates Library.
28. *Caledonian Mercury*, 27 May 1843, p. 3; Cockburn Journal vol. 2, pp. 28–9, the sequel to *Edwards* v *Leith* (1843) 15 Scottish Jurist 375.
29. *Middleton* v *Anderson* (1842) 4 D. 957, at p. 988.
30. *Campbell* v *Presbytery of Kintyre* (1843) 5 D. 657, at p. 664. See also the Lord Ordinary (Cuninghame) in the third *Auchterarder* case, *Earl of Kinnoull* v *Ferguson*, 6 December 1842, *The Times*, 20 December 1842, p. 3: 'There was nothing ultroneous on the part of this Court in any process instituted before them, or in any judgment pronounced by them. These proceedings were not created or sought by them. It was established in the previous branches of the Auchterarder case, that the Church, in the supposed exercise of their legislative powers, enacted some time ago new laws, affecting the rights of patrons and presentees, whereby they altered the law of the land as it stood on the statute book, and had been in force for ages; while they, at the same time, inflicted severe and illegal sentences on their brethren who refused to join them. The parties aggrieved applied to this court for redress and protection, and the judges were bound by their oaths to take cognizance of their cases, and to decide them according to law.'
31. Chalmers, *What ought*, p. 12.
32. Guthrie vol. 2, p. 13, reproducing words from a pamphlet that Dr Guthrie published in 1859. At the time of the first *Auchterarder* decision, the bicentenary of the Glasgow General Assembly of 1638, which 'crumpled up acts of parliament as if they were waste paper' and excommunicated the bishops, only served to encourage these sentiments: Cunningham vol. 2, pp. 474 and 478; Bryce vol. 1, pp. 81–2, referring to 'demi-theatrical exhibitions'. Interestingly enough, the weapons of Covenanting times were to reappear in 1900 on the walls of the inaugural meeting of the United Free Church in the Waverley Market: C. G. McCrie, *The Church of Scotland: Her Divisions and Re-Unions* (Macniven & Wallace, Edinburgh, 1901), p. 324.

33. Auchterarder Report vol. 2, p. 113.
34. *Middleton* v *Anderson* (1842) 4 D. 957, at p. 1025. Lord Fullerton seems to be rejecting the kind of argument on the superiority of the civil courts advanced in Inglis, pp. 574–5. Inglis was himself junior counsel for the suspenders. Lord Jeffrey thought that Lord Fullerton's was '*by far* the best speech in the case, the other three being, as I think, singularly poor; and Mackenzie's especially a show of elaboration strangely tainted with injudicial prejudice and passion.' But he had some doubts about the way that Lord Ivory and Lord Fullerton distinguished *Presbytery of Strathbogie* (1840) 2 D. 585: Letter of Lord Jeffrey to Lord Cockburn, 7 April 1842, Adv. Ms. 9.1.11, f. 1075, National Library of Scotland.
35. Auchterarder Report vol. 1, p. 408. The passage was quoted by Lord Gillies in the *Culsamond* case to show the very argument which was decisively rejected in the *Auchterarder* case: *Middleton* v *Anderson* (1842) 4 D. 957, at p. 1001.
36. The point of view of the majority party in the Church is particularly clearly explained in the *Memorial addressed to the Members of Her Majesty's Government by Robert Gordon D.D., Moderator of the General Assembly of the Church of Scotland, and others, Commissioners appointed by the Church* (September 1841), pp. 20–4.
37. Chalmers, *What ought*, p. 19.
38. Maintaining the Church's position became increasingly difficult, of course, as ruling after ruling was handed down against it. By the time of the hearing in presence in the third *Auchterarder* and *Strathbogie* cases on 24 January 1843, counsel for the Church, Mr Rutherfurd, was really reduced to going through the motions: *The Scotsman*, 25 January 1843, p. 3; *Caledonian Mercury*, 26 January 1843, p. 2.
39. *Memorial addressed to the Members of Her Majesty's Government*, pp. 22–3. A decree in absence does not count as *res judicata*: there must have been a decree *in foro contentioso*. See J. A. Maclaren, *Court of Session Practice* (W. Green, Edinburgh, 1916), pp. 396 and 1089; *Esso Petroleum Co.* v *Law* 1956 S.C. 33.
40. In his speech in the Commission of Assembly, 11 December 1839: Bryce vol. 1, p. 121. See also Chalmers, *What ought*, p. 19.
41. Hanna vol. 4, p. 284; Watt, p. 243. See also p. 50 n. 213.
42. Auchterarder Report vol. 1, Appendix, p. 17.
43. Ibid. vol. 1, Appendix, p. 26.
44. Comment on the letter from Jeffrey to Cockburn, 24 February 1833, Adv. Ms. 9.1.9, f. 577 at f. 578v, National Library of Scotland. See also Cockburn Journal vol. 1, pp. 60–1, entry for 7 June 1834.
45. J. Crabb Watt, *John Inglis* (Green & Sons, Edinburgh, 1893), p. 58.
46. His role is painted in the blackest terms by Bayne, pp. 153–7.
47. See p. 9 above.
48. *A Letter to the Lord Chancellor on the Claims of the Church of Scotland in regard to its Jurisdiction and the Proposed Changes in its Polity* (William Whyte & Co., Edinburgh; John Murray, London, 1839). The first edition was published shortly after the end of the Commission of Assembly in August 1839: Hanna vol. 4, p. 135.
49. Ironically, the sticking point seems to have been the attitude of the Strathbogie ministers who, having followed the Dean's advice in obeying the orders of the Court of Session, refused to compromise their position to help his negotiations: Bryce vol. 2, pp. 201–9.
50. G. B. Ryley, *A Historical Retrospect and Memorial of the Disruption* (Archibald Constable & Co., London, 1893), pp. 301–2.
51. The Dean and Mr Whigham were the Moderates' team in many of the litigations,

including the *Daviot* case, *Mackintosh* v *Rose* (1839) 2 D. 253, where they pressed home the victory that had been won in the first *Auchterarder* case.

52. *Minutes of Evidence taken before the Select Committee on Church Patronage, Scotland*, 21 April 1834, p. 423, Question 2783, and p. 428, Question 2796.
53. See Crabb Watt, *John Inglis*, p. 69. The author gives a useful account of some of the litigations in which Inglis was involved, at pp. 65–72.
54. He was the author of *A Vindication of Ecclesiastical Establishments* (W. Blackwood, Edinburgh, 1834).
55. Inglis' argument, in Inglis, pp. 574–5, on the superiority of the jurisdiction of the Court of Session, which had powers to execute its judgment, did not impress Alexander Dunlop: *Answer to the Dean of Faculty's 'Letter to the Lord Chancellor on the claims of the Church of Scotland in regard to its jurisdiction, and the proposed changes in its polity'* (John Johnstone, Edinburgh, 1840), p. 89*. Nor did it fare much better with Lord Fullerton in the *Culsamond* case: *Middleton* v *Anderson* (1842) 4 D. 957, at p. 1025.
56. *Memorial submitted to Her Majesty's Government by a Committee appointed at a Meeting of Ministers, Elders and others, Members of the Church of Scotland, held at Edinburgh, 12th August 1840*.
57. *The Scotsman*, 2 April 1842, p. 3; Rainy, Mackenzie, *Life of William Cunningham*, pp. 169–70; Omond, pp. 204–5. Curiously enough, Crabb Watt makes no mention of the articles or the resulting controversy. Forty years later, Inglis was, of course, to return to the Scottish courts as a litigant when, as Lord President, he fought and won *Shotts Iron Co.* v *Inglis* (1882) 9 R. (H.L.) 78.
58. Crabb Watt, *John Inglis*, p. 74, concluding a horrendous purple passage on General Assemblies.
59. For the Lord Justice Clerk's connection by marriage with Mr J. B. Balfour, later Lord President Blair Balfour (Lord Kinross), see p. 126 n. 70.
60. Omond, p. 154 n 1. They were still living with Bell, long after the Disruption, when Moncreiff was Lord Advocate. Cf. *Index Juridicus: The Scottish Law List and Legal Directory for 1852* (Adam & Charles Black, Edinburgh, D. Robertson, Glasgow and Stevens & Norton, London) pp. 148 and 157. Like his father and elder brother, James Moncreiff, who appeared in many of the litigations on the non-intrusionist side, joined the Free Church at the Disruption, although he did not leave the Establishment immediately and spoke in the Church of Scotland Assembly after the split had occurred. His father, Lord Moncreiff, was actually in London in May 1843. He had gone there with his wife who was seriously ill: Lord Cockburn, *Circuit Journeys*, entry for 20 April 1843. She died in London on 28 May: Sir Francis J. Grant, *The Faculty of Advocates in Scotland 1532–1943 with Genealogical Notes* (1943), p. 153. Henry Moncreiff went to join his parents in London immediately after the Disruption and adhered to the Free Church on his return to Scotland in June, as did Lord Moncreiff. See Moncreiff, p. 332.
61. Omond, pp. 47–9. His father was Dr Greenfield, but the family changed their name to Rutherfurd in 1799.
62. Ibid., pp. 76–7 and 78.
63. As a master of conveyancing, Rutherfurd, along with Alexander Dunlop, was involved in drawing up the Model Trust Deed on which much of the property of the Free Church was held: Free Church Appeals, p. 519; A. Taylor Innes, 'The Creed Crisis in Scotland' (1904–5) 3 Hibbert Journal 217, at p. 224 n. 1.

64. See the descriptions in Bayne, pp. 231–2, and Buchanan vol. 2, p. 515.
65. Cockburn to Jeffrey, 10 May 1843: Bell, *Lord Cockburn: Selected Letters*, p. 186 at p. 188.
66. Auchterarder Report vol. 1, p. 57.
67. Ibid., p. 135.
68. Ibid., p. 94.
69. The rhetorical closing passage in the speech of the Dean of Faculty in the third *Auchterarder* case, some of which is quoted at p. 4 above, is an astonishing example of the same phenomenon: *Speech of the Dean of Faculty, in the Court of Session*, pp. 12–13; *The Scotsman*, 28 January 1843, p. 4.
70. The Lord Justice Clerk's daughter, Elizabeth, was married to the Lord President's third son, the Dean's younger brother, James Hope WS: Sir James Balfour Paul (ed.), *The Scots Peerage* vol. IV (David Douglas, Edinburgh, 1907), p. 212.
71. Evidence, 21 April 1834, Question 2941.
72. The Lord President seems to have entered the General Assembly for the first time as a commissioner from the presbytery of Annan in 1795, the year before his colleague, the Lord Justice Clerk, began his General Assembly career: *The Acts of the General Assembly of the Church of Scotland, Begun at Edinburgh, the 21st Day of May 1795, and concluded the 26th Day of the said Month and Year*, p. 14.
73. *Report of the debate in the General Assembly of the Church of Scotland on the overtures anent the Union of Offices, May, 1826* (John Lindsay & Co., Edinburgh, 1826), p. 42. See, for instance, Moncreiff, pp. 32–42. Both the Lord Justice Clerk and Lord Meadowbank voted on the same side as the Lord President in the ensuing vote. The Lord President was alluding to this occasion when he said, in his judgment in the first *Auchterarder* case, that some years previously he had had occasion to consider, with great care and attention, the powers of the Church in its relation to the State: Auchterarder Report vol. 2, p. 2.
74. *Report of the debate in the General Assembly of the Church of Scotland on the overtures anent the Union of Offices, May, 1826*, p. 49.
75. Ibid., p. 117.
76. Conveniently reproduced in Smith, *The Memoirs of James Begg, D.D.*, vol. 1, pp. 232–5, at p. 233.
77. Ibid., pp. 235–43. The section dealing with the Lord Justice Clerk is at p. 237.
78. Ibid., p. 244, quoting a newspaper.
79. He was famous, or notorious, for a speech denouncing the idea of Home Mission, on the ground that it might be dangerous to the peace of the realm, in his first General Assembly in 1796: ibid., vol. 1, p. 232 n. 1. David Boyle was a commissioner from the presbytery of Irvine: *The Acts of the General Assembly of the Church of Scotland, Convened at Edinburgh, the 19th Day of May 1796* (Edinburgh, 1796), p. 15.
80. S. MacGregor, *Report of the Debate in the General Assembly of the Church of Scotland on the Overtures anent Calls, May 23, 1833* (John Hamilton, Edinburgh; W. R. M'Phun, Glasgow; Lewis Smith, Aberdeen; Simpkin & Marshall, London, 1833), p. 140.
81. Ibid., p. 143.
82. Cunningham, vol. 2, pp. 458–60; J. Hope, *A Letter to the Lord Chancellor*, p. 55. When things went wrong, Lord Justice Clerk Boyle could not help pointing out that he had told the Evangelical party so: *Clark* v *Stirling*, Lethendy Report, p. 72.
83. In both the first *Auchterarder* case and the *Stewarton* case, Lord Moncreiff had to endure having Sir Henry's views cast up to him by the majority judges. See, for

example, Auchterarder Report vol. 2, pp. 3–4, per Lord President Hope; p. 52, per Lord Gillies; p. 74, per Lord Justice Clerk Boyle; pp. 278–81, per Lord Moncreiff, and p. 407, per Lord Cockburn; Stewarton Report, p. 47, per Lord Medwyn; p. 59, per Lord Justice Clerk Hope; and p. 149, per Lord President Boyle; pp. 121–2, per Lord Moncreiff, and p. 133, per Lord Cockburn.

84. See pp. 67–8 above.
85. See p. 9 above.
86. See pp. 8–9 and 11 above.
87. See p. 9 above.
88. The day before the debate in the General Assembly in 1834, Cockburn wrote to Jeffrey that 'We are confident of carrying the veto tomorrow …': Bell, *Selected Letters*, p. 134, at p. 135.
89. Moncreiff, pp. 243–4. See also p. 9 above.
90. Auchterarder Report vol. 2, p. 51.
91. Ibid., p. 79, recording that he had retired from the Assembly before it took up the patronage issue, but had spoken in opposition to the Veto Act in the Edinburgh Presbytery.
92. *Report of the Proceedings of the General Assembly of the Church of Scotland 1837* (The Church Review and Scottish Ecclesiastical Magazine, June 1837) *passim*.
93. P. Forbes, *Considerations on the Constitution of the Church of Scotland* (William Blackwood & Sons, Edinburgh, 1841), p. 28.
94. Minutes of Evidence taken before the Select Committee on Church Patronage, Scotland, 26 March 1834, Lord Moncreiff's second preliminary observation; also 27 March 1834, Question 1343. See further Auchterarder Report vol. 2, pp. 275–6.
95. Lord Cuninghame referred to the situation in which he was called on to determine the validity of the Veto Act which his learned brother, Lord Moncreiff, had warmly supported in the General Assembly: Auchterarder Report vol. 2 pp. 437–8.
96. Interestingly enough, a critic of Lord Moncreiff's advocacy of the Veto Act foresaw, not that he would feel bound to defend it if it were challenged in court, but that he would be driven to disown the position he had adopted in the Assembly: Mentor [Alexander Fleming DD of Neilston], *A Letter to the Honourable Lord Moncreiff respecting two Acts of the General Assembly of 1834* … (W. Hunter, Edinburgh, 1835), p. 2. In that, at least, the author was very much mistaken.
97. For a characteristically clear account of the law in this period, see J. M'Glashan, *Practical Notes on the Jurisdiction and Forms of Process in Civil Causes of the Sheriff Courts of Scotland* (2nd edition, Thomas Clark, Edinburgh, 1842), paras 290–8.
98. A. Stewart, 'The Session Papers in the Advocates Library', in H. Macqueen (ed.), *Miscellany IV* (Stair Society, Edinburgh, 2002), p. 199, at p. 220, citing a case from 1780 in which Lord Covington admitted that he knew the defender well 'but in this case he must give an oppinion [sic] against him.'
99. For a full discussion of Lord Cockburn's attitude to the Church, see I. F. Maciver, 'Cockburn and the Church', in A. Bell (ed.), *Lord Cockburn: a Bicentenary Commemoration, 1779–1979* (Scottish Academic Press, Edinburgh, 1979), pp. 68–103.
100. Cockburn Journal vol. 2, pp. 40–1, entry for 8 June 1843.
101. For the attitude as late as 1904, however, see p. 100 below.
102. *R.* v *Bow Street Metropolitan Stipendiary Magistrate, Ex pte Pinochet Ugarte (No 2)* [2000] 1 A.C. 119.
103. [2004] UKHL 34; 2005 1 S.C. (H.L.) 7. For an analysis of the approach in

the modern cases, see S. Styles, 'Judicial Opinions and Judicial Impartiality' 2007 Juridical Review 293–314.

104. *R (Al–Hasan)* v *Secretary of State for the Home Department* [2005] UKHL 13; [2005] 1 W.L.R. 688.
105. I did not sit in *Kearney* v *H. M. Advocate* [2005] UKPC D1; 2006 S.C. (P.C.) 1 because I had actually been responsible for the appointment of Mr Macdonald QC as a temporary judge. In his judgment, however, Lord Hope of Craighead made extensive reference to his own part in setting up the very system which was under challenge: 2006 S.C. (P.C.) 1 at pp. 11–13, paras 30–5.
106. Stewart, 'The Session Papers in the Advocates Library', in *Miscellany IV*, pp. 199–200, with references.
107. The *Auchterarder*, *Lethendy*, *Culsamond* and *Stewarton* cases. The Stewarton Report was published on 25 February 1843, just a little over a month after the decision: *The Scotsman*, 25 February 1843, p. 1.
108. On judges' language, see, generally, Lord Rodger of Earlsferry, 'The Form and Language of Judicial Opinions' (2002) 118 Law Quarterly Review 226–47 and the literature cited there. The reference, at p. 232, to Lord Lyndhurst LC, should, of course, be to Lord Cottenham LC.
109. Auchterarder Report vol. 2, p. 10 (emphasis in the original).
110. The passage is singled out, for instance, in N. L. Walker, *Chapters from the History of the Free Church of Scotland* (Oliphant Anderson & Ferrier, Edinburgh and London, 1895), pp. 12–13. In *Cruickshank* v *Gordon* (1843) 5 D. 909, at p. 1000, Lord President Boyle envisaged a hypothetical case in which the Court would suspend and reduce a decree of the General Assembly deposing Lord President Hope from his office as an elder 'on the mere ground that his opinions, formerly delivered from this chair in certain causes, amounted to a denial of the sacred Headship of the Church, and a violation of its constitution …'.
111. See pp. 59–60 above and p. 110 below.
112. In the debate on spiritual independence on 23 May 1838, *The Scotsman*, 26 May 1838, p. 2.
113. Buchanan vol. 1, p. 460.
114. *Cruickshank* v *Gordon* (1843) 5 D. 909, at p. 917. Particular exception was taken to Lord Cuninghame's implied comparison of the Church to an incorporation of tailors. See the remark in the submissions of Andrew Rutherfurd in the hearing in presence on 24 January 1843: *The Scotsman*, 25 January 1843, p. 3; *Caledonian Mercury*, 26 January 1843, p. 2. Lord Cuninghame (Cockburn's successor as Solicitor General) stands out among the Whig judges as a determined supporter of the majority position on the court. Not surprisingly, therefore, perhaps, Lord Jeffrey referred to 'the crude prejudices of Cuninghame': Letter to Lord Cockburn, 5 February 1842, Adv. Ms. 9.1.11, f. 1045.
115. *Caledonian Mercury*, 26 January 1843, p. 2.
116. *Earl of Kinnoull* v *Ferguson*, 6 December 1842, *The Times*, 20 December 1842, p. 3 (Outer House); (1843) 5 D. 1010 (First Division). On the Outer House decision of Lord Cuninghame, see Charteris, *Life of the Rev. James Robertson*, pp. 162–4; on the decision of the First Division, see Mr Robertson's letter to his wife dated 14 March 1843, reproduced ibid., p. 164.
117. Opinions of the Consulted Judges in *Earl of Kinnoull* v *Ferguson*, 7 March 1843, Session Papers vol. 388, No. 172, Advocates Library.

118. The Lord Justice Clerk distinguished between the third *Auchterarder* case and the *Strathbogie* litigation. He had already recused himself in a satellite action in the *Strathbogie* litigation in June 1842: *Dewar* v *Cruickshank* (1842) 4 D. 1446, at p. 1451. Similarly, he did not attend the hearing in presence in January 1843 because it was to cover not only the third *Auchterarder* case but the *Strathbogie* case too: *The Scotsman*, 25 January 1843, p. 3. The Lord President simply announced that the Lord Justice Clerk 'had some time ago, from reasons which it was now needless to detail, signified his wish to be relieved from judging in the Strathbogie case': *Caledonian Mercury*, 26 January 1843, p. 2. Possibly, the reasons related to the problems surrounding his attempt to reach a compromise with Dr Candlish, which had foundered on the opposition of the Strathbogie ministers. See p. 64 n. 49 above. So far as the third *Auchterarder* case was concerned, his absence from the oral argument turned out not to matter, since Andrew Rutherfurd chose not to add anything to the written statement of the defenders' position.
119. *King* v *King* (1841) 4 D. 124, at p. 127*. Lord Meadowbank was Lord President Blair's son-in-law.
120. Opinions of the Consulted Judges in *Earl of Kinnoull* v *Ferguson* 7 March 1843. See also p. 29 n. 229 above.
121. *Presbytery of Auchterarder* v *Earl of Kinnoull* (1839) Macl. & Rob. 220, at pp. 284 and 350–1; 6 Cl. & F. 646, at pp. 690–1 and 755–6.
122. *The Times*, 10 May 1839, p. 6.
123. Macl. & Rob. 220, at p. 304; 6 Cl. & F. 646, at p. 710.
124. The analogy of the call with the presentation of the sovereign to the people at the coronation appears to have been suggested by the Attorney General in argument for the pursuers: Macl. & Rob. 220, at p. 304; 6 Cl. & F. 646, at p. 710.
125. Watt, pp. 174–5.
126. *Middleton* v *Anderson* (1842) 4 D. 957, at p. 985.
127. As narrated by his opponent, the Dean of Faculty: *Speech of the Dean of Faculty, in the Court of Session*, p. 6. *The Scotsman*, 25 January 1843, p. 3, records Rutherfurd as referring to 'the Lord Chancellor, in his well considered opinion'; the *Caledonian Mercury*, 26 January 1843, p. 2, has 'his very powerful and well considered argument.'
128. Watt, p. 175. Lord Mackay – admittedly, not perhaps an ideal critic of judicial style – spoke of the Lord Chancellor's 'great speech': *Ballantyne* v *Presbytery of Wigtown* 1936 S.C. 625, at pp. 683 and 688.
129. Auchterarder Report vol. 1, pp. 124–5; also pp. 101–2.
130. Ibid., p. 390.
131. Ibid., p. 391.
132. Ibid., p. 408.
133. *Presbytery of Auchterarder* v *Earl of Kinnoull* (1839) Macl. & Rob. 220, at pp. 313–15; 6 Cl. & F. 646, at pp. 719–20. See also Macl. & Rob. 220, at pp. 250–1; 6 Cl. & F. 646, at pp. 656–8.
134. *The Times*, 10 May 1839, p. 4.
135. *Tehrani* v *Secretary of State for the Home Department* [2006] UKHL 47; 2007 S.C. (H.L.) 1, at p. 16, para. 54; [2007] 1 A.C. 521, at p. 539, para. 54, per Lord Hope of Craighead; 2007 S.C. (H.L.) 1, at p. 31, para. 106; [2007] 1 A.C. 521, at pp. 555–6, para. 106, per Lord Rodger of Earlsferry. See also the remarks of the Lord Ordinary (Cuninghame) in the third *Auchterarder* case quoted above at p. 82 n. 30.
136. Lord President Hope had made precisely this point in urging the General Assembly

not to court conflict with the civil law in the debate on the union of offices in 1826: 'When [such questions] come before us, we have no choice, we cannot refuse to entertain them …': *Report of the debate in the General Assembly of the Church of Scotland on the overtures anent the Union of Offices, May, 1826*, p. 42.

137. Macl. & Rob. 220, at p. 251; 6 Cl. & F. 646, at pp. 657–8. See also, for instance, the remarks to the same effect of Lord Corehouse: Auchterarder Report vol. 2, pp. 217–18.
138. F. M. Cornford, *Microcosmographia Academica* (Bowes & Bowes, Cambridge, 1908), Chapter VII.
139. Auchterarder Report vol. 2 p. 417.
140. *A Return to show the Number of Causes, with the Date of the Commencement of each, which are at present pending in the Court of Session, respecting the Exercise of Patronage in the Church of Scotland …*, House of Commons, 7 June 1842.
141. See p. 57 above.
142. These actions were not, of course, any part of the campaign being waged by the Moderate leaders: the pursuers were simply jumping on the bandwagon.
143. See the general comments of Turner, pp. 201–11.
144. Evangelical ministers were also despatched to parishes throughout the country to counteract the accounts in the press. See Beith, *Memories of Disruption Times*, pp. 35–40.
145. Bryce vol. 1, p. 138; Macfarlane, pp. 98–9.
146. *Presbytery of Strathbogie* (1839) 2 D. 258.
147. Buchanan vol. 2, p. 132; Guthrie vol. 2, pp. 16–21. Bryce paints a rather different picture of the reception of the Evangelical ministers in the 'Dead Sea': Bryce vol. 1, pp. 131–3 and 137–8. See also Macfarlane, pp. 99–102. Even Dr Begg, who describes great enthusiasm in the area for his preaching, admits that he met stout resistance at Turriff and Ellon (the home patch of the Rev. James Robertson): Smith, *The Memoirs of James Begg D.D.*, vol. 1, pp. 361–5, especially at pp. 361–3. For an apparently quieter sojourn in the area in the summer of 1840, see Fleming, *Autobiography of the Rev. William Arnot*, pp. 143–7, letter of 27 August 1840 from the Rev. William Arnot to the Rev. John Mackail.
148. *Cruickshank* (1840) 2 D. 1047.
149. *Cruickshank* (1840) 2 D. 1380.
150. So Bryce vol. 1, pp. 133–7.
151. See, for example, Charteris, *Life of the Rev. James Robertson*, pp. 153–60.
152. Buchanan vol. 2, pp. 134–6; Guthrie vol. 2, pp 16–17.
153. Brown, *Annals of the Disruption*, pp. 34–42; Guthrie vol. 2, pp. 17–19; Smith, *The Memoirs of James Begg D.D.*, vol. 1, pp. 330 and 369–70;
154. Bayne, pp. 176–7 (not ironic).
155. Letter to Mrs Guthrie, 20 February 1840, reproduced in Guthrie vol. 2, pp. 18–21, at p. 21.
156. XX, 'The Scotch Church Question: Letter II'. *The Times*, 22 May 1843, p. 7.
157. Apparently prompted by remarks of Dr Chalmers in the Spring meeting of the Commission of Assembly in 1840: Rainy, Mackenzie, *Life of William Cunningham*, pp. 145–8. The cartoon was a lithograph from a drawing by Benjamin William Crombie (1803–47).
158. Cunningham vol. 2, p. 508 n. 2.
159. So, in more colourful language, Chalmers, *What ought*, pp. 11–12.

160. *A* v *Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 A.C. 68.
161. *A* v *Secretary of State for the Home Department (No 2)* [2005] UKHL 71; [2006] 2 A.C. 221.
162. For example, Lord Fullerton in *Clark* v *Stirling* (1841) 3 D. 722, at p. 739. In the *Lethendy* case Lord Cockburn, basing himself on the decision of the House of Lords in the first *Auchterarder* appeal, considered that the Court of Session was warranted in interfering: Lethendy Report, pp. 79–84. In the *Stewarton* case, he said he had come to doubt that view and that, in any event, he was certain that he had expressed himself far too strongly: Stewarton Report, p. 134.
163. For some, the mere fact that Lord Medwyn was an Episcopalian was sufficient to invalidate his judgments. In doing a headcount of the judges in the first *Auchterarder* case, Bayne, p. 104, remarks: 'If we believe, as we certainly may, that an Episcopalian was more or less disqualified to decide upon a thoroughly Presbyterian question. …'
164. He and Lord Cockburn were fast friends. Moreover, their wives were sisters and 'Uncle Cockburn' was a popular figure in the Fullerton household: Lord Strathclyde, *Lord Fullerton* (W. Hodge & Co. Edinburgh and Glasgow, 1921), p. 18. For some further biographical information on Lord Fullerton see 'Events of the Quarter' (1854) 20 Law Magazine and Quarterly Review of Jurisprudence (n.s.) pp. 176–8.
165. For an assessment of his excellence as a judge, see A. Ure (later Lord President Strathclyde), 'Lord Fullerton: Lawyer and Judge' (1901) 13 Juridical Review 379–98.

Lecture 3

The Long Shadow of the Disruption

In 1994 the Church of Scotland Board of National Mission appointed the Rev. Helen Percy to the position of associate minister in a parish with such an impossibly long name that the editor of Session Cases wisely just describes it as being 'in Angus'.[1] The Board can little have thought that, by appointing her, they were starting a process that was eventually to take the Church of Scotland on its first foray into the House of Lords since 1842. Given the result, several more generations may rise and fall before the Church ventures there again. What matters for present purposes is not so much that the Church lost but why it lost. It advanced an argument that the civil courts, including the House of Lords, had no jurisdiction to entertain the case – and it lost that argument.

The basic facts are straightforward. Ms Percy was unmarried. In 1997, during her tenure of the office of associate minister, an allegation of improper sexual conduct was made against her. Although her first reaction was to resign her post, she subsequently took legal advice and decided to withdraw her resignation. The Board of National Mission agreed to reinstate her, but suspended her on full pay pending an investigation by the presbytery of Angus into the complaint against her. Some months later, after a process of mediation, the presbytery accepted her offer to demit her status as a minister. Then, in February 1998, Ms Percy applied to an employment tribunal, complaining of unfair dismissal and of sex discrimination, contrary to section 6 of the Sex Discrimination Act 1975. In particular, she complained that 'similar action' had not been taken against male ministers who had had extra-marital sexual relationships. She had therefore been treated differently on the ground of her gender, and that amounted to sex discrimination under section 6. She did not specify what she meant by 'similar action' but appears to have been referring to the initiation of a trial by libel by the presbytery and her suspension on full pay by the Board.[2]

In her application to the employment tribunal Ms Percy named the

Church of Scotland as the respondent, but the notice of appearance was entered in the name of the Church of Scotland Board of National Mission. In that notice the Board submitted that, by virtue of the Church of Scotland Act 1921, the matters raised by the appellant fell outside the jurisdiction of the employment tribunal, as a civil court, and that her application was accordingly incompetent. They also denied that Ms Percy was an employee.

When the case on sex discrimination reached the First Division of the Court of Session, the Procurator of the Church persuaded us that Ms Percy was not properly to be regarded as an employee under a contract of employment, in line with a presumption that there was no intention to create contractual relations in the case of ministers and priests.[3] So she had not been working under 'a contract' and the Sex Discrimination Act did not apply.[4] I confess that I was glad to decide the case on that basis and to be relieved of the need to deal with the Church's first argument, that the matter did not fall within the jurisdiction of the civil courts.

Although Ms Percy was no longer a minister, after the decision of the First Division, the General Assembly appointed a legally qualified Special Commission, chaired by a sheriff, to hear her complaint of sex discrimination. It had power to award her compensation if the complaint was established. Eventually, however, the commission dismissed the complaint for want of prosecution.[5]

Ms Percy then reverted to her civil proceedings and appealed the decision of the First Division to the House of Lords. By a majority, their Lordships reversed the First Division.[6] Lord Hoffmann dissenting, they first held that the parties had indeed entered into a contract under which Ms Percy was to provide services to the Church and that this was a contract 'personally to execute any work or labours' for the purposes of section 82(1) of the Sex Discrimination Act.[7] This meant that the House needed to address the argument that Ms Percy's complaint fell within the category of 'matters spiritual', which were excluded from the jurisdiction of the civil courts by the Church of Scotland Act 1921. It is fair to say that, against the background of the European directive,[8] their Lordships appeared to have little difficulty in rejecting that submission and in affirming the jurisdiction of the employment tribunal. In fact, the case was settled and so it did not return to the tribunal: without admitting liability, the Church paid Ms Percy £10,000 as compensation and a further £10,000 by way of legal expenses repayable to the Scottish Legal Aid Board.[9]

The week after the decision of the House of Lords, I asked Lord Hope, if, that weekend, hordes of rioters had been despatched by Church HQ at 121 George Street in Edinburgh to break his windows. He assured me that

his windows were intact and that all had been quiet. He had been doorstepped by reporters and photographers outside his house? Again, no sign of them. Indeed, the case, including the decision of the House, attracted only comparatively little attention in the media – and then only because of the element of sex.

The decision of the House of Lords appears to have prompted no comment at all in the ordinary British legal journals and there seem to be only two discussions of the jurisdiction point.[10] Yet, in former times, the decision would have been regarded as being of major constitutional importance, dealing, as it does, with the relationship between the civil courts of the State and the courts of the Church of Scotland which are recognised by the State.

To put the point another way, if Lord Moncreiff or any of the other early Victorian judges had been alive today, they would immediately have spotted that the *Percy* case raised that self-same vexed question of the spiritual independence of the Church of Scotland which first divided the Court of Session and then split the Church and Scottish society at the Disruption in 1843. Interestingly enough, the words 'spiritual independence' do not feature in any of the speeches in the *Percy* case. Moreover, although the Procurator referred to the Disruption in her argument for the Church, there is no mention of that event or of any of the cases which preceded it. The whole issue is treated – and, in a very real sense, rightly treated – as turning on the terms of the Church of Scotland Act 1921.

The contrast between the close attention which people throughout Scotland paid to every twist and turn of the Disruption cases and the almost complete lack of interest shown in the *Percy* case is striking. It tells us quite a lot about our society today. Very obviously, it reflects the decline in interest in organised religion and, more particularly – or, perhaps, in consequence – the decline in interest in questions of ecclesiastical governance. In an age of indifference and of ecumenical co-operation in a multicultural country with a significant Muslim population, debates over the spiritual independence of the Church of Scotland may seem irrelevant – or, at the very least, much too arcane for a sound-bite generation. On a wider view, the only civil cases in the Scottish courts to attract any real attention from the media in recent years have related to prisoners – slopping-out and votes come to mind – or Tommy Sheridan's reputation. Prisoners always make good copy and any opportunity to talk or write about sex is too tempting to miss. Even so, in both cases the reporting was superficial. By contrast, in the nineteenth century full reports of the judgments in four of the Disruption cases were published and there were 782 'distinct pamphlets on this one subject printed during these years,

circulated by thousands, and falling like snowflakes all over the land.'[11] Clearly, at that time, a significant number of people throughout Scotland – a lot of them, presumably, ministers[12] – were prepared to devote both time and money to following the serious and complex issues in detail. Nevertheless, even then, speaking in London after the Disruption, Dr Cunningham complained that 'the newspaper press in general gave to the world no more of the subject than what might be called the gossip and the scandal of it.'[13]

Given the almost complete lack of interest in the *Percy* case, it may seem perverse in the extreme to spend time on it. But I happen to believe that the case does matter. For one thing, questions about the place of religion in our public life are far from unimportant. More particularly, *Percy* marks a significant development in an area of the law which many people hoped had been settled once for all when Parliament passed the Church of Scotland Act 1921. That Act was intended to put an end to a kind of religious dispute that had been the very stuff of Scottish history. Indeed, at the time of the Disruption cases, the point was often made that, by contrast with England where the key historical struggles seemed to have been for political liberty, in Scotland the key struggles had been, not even for religious liberty in a broad sense, but for the liberty to have a presbyterian form of church government. One such comment is found in Henry Moncreiff's *Letter to Lord Melbourne*:

> It has been well remarked, that while the English were laying the foundations of a free civil constitution, the attention of the Scotch was engrossed by their earnest struggles for the maintenance and preservation of their ecclesiastical liberties.[14]

There is considerable force in the point. In part at least, it helps to explain the relatively slight role which the law is regarded as playing in the wider history of Scotland.

One of the things for which the Romans are most famous is their law. Even today, some of us believe that the Roman jurists have never been equalled, far less surpassed, in their skill in handling complex legal questions. But we find very little sign that their non-lawyer contemporaries regarded the jurists' achievement as remarkable or looked with pride or affection on the law as one of the glories of Rome. For the most part, Roman lawyers were '*ungeliebt*' – 'unloved', as a German scholar recently described them.[15]

Arguably, English law enjoys an altogether different place in the life and history of England. Of course, modern English lawyers are pretty *ungeliebt* too, the law's delays are infamous and the courts of Chancery have never

shaken off the caricature in *Bleak House*. But even that caricature is now softened by association with the fogs and larger-than-life characters which Dickens has made our idea of nineteenth-century London. Go back to Chaucer's *Canterbury Tales* in the fourteenth century and you find quite an affectionate portrayal of the Serjeant at Law, already freighted with his books of cases from the time of William the Conqueror onwards.[16] Five hundred years after Chaucer, Tennyson described England as a country

> Where Freedom slowly broadens down
> From precedent to precedent.[17]

The ordinary reader is assumed to know what precedents are and to appreciate how freedom might be thought to broaden down from one precedent to another. In our times Lord Denning saw the law as bound up with the history, and indeed with the literature and poetry, of England. As he recounted it at least, the history of the common law was synonymous with the history of liberty in England and in English-speaking lands beyond the seas.[18] This belief shaped not only his judgments but his public persona and helped to make his views and his picture of the law familiar to many members of the public.

The attitude of Scottish people to their law seems to me to be closer to the Roman than to the English attitude. In Scotland too, of course, the public have no love for lawyers. Thanks in part to Stevenson's caricature in *Weir of Hermiston*, Lord Braxfield is remembered for his harsh conduct of the Court of Justiciary, rather than for his mastery of our feudal land law – a system which did, actually, help to shape the towns and cities of Scotland. That feudal law, which has a strong claim to being the real intellectual achievement of the Scottish judges, was unceremoniously binned by the Scottish Parliament – unmourned even by its supposed acolytes, the Professors of Conveyancing. If pride in our inheritance from Roman law even exists, it can only be among a relatively few lawyers, and certainly not among the population as a whole. No Lord Denning has woven Scots law into the history or literature and poetry of Scotland, and we tend to take our landmark constitutional cases from English law, quite properly integrating them into our history as part of Britain and the Empire.

Against that background, with the decline in interest in the religious struggles which were so much a feature of Scottish life in the past, it is not surprising that the Scots law relating to those religious matters is not generally seen as having played a part in shaping life in Scotland today. So the Disruption cases have faded from the public memory. But, even after the First World War, the effect of those decisions was still powerful enough for Parliament to intervene to deal with it by passing the Church of

Scotland Act 1921, the Act with which the House had to grapple in the *Percy* case.[19] A sketch of some of the events in the eighty years between the Disruption and the 1921 Act may help to put it in context.

When Dr Chalmers delivered his opening address to the first General Assembly of the new Free Church in May 1843, he declared:

> In a word, we hold that every part and every function of a commonwealth should be leavened with Christianity, and that every functionary from the highest to the lowest, should, in their respective spheres, do all that in them lies to countenance and uphold it. That is to say, though we quit the Establishment, we go out on the Establishment principle – we quit a vitiated Establishment, but would rejoice in returning to a pure one. To express it otherwise, we are the advocates for a national recognition and national support of religion – and we are not Voluntaries.[20]

The Scotsman described the address as a 'strange farrago' and exclaimed, in particular, at the difference between Dr Chalmers' acts and these words.[21] In one sense, his abandonment of the Established Church was indeed astonishing. He had always been passionate in his belief that the only way to achieve religious and social progress in Scotland was through a national church, endowed by the State, with its ministers serving all the needs of the people in its parishes throughout the length and breadth of the land.[22] This declaration was presumably Dr Chalmers' way of reconciling his former with his present, very different, position.[23]

Certainly, his audience would have been in sympathy with this characterisation of their position on establishment. While inside the Establishment, they had for years been fighting off the incursions of the Voluntary churches. Now to be classed with those Voluntaries as 'dissenters' would have been the last thing that this, socially very respectable, audience would have wanted.[24] 'Many of the dowagers of both sexes would have gone into hysterics had it been proposed to them off-hand to become Dissenters, and still more shocking, Voluntary Dissenters.'[25] The Free Church 'did not for a moment think of itself as a body of Seceders or Dissenters.'[26] A week after the Disruption, *The Scotsman* commented on how 'a taint of vulgarity', as it put it, attached to every class of dissenter except Episcopalians,[27] and observed how peculiarly gratifying all those present at the Free Church Assembly had found the announcement that the Marquis of Breadalbane had adhered to the new church.[28] Far better, then, from every point of view, for those in the new church to see themselves as the true heirs of the Established Church.[29] But, if Dr Chalmers' words would have been welcome to his audience, because the Free Church circulated his address in an appeal for funds, they were also to have enormous repercussions long after his death in 1847, at a time

when the idea of establishment had lost its grip on most members of the Free Church.

Thanks to the organisational skills of Dr Chalmers, the new Free Church found itself in amazingly good financial heart.[30] Critics might scoff at the unrelenting drive for 'voluntary' contributions to its funds,[31] but the results were there for all to see. Churches were built, ministers paid, schools erected, mission stations manned and, before the decade was out, a new settlement had been planted on the South Island of New Zealand at what was to become Dunedin.[32] Gold was discovered in the area and the settlement prospered so that, by the 1870s, a university had been established, with handsome stone buildings, very much in the Scottish style. The link with the Free Church is commemorated in the name of the nearby Port Chalmers.

To begin with, many Free Church leaders seem to have believed that the existing Church of Scotland would collapse and that the Free Church would indeed become the Established Church on its terms, as Dr Chalmers had hoped might happen.[33] But the Church of Scotland survived the initial shock of the Disruption, then went on a vigorous recruiting drive for new ministers to man the vacant parishes[34] and, slowly but surely, over the next twenty years it revived. The hostility which had marked relations between the Evangelicals and the Moderates in the pre-Disruption Church of Scotland replicated itself in the relations between the Free Church and the Established Church.[35] In the early years at least, the hostility was often even more pronounced.

Even though the Established Church recovered, its position in the life of Scotland had been weakened. Society was becoming more secular.[36] In 1845, the Poor Relief (Scotland) Amendment Act transferred responsibility for the relief of poverty from the Church to the State. This was the very antithesis of the kind of system favoured by Dr Chalmers. Even more significantly perhaps, after many attempts at reform, in 1872 the Episcopalian Lord Advocate, George Young, managed to get Parliament to pass the Education (Scotland) Act. Previously, through its presbyteries, the Church had been responsible for schools and schoolmasters,[37] but there was general agreement that the system had become unsatisfactory. The 1872 Act transferred that responsibility to local Boards, with provision being made for religious instruction to be given to children whose parents did not object. In these ways, the practical significance of the establishment of the Church in the everyday life of Scotland was reduced.

As the years went by,[38] it dawned on many in the Free Church that they were never going to be the Established Church. Nor would any government ever again endow the Established Church. A new model for

the relations between the Church and the State would have to be developed to meet the needs of a liberal, pluralist society.[39] In any event, as the history of the Free Church seemed to proclaim, a church could have a national reach without being supported by the State. This suggested to them that, after all, establishment was no part of God's plan for the Church. So, on the one hand, the Free Church should campaign against the vitiated establishment of the Church of Scotland,[40] and, on the other, it should try to unite with churches, such as the United Presbyterian Church, which were similar in doctrine, save that they had always rejected the idea of establishment. This became the dominant view in the Free Church under its powerful leader, Principal Robert Rainy.

Not all were convinced. A minority, known as the 'constitutionalists' and led for many years by Dr James Begg, clung tenaciously to the view that, as Dr Chalmers had declared in that first General Assembly, the establishment of the Church by the State was one of the central tenets of the Free Church.[41] They saw the majority's abandonment of the establishment principle as just one of a number of departures from the purity of the belief and practice of the Free Church at the time of the Disruption.[42] Indeed, some felt so strongly about one particular departure from the standards of the Church in the Declaratory Act of 1892 that, the following year, in what was sometimes called 'the Second Disruption', they left the Free Church to set up the Free Presbyterian Church.[43]

Eventually, however, Principal Rainy carried the day[44] and, on 31 October 1900, the Free Church united with the United Presbyterian Church to form the United Free Church. Despite the impressive processions on the day, the great congregation of about 10,000 in the Waverley Market, and the stream of congratulations,[45] never in actual fact can any church have had a less auspicious beginning. Within three weeks, the tiny constitutionalist minority in the Free Church still opposed to the union – some 24 ministers out of 1100 – announced that legal proceedings would be taken.[46] On 14 December they began their Court of Session action against the United Free Church to claim the church property.[47] In reality, the opposing positions were held so firmly as to admit of no compromise.[48] If the pursuers' funds held out, a long contest lay in prospect.[49]

The pursuers claimed that those who had gone into the United Free Church had departed from the original doctrines of the Free Church not only on the principle of establishment[50] but also – when the case reached the House of Lords[51] – on predestination and the Atonement.[52] By doing so, they had forfeited their right to all the vast property built up by the Free Church and held on trust for a church which adhered to its original central

and unchangeable beliefs. So all the church buildings, the Assembly Hall, the colleges and the mission stations, plus all the Church's investments, were still on trust, they said, not for the new United Free Church, but for the old Free Church and its few remaining ministers and members.

On the other side, the United Free Church argued that it was entitled to all the property. Despite Dr Chalmers' declaration in his opening address to the first General Assembly,[53] establishment had never been a defining tenet of the Free Church. The Free Church had accordingly been entitled to unite with a church which had always rejected establishment. There had, the United Frees said in the House of Lords, been no change in doctrine on predestination and the Atonement.[54]

Since much of the dispute thus turned on the position of the Free Church when it came into existence at the Disruption, counsel for both parties referred to the Disruption cases and to the Claim of Right in order to try to show on what points of principle the Evangelical party who founded the Free Church had taken their stand.[55]

Counsel for the United Free Church also argued that, even if there had been changes in the position of the Free Church on establishment or on predestination and the Atonement, the Church had been empowered to make them without forfeiting its property.[56] In planning their tactics, members of the United Free team differed as to whether it was preferable to give prominence to the argument that there had been no real change in the Church's position or to their argument that, in any event, the Church had been free to change.[57] In the end, however, the question whether the Free Church enjoyed this freedom to change without losing its property was an important issue in the appeals.[58]

The Lord Ordinary and the Second Division had no hesitation in rejecting the submissions of the Free Church minority.[59] The pursuers had indeed anticipated this, since it was thought that judges in the Court of Session would be very conscious that a decision stripping the new, and potentially powerful, United Free Church of its assets would produce a convulsion, not just for that church, but for much of Scottish society. The judges in Scotland would be reluctant to pronounce a judgment which would have that effect. The judges in the House of Lords, insulated to some extent at least from these considerations, might look at the case more objectively and apply what the Free Church minority saw as the powerful authority in their favour in the decision of Lord Eldon in the *Craigdallie* case.[60] From the outset the pursuers planned their strategy accordingly, selecting Lord Low as Lord Ordinary for his likely care[61] and the Second Division for the reclaiming motion[62] because any decision against the pursuers was likely to be couched in extreme terms which would provide a

good stepping-off point for any appeal to the House of Lords.[63]

The House of Lords heard the appeals twice.[64] Lord Shand, who had been one of the judges at the first hearing,[65] died before judgment could be given. There were powerful rumours to the effect that he had prepared a speech in favour of dismissing the appeal[66] and, some years later, Lady Shand confirmed that he had indeed 'written a most careful draft of a possible judgment just before his last illness.'[67] On the other hand, at the first hearing Lord Chancellor Halsbury had appeared to be in favour of the appellants:[68] indeed, reports of his attitude on the very first day of that hearing had greatly alarmed Dr Rainy, back in Edinburgh.[69]

The Lord Chancellor invited Lord President Kinross[70] to sit in the new hearing. On Tuesday, 7 June 1904 he duly caught the night train to London, with a view to taking his place among the Law Lords when the hearing started on the Thursday.[71] But, the previous week, *The Times* had published a letter from the Rev. John Sinclair, the Church of Scotland parish minister of Kinloch Rannoch, pointing out that, in the run-up to the union, the (bland[72]) Procurator of the Free Church, Mr Guthrie QC, had consulted Mr Balfour QC (now Lord Kinross) as to 'whether there would be any risk of the United Church not being able to retain the property of the Free Church.' Mr Balfour had replied that 'there was no risk whatever.'[73] Dean Asher, Mr Haldane and Mr Guthrie, who were privy to Lord Kinross's advice to their side on the very issue in the case, were to remain members of the appellants' legal team in the new hearing.[74] Presumably after discussing the position with the Lord Chancellor on the Wednesday, Lord Kinross came to the view that he should indeed excuse himself, for fear he might be supposed prejudiced 'by former opinions he had entertained' on the subject.[75] So, having attended the Lord Mayor's Banquet for His Majesty's Judges on the Wednesday evening,[76] a doubtless somewhat disappointed Lord President was back on the train to Edinburgh on the Thursday when, in Westminster, the second hearing was getting under way.[77] The only Scottish judge among the seven at that hearing was Lord Robertson.[78]

The fact that Lord Kinross felt compelled to stand down suggests that, by 1904, rather stricter standards on conflicts of interest were being applied than in Disruption times. On the other hand, since he actually set off for the hearing, he cannot have been persuaded initially that he needed to excuse himself. That would not have been an isolated view: *The Scots Law Times* indicated that, 'in legal circles', the suggestion in Mr Sinclair's letter that Lord Kinross should not sit would meet with no support.[79]

The new hearing of the appeal, which took place, of course, in the great empty chamber of the House of Lords, did not attract much public

interest.[80] The general audience was never more than about twenty or thirty – but the Archbishop of Canterbury was on the bishops' bench for a good deal of the time.[81] Apart from him, seven elderly gentlemen sat on the benches, paying close attention to the arguments, except when they appeared to fall asleep.[82] About a dozen lawyers were at the bar of the House, 'huddled in a pen', with their back-up teams having to stand nearby. The House sat from ten till four, with only one half-hour break,[83] but occasionally the proceedings were adjourned because of the demands of other public business.[84] By contrast with the hearing of the first *Auchterarder* case in the Court of Session back in 1837, when there were almost no questions or interruptions from the bench, in the House of Lords in 1904 there was a dialogue between counsel and the judges. The questioning was dominated by the Lord Chancellor, Lord Davey and Lord James of Hereford. To United Free Church observers, the Lord Chancellor was 'almost derisively' against them and jeered at their case.[85] Certainly, he and others of the judges harried counsel for the United Frees on various matters, especially on the extent of the freedom they claimed for the Church to alter its doctrines – could the Church, for instance, adopt Roman Catholic doctrines?[86] One eye-witness records that Lord Robertson sat perfectly still throughout the hearing;[87] another referred to his 'vigilant reticence';[88] a third described him sitting 'in grim and smiling silence'.[89] As in the first hearing,[90] Lord Macnaghten and Lord Lindley said hardly a word. In the cloakroom during the hearing, Dr Rainy commented, 'This is very dry and very dreigh.'[91]

Unfortunately, space does not permit a general examination of the arguments of counsel.[92] I confine myself to the speech of Mr Haldane, who was second in the United Free team led by Dean of Faculty Asher ('clever and versatile if not deep'[93]). On 5 May 1899, Haldane had given an emphatic opinion to the effect that there would be no risk of the new church not being entitled to the property of the Free Church – even suggesting that, if anything went wrong in the Court of Session, the House of Lords would put it right.[94] In September of the same year, in a speech in Inverness, Haldane had staked 'his reputation as a lawyer' that 'in the constitution of the Free Church there was from the beginning to the end nothing that pledges that church, or binds that church, with the principle of an establishment.'[95]

Haldane's practice was largely in the Privy Council and the House of Lords. Indeed, given any opportunity or none, he would deliver you a speech on the appellate tribunals of the Empire.[96] He tells us that he knew the judges in the House of Lords and Privy Council so well that he could follow the working of their individual minds.[97] Actually, it is usually more

important for the judges to be able to follow the working of counsel's mind – a point which Haldane singularly overlooked in his address in the *Free Church* case. His failure to communicate his arguments on predestination and the Atonement, in particular, makes his speech a textbook study in the art of bad appellate advocacy.

In theory, Haldane must have seemed the ideal person to deal with the matter.[98] He came from a family that was steeped in Scottish theology. When suffering religious doubts at the age of seventeen, he had gone to Göttingen University for a few months to study philosophy and theology. Throughout his life he had lectured and written on metaphysics. Haldane tells us[99] that, in consultation before the *Free Church* case, he had not been impressed by the theologians who had been summoned to support counsel. They did not strike him as being as fully possessed of the subject as their predecessors in the great days of theology in Scotland. His sense of his own superior knowledge of the topic was to prove his undoing before the House of Lords. Success would have depended on explaining theological distinctions between Calvinism and Arminianism which were not just fine, but invisible or incomprehensible to those unfamiliar with the subject. Sometimes the skill of an advocate lies in making something that is actually simple appear complicated. But here Haldane's task was to make what was actually complicated appear simple. A perceptive member of the United Free team spotted a tendency in him to be doctrinaire, and added: 'I hope he won't waste his time on "Arminianism" – ten minutes should polish off that business.'[100] If only. … Instead, he went into it in great detail and baffled his listeners, except for Lord Halsbury who fancied himself as having some knowledge of the subject and was determined to pursue his own line anyway.[101]

We have a sketch by an admirer of Haldane, Sir Edmund Gosse, who witnessed the scene and naïvely took his polished serenity in the face of the judges' bewilderment as a sure sign of his intellectual superiority. In Sir Edmund's eyes, he was 'making a very fine performance' and 'turning the whole thing into a supplement of his own *Pathway to Reality*.'[102] 'Whether or not it was war,' remarked a member of the United Free team, 'it was philosophically magnificent.'[103] The trouble was, precisely, that it was not war.

Any sensible onlooker[104] would have seen that Haldane was doing his case no good at all when, for example, Lord James of Hereford said 'With the greatest deference, I have not the slightest idea how that last answer of yours answers what I have put to you.'[105] Worse is to come. Next morning,[106] Haldane reads into his argument a tract of material from a Professor Taylor's *Elements of Metaphysics*,[107] followed by a passage from

Ethical Studies by Mr F. H. Bradley of Merton College, Oxford.[108] Then, as the crowning delight for their Lordships, Haldane announces that he has himself translated a few sentences from page 414 of the German edition of *Die Menschliche Freiheit* by Professor Vatke,[109] a Professor of Theology at the University of Berlin, which he would venture to read to them.[110] I shall spare you, as Haldane did not spare their Lordships, such things as 'the speculative conception of nature within the moments of the idea. …' Having completed his reading, he reassures their Lordships that he does not ask them to follow these things out – in other words, 'it doesn't really matter if you can't understand what I've been reading.' This patronising comment makes quoting the passage a waste of time. Haldane is soon referring to Mr Balfour's book on *Foundations of Belief*.[111] Then he gives Lord Alverstone a child's guide to what is meant by antinomy. The 'jovial old whig',[112] Lord James of Hereford, must have spoken for all the judges when he interrupted Haldane, who had just mentioned 'the first thinkers' in the subject, to say, 'The first thing is to understand you – I hope I have tried my best, but I cannot say I have succeeded very well so far.'[113] Not long after, Lord James gave up: 'I never knew how incapable I was of understanding these things until I heard your argument.'[114] Haldane's clever and clear-sighted sister was watching from the gallery above. It is kinder not to imagine what she must have made of his performance.[115]

The House gave judgment on Bank Holiday Monday, 1 August 1904. Despite the holiday, more people had gathered to hear the judgment than to hear any judgment for many years.[116] Lords Macnaghten and Lindley dissenting,[117] the House allowed the appeal.[118] The delivery of the speeches was interrupted by the formalities for signifying Royal Assent to a number of Acts.[119] All of their Lordships except the Lord Chancellor, who gave his readers some Greek with a Latin translation, ducked the question on predestination and the Atonement[120] and concentrated on the establishment question.[121] There was little law in their decision. In effect, not least because of the address by Dr Chalmers to the first General Assembly, the majority held that, as a matter of fact, adherence to the principle of establishment had been a defining tenet, which the Free Church had not been free to discard without forfeiting its property in terms of the *Craigdallie* decision.[122]

Although it was said that Principal Rainy, who was present below the Bar in the House, had been stunned by the decision, according to one admirer, 'there was no ruffle on his brow, no cloud on that placid face.'[123] We are told that, when the proceedings ended, addressing his close colleague, Carnegie Simpson, his first words were simply, 'Well, Carnegie, what do you think of it?' He was walking about in the lobby with his

splendid serenity and as smiling and happy as ever.[124] Haldane came up and they walked out together.[125] Was it, I wonder, in part a consciousness of the failure of both his over-confident initial opinion and his impenetrable speech that made Haldane immediately say to Rainy that he would contribute £1,000 to a fund to support the United Free Church?[126] Certainly, at least one of Rainy's supporters might have thought so. Referring to Haldane, he said that part of the responsibility for the decision against the United Frees 'must be allotted to that able man's singular lack of judgment.'[127]

The Edinburgh correspondent of *The Times* reported[128] that the possibility of a successful outcome to the appeal had been too remote ever to be seriously discussed and that the decision had come home to Scotland with striking suddenness. In Glasgow and the west of Scotland also, it had caused a profound sensation. Hundreds of thousands of people had been rendered churchless and several hundreds of ministers would share their exile,[129] while the four or five thousand people in the Free Church would now find themselves heirs to hundreds of churches and to millions in cash and securities.[130] The decision was widely denounced – for instance, as having 'left for centuries a stain on the annals of the Supreme Court of the realm.'[131]

Once the initial shock was over, it was realised on all sides that something would have to be done. Some breathing space was afforded by the fact that the Inner House of the Court of Session had to apply the judgment of the House of Lords and this could not be done until the court sittings resumed in October.[132] While insisting on occupying the Assembly Hall and New College,[133] the Free Church victors recognised that they could not possibly administer, far less make use of, all the property. In their view, they should keep as much of the property as would be proportionate to their needs and the remainder should fall to the Crown.[134] On the very theory of the judgment of the House of Lords, even if, *per impossibile*, they had been so minded, the victorious Free Church minority could not simply have come to an arrangement to transfer the surplus property to the United Free Church. To do so would have been to commit precisely the same breach of trust as the majority had committed by entering into the United Free Church.

The United Free Church and its sympathisers exerted themselves to bring its plight to the attention of the public, the Government and politicians generally.[135] Eventually, the Government decided to set up a Royal Commission.[136] In April 1905 it reported that a power should be created to allocate the property. The result was the Churches (Scotland) Act 1905, which established a Commission with the necessary power.

Working under the chairmanship of Lord Elgin, the Commission eventually carried out its task in a way that the Free Church minority, somewhat reluctantly, found acceptable.[137]

Although *The Times* correspondent stressed that the decision of the House of Lords could not have been foreseen, that can hardly have been so. The atmosphere of the hearing would have told you a lot, and indeed the London correspondent of the *Scottish Law Review*, writing at the end of June, had heard that the general drift of the proceedings would suggest that the appeal would be allowed.[138] The Free Church supporters had also been encouraged: for them there was little doubt which side had emerged most successfully from the final argument.[139] On the other side, Taylor Innes, too, had thought that the hearing was going in favour of the Free Church[140] and Principal Rainy himself was well aware that the United Frees were losing.[141] On the train back to Edinburgh after the hearing, he already 'foresaw the Church spoiled of her goods, turmoil, chaos, suffering.'[142] After the decision had been announced, he acknowledged that the outcome was 'by no means unexpected.'[143]

On the other hand, portraying the decision as having been unforeseeable in advance of the legal proceedings was essential for the United Free leaders if they were to enlist the sympathy of the public and of politicians. Any idea that Principal Rainy and his supporters had run a known risk and lost would put things in a very different light.[144] Yet, as was quickly pointed out in *The Scotsman*, that was the reality.[145]

In March 1897 Taylor Innes had alerted Rainy to the possible problems over the property of the Free Church in the event of a union.[146] Rainy raised the matter with the Procurator, Mr Guthrie, who informally consulted Mr J. B. Balfour. Balfour indicated that the Church could not abandon its view on establishment without risking its right to its property.[147] Indeed he startled Guthrie and Rainy by saying that there was a chance that the Church would lose all its property, including that held under the Model Trust Deed (which Taylor Innes had thought safe). Despite this, Rainy was determined to go on.[148]

The potential problems can have come as no real surprise to Rainy. He was well aware that the property position in the event of a union had been investigated by both sides in 1873 when a union with the United Presbyterian Church had been under active consideration for some years.[149] The proposal was bitterly opposed by Dr Begg and others, partly on the ground that it would entail an abandonment of the establishment principle. In that connection, in the spring of 1873 he and his supporters prepared an elaborate memorial, on the constitution of the Free Church and its significance for the determination of the rights to the property of

the Church, for the opinion of various counsel.[150] The counsel included the Solicitor General, Mr Rutherford Clark (later Lord Rutherford Clark), and Mr J. B. Balfour.[151] Among the answers returned by them was the following: 'We are of opinion that the Church has no power by a majority, however large, to alter its constitution in any essential or fundamental point, which, as we have stated, we consider the Establishment principle to be.'[152] The other opinions were to similar effect.[153]

On the afternoon of 20 May 1873, two days before the Free Church General Assembly opened, leading members of the Church who were in favour of union with the United Presbyterians – including a now frail Dr Candlish and Dr Rainy himself – also consulted the same Mr Rutherford Clark and Mr Balfour, along with the young Taylor Innes. The consultation was short and, at Candlish's insistence, there was no written memorial and only a verbal opinion, 'leaving no documentary trace'.[154] Nevertheless, Clark had 'no doubt that the doctrine of establishment was part of [the Free Church] constitution.'[155] When Dr Begg's memorial and opinions were published in September 1874,[156] Taylor Innes and Rainy discussed whether Clark and Balfour might have been over-influenced by that elaborate memorial.[157] Shortly after the Assembly in 1873, and again the following year, Taylor Innes shrewdly suggested that the Free Church should deliberately introduce changes in order to show that it could, but his advice was not acted upon.[158]

In 1899, with the principle of the proposed union due to be discussed at the General Assembly, Dr Rainy and other leaders of the Free Church were persuaded to obtain formal legal advice on the property question. The counsel were, of course, made aware of the opinions taken a quarter of a century before.[159]

First, after a 'conversational consultation', with Rainy putting the questions, on 14 March Dean of Faculty Asher returned an opinion that was anything but encouraging and warned that 'establishment was an original tenet or principle of the Free Church' and so there were potentially grave risks for the property.[160] Nevertheless, it was decided to go ahead and to recommend union. The Church then turned to Mr Haldane and, in May, shortly before the Free Church General Assembly, he gave his emphatic opinion that all would be well.[161]

Lastly, in August 1899, the Church sought the opinion of Mr Balfour, the future Lord President Kinross and the sole survivor of the counsel who had advised in 1873.[162] Mr Balfour remained of the view that establishment was one of the original tenets of the Church, but 'raised hopefully the important point of that body having the right to modify those tenets'[163] and, presumably on that basis, concluded – contrary to his earlier opinions

– that 'there was no risk whatever'.[164] One can only suppose that he would have said, in the immortal words of Bramwell B during oral argument in *Andrews* v *Styrap*, 'The matter does not appear to me now as it appears to have appeared to me then.'[165] The explanation – which was indeed put forward at the time – may be that Balfour changed his mind because the facts as set out in the memorial for his opinion were stated more fully, and rather differently from the way they had been presented in 1873.[166] Who knows what Lord Kinross would have held if he had sat on the appeal? That must remain a minor 'What if?' of legal history.

After the judgment, the Free Church did not fail to emphasise this general background. In the memorandum which its Law and Advisory Committee issued on 17 August, they referred to the opinions of counsel and commented that 'parties who, knowing that there is a risk, deliberately accept it, have no claim to sympathy, on the profession that they are taken by surprise when the issue goes against them.'[167]

Another complaint which the United Free Church side made against the decision of the House of Lords was that it represented an attack on the spiritual independence of the Free Church. In other words, the House of Lords was interfering with the right of the Free Church to formulate its beliefs. But, as was also quickly pointed out, this appeal to spiritual independence was scarcely justified. The House of Lords did not say that the Free Church was not free to reformulate its beliefs: all it said was that, if it did, the church could not keep property which was held on trust for a church professing its original beliefs. More fundamentally perhaps, spiritual independence, as it was understood before the Disruption, had nothing to do with property.[168] The Evangelical party had always recognised that, so far as property was concerned, it fell to be regulated by the civil courts.[169] On that approach, the dispute in the *Free Church* case fell squarely within the jurisdiction of the civil courts.[170] Unfurling the banner of spiritual independence could therefore be presented as an attempt on the part of the United Free Church to distract attention from the true, more 'sordid', nature of the dispute.[171]

If nothing else, the decision of the House of Lords sent out the clearest possible warning to any church, whose constitution was not regulated by statute, of the dangers that lurked in any purported change in its central tenets. Unless it could be shown that the church in question had the power to make a change by some appropriate mechanism, the *Free Church* case indicated that its right to its property would be called into question. Not surprisingly, therefore, in 1905 the General Assembly of the United Free Church passed a declaration on the spiritual independence of the Church.[172] The following year this was turned into an Act,[173] which

referred to the Free Church appeals and confirmed the power of the new church to make alterations in doctrine.

The problem that had been confronting the Church of Scotland for some time was different. It arose precisely because the Church was regulated in part by statute. For some years, the Church had been discussing the possibility of changing the formula by which ministers and elders subscribed to the Confession of Faith. But the Church had been advised by counsel that the old Scots Act 1693 c. 22 prevented it from making the change.[174] Therefore amending legislation would be necessary. It had seemed unlikely that the Conservative Government would wish to provide the necessary time in its legislative programme for such a measure which would, in any event, have been liable to meet with opposition, especially among Liberal MPs. So, when it became clear in August 1904 that legislation was going to be needed to sort out the problems caused by the judgment of the House of Lords in the *Free Church* case,[175] the leaders of the Church of Scotland immediately seized on this unexpected opportunity. A clause was inserted in the Churches (Scotland) Bill which, when enacted, put the power of the Church of Scotland to adopt a new formula of subscription beyond legal challenge.[176]

The creation of the United Free Church had been a major step forward in producing unity among the presbyterian churches outside the Establishment. But the much larger prize would be for the Church of Scotland itself to join with the United Free Church. If this could be brought about, the Church of Scotland would include the successors of most of the ministers and congregations who had left at the time of the Disruption. The position of the Church of Scotland would be strengthened. This was thought to be particularly desirable at a time when the Church seemed to be losing influence, not least because of the rise of the Roman Catholic Church, especially as a result of immigration from Ireland to the West of Scotland.[177] Nothing could be done, of course, until the chaos in the affairs of the United Free Church had been sorted out. But the predicament of the United Frees had struck a chord with many in the Established Church. When the United Free Church was eventually able to look around itself, the Church of Scotland suggested that the two churches should explore the possibilities of union. In 1909 the United Free Church agreed.[178]

The negotiations covered a variety of topics.[179] One was the form of establishment after any union, since, having fought off a determined campaign for its disestablishment,[180] the Church of Scotland naturally insisted that establishment – in one sense its defining characteristic – should be maintained in some form. While the United Presbyterian strand in the United Free Church was opposed to establishment in principle, for

the most part, the real question was the terms of any future establishment. Those would have to be determined. A related problem is the one that matters for present purposes: the spiritual independence of any united church from the dictates of the civil courts.[181]

So far as the Established Church was concerned, there had been no recurrence of hostilities with the courts since 1843. In *Wight* v *Presbytery of Dunkeld*,[182] in an act of filial piety, the Free Church Lord Justice Clerk Moncreiff had taken the opportunity to play down what he called 'inconsiderate dicta' which had been 'thrown out' in earlier cases – by which he clearly meant the Disruption cases. Other post-Disruption decisions had indeed suggested that, in practice, the Court of Session would not readily interfere. '[O]stentatious obsequiousness' was one observer's plausible description of the attitude of the Court of Session to the Established Church after the Disruption.[183] Nevertheless, the decisions of the House of Lords in the *Auchterarder* cases stood, and they represented the law, so far as the Church of Scotland was concerned. The Church did not, of course, consider that those decisions meant that she lacked the necessary degree of spiritual independence. But, so long as the position remained as laid down in the Disruption cases, the United Free Church would never enter a union with the Church of Scotland since it would mean being subjected to the very legal régime from which the forefathers of the Free Church element in its midst had departed, at great cost to themselves, at the Disruption.

All these matters were discussed by a joint conference of representatives of both churches. Partly due to an interruption during the First World War, its work stretched out over a period of years.[184] In the end, the Church of Scotland was quite happy to have a new comprehensive declaration of its spiritual freedom.[185] The upshot was the Church of Scotland Act 1921,[186] one of whose main aims was, precisely, to secure the spiritual independence of the Church of Scotland – and hence of any united church. This was done by drawing up a series of painstakingly worded articles which were said to be declaratory of the constitution of the Church of Scotland in matters spiritual, and by putting those articles into the schedule to the 1921 Act. Section 4 of the Act provided that it was to come into force on a date after the articles had been adopted by an Act of the General Assembly of the Church of Scotland with the consent of a majority of the presbyteries of the Church. In other words, the articles would first have been made fully binding on the Church by the operation of the Barrier Act. These steps were duly carried out and only then was the 1921 Act brought into force by the Church of Scotland Order 1926.[187]

Section 1 of the 1921 Act provides that the Declaratory Articles in the

schedule are lawful articles and that 'the constitution of the Church of Scotland in matters spiritual is as therein set forth.' In *Percy* v *Board of National Mission* Lord Nicholls of Birkenhead commented that the expression 'matters spiritual' is not defined.[188] In one sense that is so. But Parliament must have regarded all the matters in the schedule as 'matters spiritual', since the whole point of the schedule is to set out the constitution of the Church in such matters. In other words, what the Act does is to substitute this new constitution of the Church of Scotland in matters spiritual for the old constitution as it had been shaped by the decisions of the Court of Session and the House of Lords in the Disruption cases.[189] Parliament was doing in 1921 what it had refused to do when asked in 1840–3.

This is confirmed when we see the terms of section 3 of the Act. It provides that, subject to the matters dealt with in the Declaratory Articles being recognised as 'matters spiritual', nothing in the Act is to affect or prejudice the jurisdiction of the 'civil courts' in relation to any matter of a 'civil nature'. The language is redolent of the Disruption cases. So all the matters in the Declaratory Articles are to be regarded as matters spiritual and the implication is that, to this extent, the Articles are to affect or prejudice the jurisdiction of the civil courts. In short, the civil courts' jurisdiction is excluded in the case of the matters spiritual in the articles.

On turning to Article IV, we immediately recognise the theological doctrine of the Headship of Christ. The article provides that the Church receives from Lord Jesus Christ alone 'the right and power, subject to no civil authority, to legislate and to adjudicate finally in all matters of doctrine, worship, government and discipline in the Church, including the right to determine all questions concerning membership and office in the Church. …' So, by enacting section 1 and Article IV, Parliament gave statutory effect to the position which Solicitor General Rutherfurd had quite deliberately not advanced on behalf of the Church in the first *Auchterarder* case – and which Lord President Hope had been able to dignify by no other name than 'absurdity'.[190] Somewhat ironically, it is by the authority of the legislature of the State that legal effect is given to the Church's position, that it receives its right and power to legislate and adjudicate finally in the specified matters, not from the State, but from Christ alone. The final words of Article IV seem intended, in part at least, to address this point by insisting that, by its legislation, the State does nothing more than recognise the position of the Church. Whatever the possible ironies, such legislation was, of course, the only way to obliterate the law, to precisely the opposite effect, which had been laid down by the courts in the Disruption cases.

The effect of all this seems to be that, by virtue of the 1921 Act, the Church of Scotland was to be given a constitution of the kind which the Evangelical party had always claimed was its historic constitution as secured by the Act of Union. They considered that, under that historic constitution, the Church had enjoyed a spiritual independence which was destroyed by the courts in the Disruption cases. They carried that view with them into the Free Church and from there into the United Free Church. The hope and intention behind the 1921 Act was that, once the constitution in the schedule was given legal effect, the United Free Church would be satisfied that the spiritual independence of the Church of Scotland was now secure. The ministers and members of the United Free Church would therefore lose none of their highly prized spiritual independence if they went into a union with the Church of Scotland.

There was a further problem which, it had always been recognised, the Church of Scotland would need to sort out before there could be any union with the United Frees. An Act of Parliament would be needed in order to transfer the ecclesiastical property and endowments from the State to the Church of Scotland so as to put an end to the situation where, say, the right of a minister to occupy the manse could give rise to questions of civil law, thus giving an opening to the civil courts to exercise their jurisdiction. In addition, the system of teinds, which was regulated by the (civil) Teind Court, would need to be ended.[191] The proposed legislation was strongly resisted by landowners whose interests were affected – in particular, by having to pay a lump sum to redeem the teinds. They saw no reason why they should, in effect, be asked to make a financial sacrifice in order to facilitate union between the two churches.[192] In the end, however, the Church of Scotland (Property and Endowments) Act 1925 was passed.

The two Acts had the desired effect. The final negotiations for union were now able to proceed[193] and, with the exception of a small group in the United Free Church,[194] the two churches eventually united on 2 October 1929.[195]

In practice, the 1921 Act was certainly used to good effect in those cases – mostly unreported – where ministers tried to challenge the decisions of Church of Scotland courts before the Court of Session. Citing the Act, the court would hold that it had no jurisdiction.[196] That put a speedy end to the proceedings. *Percy* has changed things, but it may be some time before we can tell how far-reaching the change is.

It is important to remember that Ms Percy was not complaining that she had suffered sex discrimination in the general run of her employment with the Church. Her complaint was that, by being suspended by the Board

of National Mission and subjected to judicial proceedings before her presbytery, she was being treated differently from male ministers in a similar position. At first sight it would seem that a presbytery which adjudicates on the conduct of a minister is either adjudicating on a matter of government or discipline in the church, or else is determining a question concerning office in the church, in terms of Article IV. The same would apply to accepting a minister's demission of her status in the course of such proceedings. The same would also apply to suspending an associate minister's appointment on disciplinary grounds. In that event, in terms of Article IV, the Church's adjudication or determination would be final. To put the matter in another way, the Church would have exclusive jurisdiction in this matter spiritual. Any encroachment by the civil court on to the area of those decisions would once more threaten the spiritual independence of the Church.

I have little doubt that this is how those who framed the 1921 Act would have intended it to work. They would have thought that Ms Percy's only remedy for any unfairness in the proceedings of the presbytery or the actions of the Board, such as sex discrimination – an impossible idea, of course, with the all-male ministry and eldership back in 1921 when the Act was passed – lay in an appeal to the General Assembly, whose decision would be final.[197] In principle, today, one would expect the General Assembly to make sure that Church courts and other bodies avoided any sexual discrimination in their proceedings. But Baroness Hale records that in *Percy* the Church conceded that it did not provide internal remedies which met the requirements of the Equal Treatment Directive.[198] She concluded that the civil law must therefore do so.

In effect, the judges are saying that, since the actions of the Board and the Church court, the presbytery, in disciplining Ms Percy allegedly caused her an injury for which the civil court, in the shape of the employment tribunal, provides a remedy under the civil law, she must be able to claim that remedy from the tribunal. That is not, in substance, very different from the approach of the Court of Session and the House of Lords in the *Auchterarder* cases. The action of the Church court, the presbytery, in refusing to take Mr Young on trial had allegedly caused him and his patron an injury for which the civil court, in the shape of the Court of Session, provided a remedy under the civil law. Therefore, they must be able to claim that remedy from the court. As these cases show, the simple fact is that a civil court will be reluctant to accept that it cannot deal with what it sees as an allegation of a substantial wrong. Like the House of Lords and the majority of the Court of Session in the *Auchterarder* cases, their Lordships in *Percy* were satisfied that they were not interfering in any

matters spiritual. In the light of history, it would not be surprising if some in the Church thought otherwise.[199]

The Equal Treatment Directive played a significant part in Lord Hope's reasoning, but not, so far as I can see, in the reasoning of Lord Nicholls.[200] Presumably, he just concluded that section 6 of the Sex Discrimination Act had impliedly repealed section 1 of the 1921 Act and Article IV in the schedule, to the extent necessary to make section 6 effective in these circumstances. Lord Hope, on the other hand, invoked the court's obligation under *Marleasing*[201] to interpret national law, so far as possible, to achieve the result pursued by the Directive – here, equal treatment of men and women.[202] The Church accepted that its procedures could not provide an adequate remedy for the purposes of the Directive. Using the *Marleasing* approach, Lord Hope considered that Article IV of the Declaratory Articles could be interpreted in such a way as to avoid leaving this gap in the protection which national law was required to provide. He held that the Article was 'sufficiently broadly worded' for him to be able to hold that the exercise of the exclusive jurisdiction in matters spiritual did not extend to a claim of unlawful sex discrimination.[203] In its first real trial, the 1921 Act thus proved to be anything but *ein' feste Burg*, a sure fortress, for the Church.

Much of the reasoning of the House of Lords in the *Percy* case is posited on the view that, as an associate minister, Ms Percy was working under 'a contract personally to execute any work or labour.'[204] Arguably, the position of parish ministers is different and so that reasoning would not apply. This remains to be seen. Although Ms Percy had named the Church of Scotland as the respondent to her application to the employment tribunal, as already mentioned,[205] the notice of appearance was entered in the name of the Board of National Mission. So Lord Hope confined his consideration to the Board's actions in the performance of what he had found to be their contract with Ms Percy as an associate minister.[206] Those actions were plainly of a disciplinary nature. But, in reality, the main thrust of Ms Percy's complaint was directed at the actions of the Presbytery of Angus, to which, like any other minister in the district, she was subject in matters of discipline. In any event, it would be hard to isolate the actions of the Board from the parallel actions of the presbytery. In substance, therefore, the *Percy* decision shows that, despite the 1921 Act, the civil court is ready to involve itself in actions taken by the Church to discipline a minister where that involvement is necessary to give effect to the Sex Discrimination Act and the Equal Treatment Directive. Perhaps, as Taylor Innes said of the Disruption cases, 'What has really been settled is the general relation of the Church of Scotland to the British

Parliament and to its legislation in Church matters.'[207] Or perhaps what has been settled is the general relation of the Church to the European Community and its legislation.

We have come full circle – we are back discussing the very kind of jurisdictional question which arose in the Disruption cases. It is as good a point as any at which to take stock.

It is tempting to ask: Who was right in the Disruption cases? The majority or the minority judges? The partisan literature is overwhelmingly in favour of the minority – not surprisingly, since most of it was written by Free Church authors. On the other hand, the author of the chapter on Church and State in Story's late Victorian *magnum opus* on the Church of Scotland is magisterially dismissive of the Free Church position.[208] More significantly perhaps, given that he was devoted to the Free Church, Taylor Innes wrote:

> I have never been able to join in the condemnation launched against the Judges who laid down this solid mass of our existing law. I believe that they dealt with a great constitutional question, which was forced upon them, and that they did so with immense deliberation as well as firmness, and that all the decisions from first to last depended upon that one principle of subjection and subordination, which, whether true or not, has never since been even called in question.[209]

Like Professor Lyall,[210] I prefer to leave the question open. After all, it does not admit of a single straightforward answer. An authority on the history of the Reformation or on events in the seventeenth and eighteenth centuries might prefer the historical expositions of Lord Moncreiff to those of Lord Medwyn or vice versa. But that would still not really decide whether the general approach of the majority or minority judges to the immediate issues before the court was to be preferred – far less, whether the decision in any particular case was appropriate.

As is often the case, some of the arguments used by the judges do not look altogether convincing. For example, when Lord President Hope said in the first *Auchterarder* case 'that in every civilized country, there *must* be some court or other judicature, by which every other court of judicature may be compelled to do their duty, or kept within the bounds of their duty,'[211] this was really just assertion.[212] As the minority judges did not tire of pointing out, it did not actually seem to be true of Scotland, where the Court of Exchequer and the Court of Justiciary appeared to be co-ordinate courts, each, like the Court of Session, supreme in its own realm. The Lord President would have been hard pushed indeed to concoct a scenario in which the Court of Session would pronounce an interlocutor ordering the

Court of Justiciary to do its duty. The best that Lord Justice Clerk Hope could come up with was a situation where the Court of Justiciary admitted someone to the office of Lord Justice Clerk who did not have the Queen's grant of appointment.[213]

On the other hand, the Lord President had not just dreamed up this position for purposes of the first *Auchterarder* case. There was significant support for it in at least two previous decisions concerning schoolmasters. The first was *The Heritors of Corstorphine* v *Ramsay* – a decision in which Lord President Hope himself had presided more than a quarter of a century earlier.[214] In dismissing a libel against a schoolmaster relating to alleged fraud, the Edinburgh presbytery had taken account of the Criminal Procedure Act 1701 c. 6, which barred further criminal proceedings against the minister in the circumstances. There was no right of appeal from the presbytery to a higher Church court. In a bill of advocation, the heritors complained that, by taking account of the 1701 Act, the presbytery had proceeded on a ground of which it was not competent to judge and the Court of Session could intervene to correct this excess of power. On behalf of the schoolmaster, Mr James Moncreiff – the future Lord Moncreiff of the Veto Act – submitted that the libel was an ecclesiastical libel and the Court of Session had no jurisdiction. There is a striking similarity between counsel's submissions and the submissions in the first *Auchterarder* case.[215] The Court of Session held that it had jurisdiction. Lord President Hope said:

> It is no solution of this question to say that this is an ecclesiastical libel. It is so; but the presbytery must go on with it, and not go beyond their powers in judging of it. It is very true that the 43d of the King gave the exclusive jurisdiction as to schoolmasters to presbyteries alone. But that jurisdiction is exclusive only where they act in matters committed to them. But if they refuse to act at all, or go beyond their powers, they may be controlled by this court.[216]

In 1829 that decision had been followed by the House of Lords in *Campbell of Kilberry* v *Brown*,[217] upholding a similar decision of the First Division. Again, the case concerned the presbytery's deposition, not of a minister, but of a parochial schoolmaster, for neglect of duty. Lord Chancellor Lyndhurst rejected the argument that the Court of Session had no power of review in an ecclesiastical matter and said:

> But I apprehend that (particularly from the circumstance of the appeal being taken away) a jurisdiction is given in this case to the Court of Session, not to review the judgment on the merits, but to take care that the Court of Presbytery shall keep within the line of its duty, and conform to the

> provisions of the Act of Parliament. There is in the Court of Session in Scotland, that superintending authority over inferior jurisdictions, which is requisite in all countries, for the purpose of confining those inferior jurisdictions within the bounds of their duty. … Now, in this particular case, the power of final judgment is given to the presbytery, under certain limitations and certain restrictions. The party is to be served with the libel – the necessary proof is to be taken – and unless the inferior tribunal pursue the course pointed out by the Act of Parliament, they have no authority to proceed to judgment; and if, without pursuing the course pointed out, they do proceed to a judgment, in that case all their proceedings will be so inconsistent with the authority with which they are invested, that the superintending authority of the Court of Session may be interposed for the purpose of setting aside those proceedings.[218]

Of course, the circumstances in that case were distinguishable from those in the first *Auchterarder* case. It could be said, for instance, that the appointment or deprivation of a schoolmaster was not intrinsically a matter of ecclesiastical discipline or order.[219] Moreover, Parliament had taken away the schoolmasters' right of appeal to the higher Church courts, while ministers still had that right of appeal. Nevertheless, the House of Lords had indeed spoken of a superintending authority being 'requisite in all countries'. The Lord Chancellor had also affirmed the jurisdiction of the Court of Session to review the decision of a presbytery, an ecclesiastical court, in the purported performance of a duty imposed by an Act of Parliament.[220] Even Alexander Dunlop had not rejected that view before he became carried away with championing spiritual independence in the years before the Disruption.[221]

Judges in the minority argued that, as a court, the General Assembly of the Church of Scotland was comparable to the Court of Justiciary. If the civil Court of Session did not interfere with judgments of the criminal Court of Justiciary, it shouldn't interfere with those of the ecclesiastical General Assembly.[222] As a matter of pure logic, that is compelling – even though the real question may have been whether, in relation to the particular duty of the presbytery under the relevant legislation, the Church courts were indeed supreme.[223] But the majority judges were right to see that the General Assembly was not really like the Court of Justiciary. Its composition changed from year to year; most of the members were not legally qualified; it was often swayed by rhetoric or wit or emotion, rather than by precise reasoning. An advocate member, Graham Bell, commented in 1838 that he had 'sat in the Assembly for the last three days, putting to himself the question from hour to hour, whether he was in a legislative assembly or in a court; and he must admit that he had been

compelled to answer that, if he was in a court, it was certainly not in a court of justice.'[224] So scrutiny of the decisions of the General Assembly by the Court of Session was actually rather different from scrutiny of the decisions of the Court of Justiciary.

Lord Jeffrey could reply that the argument proved too much: if you took that line, you should not respect any of the decisions of the Church courts, and yet the majority judges were happy to respect any decision on purely spiritual matters.[225] Again, a good logical point, but it does not actually alter the basic fact that the General Assembly is a very different animal from the Court of Justiciary and one which looked, at the time, as if it might need some controlling. Lord Mackenzie made the contrast in vivid terms in the *Stewarton* case. Having referred to the Court of Justiciary and the Exchequer Court and having suggested that in practice jurisdictional problems did not arise, he continued:

> They are, like this court, merely judicial bodies, determining, on actions brought, the interests of others. And the judges of these courts are all removeable in a mode pointed out by the constitution. They never could, or did, pretend to be any thing but the mere servants of the State, *i.e.* of King and Parliament. But the Church is a body of quite a different kind. It has always pretended to certain powers by divine right, subject, within its province, to no human control. It claims, and with modification enjoys, a *quasi* oligarchic constitution, its office-bearers being appointed not without its concurrence, and removeable by itself; and it has always struggled to get this power entirely into its own hands, excluding the State altogether. It is not a merely judicial power, determining the interests of others, but always studying and urging its own. Look at the present state of the Church. Is the General Assembly altogether like an ordinary court of justice, deciding between litigants, whom it regards with indifference, and judging its own jurisdiction with equal indifference? When I ask the question, I am not censuring the Assembly at all. I am only doubting their similarity with a mere court of justice.[226]

As Lord Mackenzie was pointing out, the General Assembly was – and is – very different from the Court of Justiciary. Although at one time the Court of Session and the Court of Justiciary exercised extensive powers of legislation by Act of Sederunt and Act of Adjournal, by this period those powers were, in practice, much reduced. The courts were, to all intents and purposes, simply courts. But the General Assembly was not just a court: it was also a legislature and a forum for deliberating on the affairs of the Church. Attitudes formed in its deliberative or legislative functions could easily be carried over into its judicial function. It was this combination of the claim to legislate in a way which did in practice impinge on civil rights

with a claim to adjudicate finally on the validity, interpretation and application of its legislation, that made it a unique body.[227] To many people these claims were not only unique: they were potentially alarming in the hands of zealous churchmen. What might future majorities in the Assembly not claim to do?[228]

People became alarmed, for example, in August 1840 when Dr Candlish conceded that the Evangelical party might be said to have taken their original decision to pass the Veto Act under a mistaken apprehension of the civil law,[229] but continued:

> But we were under no mistake in regard to the law of Christ. We thought the law of the land allowed – we were sure that the law of Christ required – us to decide as we did decide. And whatsoever the law of the land may now be found, or may be made, to say, the law of Christ is not changed – the law of Christ requires that we abide still by our decision. The question, should this man be pastor of Christ's flock in this parish, has already been settled, according to the mind of Christ.

Dr Candlish was claiming that he, and those for whom he spoke, actually knew the mind of Christ on the question of the Veto Act and on whether someone should be admitted as a pastor. Remember: the Act was a piece of Assembly legislation which had not even been thought of ten years before and which Dr Chalmers still considered should be repealed.[230] Yet, here we have Dr Candlish saying that the law of Christ had required the Assembly to decide to pass the Act and that the law of Christ also required that they abide by that decision. Just in case anyone wondered, he declares that they are under no mistake with regard to the law of Christ.

To many this appeared to be a papal assertion of infallibility.[231] At all events, a General Assembly which acted on the basis that it could say that its legislation was an infallible enactment of the law of Christ looked potentially dangerous. It would be doubly so, if there were no outside body to control it.

Claims of this kind cost the Evangelical party public sympathy. They liked to stress the appeal of the Veto Act and of Evangelical thinking to those whom Dean of Faculty Hope described as 'the lower orders among the members of the Establishment',[232] particularly those whom the Rev. Henry Moncreiff referred to as 'peasants'.[233] In the words of Dr Chalmers, 'evangelical theology is also the popular theology.'[234] But, curiously enough, with all their Whig credentials, the Evangelicals found themselves on the wrong side of the democratic argument. This was an age of Reform, when established churches, church taxes, State endowment of churches and so on were under attack. At such a time, making wild assertions about the powers of the General Assembly was not likely to

attract widespread support among the poorer classes, or indeed among those who were generally in favour of change in society. In the words of one not unsympathetic critic,[235] the Church 'began by demanding a popular right, but it ended by demanding a clerical right, which, at will, could have scattered the popular to the winds.' Somehow, the Evangelicals' claim, that they were only asserting the right for the clergy in order to use it for the benefit of the people,[236] failed to carry conviction. On the other side, interference with the civil right of patronage and defiance of the courts of the land alienated the more conservative members of society who might otherwise have been natural supporters of the Church, especially in uncertain times. Understandably too, most members of Parliament found it impossible to side with the Church when it would not respect the decisions of the civil courts.

In a strange way, the old Tory judges – Lord President Hope and Lord Justice Clerk Boyle – read the spirit of the times more accurately. Whether they were right or wrong in their interpretation of what had happened at the time of the Reformation and afterwards was not really the point. Lord Cockburn saw that: all these historical excursuses could not really decide the issue, he said, since much of the material dated from a time when the Church was making claims to obtrude 'its intolerance both into all public affairs, and into every asylum of private life' which no one would have acknowledged now.[237] What mattered was whether the Church courts, including the General Assembly, should be free from control in the conditions of the 1830s and 1840s. On that, the judicial instinct of the majority may well have been correct. In other words, they may well have been right to sense that, in the new climate of the times, it was not acceptable for the Established Church to be outside the control of the civil courts if it was going to assert an unfettered right to adopt measures such as the Veto Act which affected civil rights. Significantly, when the Evangelical party appealed to Parliament, for the most part the Whigs were as opposed to their stance as Peel's Conservatives. There is, perhaps, more than a hint of these problems to come in Lord Jeffrey's gloomy comment to Lord Cockburn in April 1838:

> [The Church] has allowed the interested flatteries of a faction to lead it into a belief that in good earnest it is sacrosanct and the only thing in short for which Government and Society are established. This is a course that has been run before – but the time is gone bye when it could prosper and the end will be that no party in the state will submit to its exactions, and, having lost all hold on the affections of the people it will be pulled down amidst their shouts and laughter. Sic vaticinor, et fiat.[238]

The obvious self-sacrifice of the ministers who left the Church at the Disruption, which Jeffrey so much admired,[239] may have helped postpone some of the effects which he foresaw, for a time at least.

There I must bring these lectures to a close, even though I have only scratched the surface of the topic. For instance, I have not followed the travels of the non-intrusion *corps diplomatique*[240] back and forth to London to lobby ministers and others – all in vain.[241] The wider political context, both in Scotland and in England, is important and relevant and I have said next to nothing about it. The parallels with the developments in the Church of England, with the rise of the Oxford Movement,[242] are also significant, not least in explaining the stance of the Government and Parliament towards requests from the Evanglical party in the Church of Scotland for recognition of its spiritual independence. Even *The Tablet*, newly founded in 1840, followed the disputes leading to the Disruption with interest, since it could see the importance of spiritual independence for the Roman Catholic Church. So far as the law is concerned, I have not been able, for example, to look at Lord Medwyn's theory of Church and State, which so fascinated Harold Laski,[243] or at Lord Jeffrey's theory of the scope of the Court of Session's power of review. Nor have we opened the box of delights which awaits those with a proper taste for the competency of pure declarators, the scope of defences to interim interdicts, the reconciling of overlapping jurisdictions and much, much more besides. I shall be more than happy, however, if I encourage anyone, whether judge, practitioner, student or non-lawyer, to open the Disruption cases which have, for too long, remained closed and neglected.

Notes

1. *Percy* v *Board of National Mission of the Church of Scotland* [2005] UKHL 73; 2006 S.C. (H.L.) 1; [2006] 2 A.C. 28.
2. 2006 S.C. (H.L.) 1, at p. 13, para. 48; [2006] 2 A.C. 28, at p.45, para. 48, per Lord Hoffmann. That assumption is confirmed by the fact that, in the proceedings before the Special Commission set up by the General Assembly, Ms Percy claimed that 'a man in her position would not have been suspended, would not have been the subject of a preliminary inquiry' and would not have been advised by 'three men appointed by the Church' to demit status and resign her appointment as an associate minister. See the Report of the Special Commission, *Reports to the General Assembly 2004* (Church of Scotland, Edinburgh, 2004), pp. 34/1–34/13.
3. 2001 S.C. 757. The applicant did not proceed further with her claim for unfair dismissal.
4. See section 82(1) of the Sex Discrimination Act 1975.
5. Opinion of the Special Commission dated 20 October 2003, reprinted as Appendix 3 to their Report: *Reports to the General Assembly 2004*, at pp. 34/10–34/13.

6. 2006 S.C. (H.L.) 1; [2006] 2 A.C. 28.
7. On this aspect of the decision, see *The New Testament Church of God* v *Rev. Sylvester Stewart* [2007] EWCA 1004.
8. Equal Treatment Directive 76/207.
9. Section 2.2 of the Report of the Legal Questions Committee, *Reports to the General Assembly 2007* (Church of Scotland, Edinburgh, 2007), p. 6.4/4.
10. F. Cramner, S. Peterson, 'Employment, Sex Discrimination and the Churches: The Percy Case' (2006) 8 Ecclesiastical Law Journal 392 and M. Maclean, F. Cranmer, S. Peterson, 'Recent Developments in Church–State Relations in Scotland' (unpublished).
11. Guthrie vol. 2, p. 27. The number is derived from Buchanan vol. 1, p. 3*.
12. The full report of the first *Auchterarder* case in the Court of Session was published on 26 May 1838, the last day of the General Assembly, just three days after the big debate relating to the decision. See the advertisement in *The Scotsman*, 26 May 1838, p. 3.
13. *The Times*, 29 June 1843, reporting his speech at a meeting the previous day. The meeting shows the Free Church speakers consorting with, and buttering up, dissenters in England.
14. The Rev. Henry Moncreiff, *A Letter to Lord Melbourne* (John Johnstone, Edinburgh; J. Nisbet & Co., London, 1840), p. 41. See also Mackinnon, *Some Chapters in Scottish Church History,* Preface.
15. D. Liebs, 'Der ungeliebte Jurist in der römischen Welt' (2006) 123 Zeitschrift der Savigny Stiftung für Rechtsgeschichte (Romanistische Abteilung) 1–18. See also D. Nörr, *Rechtskritik in der römischen Antike* (Verlag der Bayerischen Akademie der Wissenschaften, Munich, 1974), especially Chapter VI.
16. Prologue, lines 325–6.
17. From the third verse of 'You ask me, why, tho' ill at ease', first published in A. Tennyson, *Poems* (E. Moxon, London, 1833). It was a Northern Irish judge, Lord Carswell, who quoted these lines in A v *Home Secretary (No 2)* [2005] UKHL 71; [2006] 2 A.C. 221, at p. 300, para. 152. One might wonder, of course, exactly how much of Britain Tennyson was including in 'England'. He also refers to 'That codeless myriad of precedent' in 'Aylmer's Field', first published in Alfred, Baron Tennyson, *Enoch Arden, etc.* (E. Moxon & Co., London, 1864).
18. See, for instance, in addition to his judgments, his Hamlyn lectures – Sir Alfred Denning, *Freedom under the Law* (Stevens & Sons, London, 1949) – and Lord Denning, *Landmarks in the Law* (Butterworths, London, 1984) and *Leaves from my Library: An English Anthology* (Butterworths, London, 1986).
19. A deputation of the Church of Scotland met the Prime Minister, Lloyd George, and two sons of the Free Church manse, the Leader of the Opposition, Bonar Law, and the Scottish Secretary, Robert Munro, to discuss the prospective legislation at a breakfast meeting at 10 Downing Street on 20 March 1920. See C. L. Rawlins (ed.), *The Diaries of William Paterson* (Faith and Life Books, Edinburgh, 1987), at pp. 273–4.
20. *Proceedings of the General Assembly of the Free Church of Scotland at Edinburgh, May 1843*, p. 20.
21. *The Scotsman*, 20 May 1843, p. 2.
22. See, in particular, S. J. Brown, *Thomas Chalmers and the Godly Commonwealth in Scotland* (Oxford University Press, Oxford, 1982).
23. In fact, he was forced to qualify his position shortly afterwards – a fact that was not brought to the attention of the House of Lords. See p. 99 n. 54 below.

24. The *Caledonian Mercury*, 20 May 1843, p. 3, referred to 'the sensitive apprehensions this distinguished Divine seemed to entertain, about being confounded with the general body of Dissenters.' The editorial writer surmised that the speech had contained certain references and a certain tone 'which would not have been exactly adopted by Dr Candlish or Dr Cunningham.'
25. J. G., 'A Word to Dissenters', *The Scotsman*, 27 May 1843, p. 4.
26. Walker, *Chapters from the History of the Free Church of Scotland*, p. 40.
27. Chapter XLV of Brown, *Annals of the Disruption*, which, tellingly, is devoted to the social standing of Free Church ministers, reverses the point by saying that dissent had never stood in a position of social inferiority in Scotland to the same extent as in England, 'owing, perhaps to the fact that with us the Episcopalian clergy and laity are Dissenters.' Omond, himself the son of a Free Church minister, remarks that, after the Disruption, 'the clergy and the laity were of the same social standing as those who remained in the Established Church': Omond, p. 94. For an analysis of the social composition of Free Church congregations in different parts of Scotland, see P. L. M. Hillis, 'The Sociology of the Disruption', in Brown and Fry (eds), *Scotland in the Age of the Disruption*, pp. 44–62. On the north of Scotland, see Paton, *The Clergy and the Clearances*, pp. 152–60.
28. 27 May 1843, p. 2. The hostile editor had been caught out by the large number of ministers who left the Established Church on a matter of principle.
29. 'Many who have joined the ranks of the Free Church cannot persuade themselves that they have descended to those of *Seceders* and *Dissenters*; and no great disposition has been shown by them to fraternise, on anything like terms of equality, with their new associates …': Bryce vol. 2, pp. 386–7.
30. The acceptance of money from slave-owning circles in the American South caused a major crisis, however. See, e.g., G. Shepperson, 'Thomas Chalmers, the Free Church of Scotland, and the South' (1951) 17 Journal of Southern History 517–37, with references.
31. Macfarlane, pp. 153–64.
32. Brown, *Annals of the Disruption*, pp. 569–71. A circular, entitled 'Scheme of the Colony of the Free Church of Scotland at Otago in New Zealand', was issued by the Lay Association of the Free Church of Scotland for Promoting the Settlement of a Scotch Colony at Otago, New Zealand, in 1845. Among the members were well-known legal Free Church veterans of the Disruption struggle such as Sheriff Speirs, Sheriff Monteith and Mr John Hamilton, Advocate. (Peter Skegg showed me his copy of the circular in Dunedin and kindly sent me a scanned copy.) For a wider view of the position in the colonies, see B. C. Murison, 'The Disruption and the Colonies of Scottish Settlement', in Brown and Fry (eds), *Scotland in the Age of the Disruption*, pp. 135–50.
33. Writing in 1859, Turner, p. 9, refers to 'the conviction entertained by many, that even yet the triumph of the party was but a few years delayed, that the temporary structures about to be erected for the outgoing congregations would more than outlive their brief secession, to be followed by a triumphant restoration …'.
34. Bryce vol. 2, p. 385. Brown, *Annals of the Disruption*, p. 560, paints an amusing picture of the colonial ministers who adhered to the Establishment 'in hot haste' and 'left their Canadian congregations, and started across the sea eager to have a share of the spoil.'
35. Bryce vol. 2, pp. 385–90, but also pp. 414–17; Omond, pp. 94–5.

36. For the general background, see O. Chadwick, *The Secularization of the European Mind in the Nineteenth Century* (Cambridge University Press, Cambridge, 1975).
37. After the Disruption, the Free Church had made a big effort to set up its own schools – thereby weakening the position of the Established Church in the field of education and so also weakening its claim to be recognised as the national church. See Hutchison, *A Political History of Scotland 1832–1924*, pp. 72–3. But its policy on education soon split the Free Church in a way that was to have lasting effects. See D. J. Withrington, 'Adrift among the Reefs of Conflicting Ideals: Education and the Free Church, 1843–55', in Brown and Fry (eds), *Scotland in the Age of the Disruption*, pp. 79–97.
38. For a full account, see Ross, Chapter III; also J. L. MacLeod, *The Second Disruption: The Free Church in Victorian Scotland and the Origins of the Free Presbyterian Church* (Tuckwell Press, East Linton, 2000) and Fry, *Patronage and Principle*, pp. 51–8.
39. Ross, pp. 147–53.
40. The somewhat curious reason for the majority in the Free Church coming to adopt that position is explained in Ross, pp. 119–21.
41. Ross, pp. 139–47.
42. Ross, Chapter VI; Life of Rainy vol. 1, Chapter VII.
43. For the background and reasons, see MacLeod, *The Second Disruption* and *History of the Free Presbyterian Church of Scotland* (Glasgow, 1933, reprinted, 1965), especially Chapters V–VII.
44. For the way that a lawyer, and hitherto ardent constitutionalist, reconciled himself to the union, see J. Buchan, *Andrew Jameson Lord Ardwall* (William Blackwood & Sons, Edinburgh and London, 1913), pp. 106–14. In reproducing his speech to the General Assembly of 1899, Buchan tactfully deletes the indication which Sheriff Jameson actually gave that the property question was likely to be resolved in favour of the majority: *Proceedings and Debates of the General Assembly of the Free Church of Scotland, held at Edinburgh, May 1899* (Macniven & Wallace, Edinburgh; James Nisbet & Co., London, 1899), pp. 172–3, quoted in Ross, Chapter I n. 151 at p. 313. In the immediate aftermath of the disaster of 1 August 1904, Jameson suggested that the union should be rescinded and that the former Frees among the United Frees should rejoin the Frees: R. L. Orr, *Lord Guthrie: a Memoir* (Hodder & Stoughton, London, 1923), p. 141. That idea was swiftly rejected at the special Commission held on 10 August: Taylor Innes, 3 Hibbert Journal 217, at pp. 232–4. John Buchan was himself the son of a Free Church minister. By the time he wrote the biography of Lord Ardwall, he was a member of the United Free Church. On unification in 1929, he became a member of the Church of Scotland.
45. Life of Rainy vol. 2, pp. 247–54 and pp. 260–1; H. Morrison, *Manual of the Church Question in Scotland* (Keith & Co., Edinburgh, 1905), pp. 12–16. The Free Church naturally saw the day's events rather differently: Cameron, pp. 41–9.
46. Morrison, *Manual of the Church Question in Scotland*, p. 19.
47. *Bannatyne* v *United Free Church of Scotland* (1902) 4 F. 1083. The United Free Church itself raised proceedings for possession of a manse: *United Free Church of Scotland* v *M'Iver* (1902) 4 F. 1117. This was a way of ensuring that the Model Trust Deed, under which most congregational property was held, was brought into the picture: Life of Rainy vol. 2, pp. 264–5. To some extent the move backfired since it allowed the United Free Church to be portrayed as harshly driving out a long-serving minister from his home. See further p. 100 n. 64.

48. This was seen at the time, when the Lord Provost of Glasgow was asked to try to bring the two sides together: Life of Rainy vol. 2, pp. 309–10. For the compromise proffered at a late stage by the United Free Church, see p. 100 n. 68.
49. On the financing of the litigations for the Free Church minority, see Stewart and Cameron, pp. 189–90, and Cameron, p. 86.
50. Appellants' Case, in Free Church Appeals, pp. 89–98; Ross, pp. 55–72 and 136–53.
51. Free Church Appeals, p. 487.
52. Only hinted at in the Appellants' Case, in Free Church Appeals, p. 98; Ross, pp. 73–81 and 166–223.
53. See p. 96. Although it was recognised in 1843 that Dr Chalmers was but one man, the perception was that 'he is *the* man of the movement' and, moreover, that, in his address to the General Assembly, 'he spoke as the mouthpiece of the party': J. G., 'A Word to Dissenters', *The Scotsman*, 27 May 1843, p. 4.
54. Some, at least, of the criticism of the judgments of the majority on establishment was based on pronouncements by the leaders of the Free Church which were never put before the House of Lords. See, for instance, H. Macpherson, *The Scottish Church Crisis* (Hodder & Stoughton, London, 1904), pp. 7–30; Taylor Innes, 3 Hibbert Journal 217, at p. 228 n. 1. It may be that the United Free Church legal team underestimated the difficulties and did not include enough of the material, which might have gone some way to counter the famous passage from Dr Chalmers' address to the first General Assembly.
55. Free Church Appeals, pp. 209–23 (Johnston KC); 346–60 and 386–96 (Dean Asher).
56. Respondents' Case, in Free Church Appeals, pp. 130–2; denied by the Appellants in their Case, in Free Church Appeals, pp. 98–105; Ross, pp. 82–103, 194–216 and Chapter VI.
57. Dr Rainy preferred not to emphasise the Church's freedom to change, while Taylor Innes was of the opposite view: Taylor Innes, pp. 236–7. Dean Asher put considerable emphasis on the freedom of the Church to change – perhaps being influenced by the advice of Mr Balfour given in August 1899, shortly before he became Lord President. See pp. 106–7.
58. So, rightly, Ross, p. 82.
59. *Bannatyne* v *United Free Church of Scotland* (1902) 4 F. 1083; *United Free Church of Scotland* v M'*Iver* (1902) 4 F. 1117. The decision of the Second Division was printed in a separate report: *The Church Union Case: Judgment of the Court of Session 4th July 1902. Opinions revised by their Lordships* (William Blackwood & Sons, Edinburgh and London, 1902), with a brief introduction by Taylor Innes. Curiously, in *Thomas Shaw (First Lord Craigmyle): a Monograph by his Son* (Nicholson & Watson, London, 1937), p. 46, it is said that Shaw, a member of the United Presbyterian Church, was not only prominent in the negotiations for union, but was also the leading counsel for the United Free Church in the Court of Session. In fact, Dean of Faculty Asher was the leader in the Court of Session and Shaw was not instructed. It was not 'by some blunder never adequately explained' that he was not instructed in the House of Lords. In effect, those who had been advising the leaders of the Free Church before the union, Asher, Haldane and Guthrie, represented the United Free Church in the litigation.
60. *Craigdallie* v *Aikman* (1813) 5 Paton 719; (1820) 6 Paton 618. See Taylor Innes, *The Law of Creeds in Scotland*, pp. 222–36.

61. On the proceedings before him and his judgment, see Stewart and Cameron, pp. 157–70.
62. On the proceedings in the Second Division, see Stewart and Cameron, pp. 171–89. This was essentially the notoriously impatient and slapdash Second Division whose exploits were so bravely exposed in N. J. D. Kennedy, 'The Second Division's Progress' (1896) 8 Juridical Review 268. The composition of the Division changed shortly after the Free Church case finished. Lord Trayner resigned at the end of 1904, Lord Moncreiff three weeks later and Lord Young in May 1905. The Free Church hero of the litigation, Mr Johnston KC, succeeded Lord Young on the bench and soon had to decline to deal with the after-effects of his triumph: *Free Church of Scotland* v *M'Rae* (1905) 7 F. 686. For Lord Young's attitude to his own judgment, see the account of his conversation with Taylor Innes in Taylor Innes, p. 234 n.1.
63. Stewart and Cameron, pp. 152–3. This was no *ex post facto* rationalisation: the point was made in a circular asking for funds to finance the appeal to the House of Lords: Cameron, p. 86. *The Scotsman*, 2 August 1904, p. 4, commented that the judges in the House of Lords had gone into the heart of the case, had probed it to its depths, had faced the facts unflinchingly and had not been deterred from pronouncing what law and justice had to say from fear lest the ecclesiastical heavens should fall: 'It has been common subject of comment that as much could not be said of the judgments upset by yesterday's findings. That of the Lord Ordinary, whatever may be thought of its law, was indeed a careful, thoughtful, and reasoned deliverance. But of the weight and value of the dicta that issued from the majority of the members of the Second Division who had the case in their hands, perhaps the less said the better.' The reference to the majority must be an allusion to the absence of Lord Moncreiff due to illness. See Life of Rainy vol. 2, p. 307. He was a grandson of Lord Moncreiff of Disruption times, a son of Lord Justice Clerk Moncreiff, and the brother-in-law of Lord President Kinross. On account of this relationship the Lord President declined jurisdiction in an appeal by him against a decision of the Sheriff of Chancery: (1904) 12 Scots Law Times (News) 38.
64. The decision after the second hearing is reported in Session Cases as *Free Church of Scotland* v *Lord Overtoun* (1904) 7 F. (H.L.) 1. This appeal was conjoined with an appeal in *Macalister* v *Young*. The decisions of the House of Lords in the two appeals are also reported as *Free Church of Scotland* v *Lord Overtoun* [1904] A.C. 515. The Appeal Cases report is superior since it gives the gist of the argument and also reproduces many of the relevant documents. In addition, there were two editions of the judges' speeches produced for sale to the general public: A. McNeill, *The Free Church Case* (William Hodge & Co., Edinburgh, 1904) and A. Taylor Innes, *Free Church Union Case, judgment of the House of Lords, 1st August 1904, revised by their Lordships* (Blackwood, Edinburgh, 1904). But the appeals are best studied in the verbatim report by Orr, *The Free Church of Scotland Appeals 1903–4* ('Free Church Appeals'). *Macalister* v *Young* was a case brought by pursuers, claiming to be the United Free trustees of the former Free Buccleuch and Greyfriars Church in Edinburgh, for possession of the church. It was treated as a test case for congregational property held under the Model Trust Deed. At the first hearing, the appeal in the *Macalister* case was argued separately at the end: *The Scotsman*, 8 December 1903, p. 7. But, contrary to the thinking of Taylor Innes, pp. 239–40, counsel for the United Frees came to the view that the outcome would follow the decision in the main appeal and so, at the second hearing, there was no separate consideration of this case and the

argument was withdrawn: Free Church Appeals, pp. 337–8. Doubtless, counsel based this assessment on their feeling about the way the argument had gone in the first hearing. Taylor Innes set out the (impressive) argument on the Model Trust Deed which he favoured in 3 Hibbert Journal 217, at pp. 222–5.

65. The arguments in the first hearing are not reproduced in the reports, but they were extensively reported in *The Scotsman*, 27 November 1903, p. 7; 28 November, p. 11; 2 December, p. 10; 5 December, p. 7; and 8 December, p. 7. Counsel for the appellants were Johnston KC and Christie; for the respondents the Dean of Faculty (Asher KC), Haldane KC, Guthrie KC (a son of Dr Guthrie of Disruption times) and Orr. A little of the atmosphere of the hearing comes through in Orr, *Lord Guthrie*, pp. 137–9, and in the letter from Principal Rainy to Dr Ross Taylor reproduced in Life of Rainy vol. 2, pp. 311–12. As late as the evening of 26 November, it was still not settled whether Guthrie or Haldane should make the second speech for the United Free Church. Possibly because Guthrie was less confident than Haldane about the soundness of their case, the choice eventually fell on Haldane: Orr, *Lord Guthrie*, pp. 137–8.
66. Rainy's impression from the hearing was that Lord Shand had seemed to be for the United Frees: Life of Rainy vol. 2, p. 312. Stewart and Cameron, p. 173, only just manage to avoid attributing Lord Shand's death to an intervention of Divine Providence in favour of the Free Church minority.
67. Taylor Innes, p. 234 n. 1, at p. 236. The clear implication is that the draft was favourable to the United Frees. This would have been consistent with Lord Shand's view, expressed in a conversation as far back as 1876, that the Free Church had considerable freedom to change its view on what were to be regarded as fundamentals: Taylor Innes, p. 234 n. 1, at pp. 235–6.
68. Because of the way the first hearing had gone, during the General Assembly of the United Free Church in May 1904, shortly before the second hearing of the appeal was due to start, an offer of a compromise settlement on the basis of a lump-sum payment of £50,000 was made. It was ignored by the Free Church side. See Life of Rainy vol. 2, pp. 313–15; Stewart and Cameron, pp. 195–200. Taylor Innes and some others had favoured making an offer of settlement based on a numerically proportional share of the property, but this suggestion had not attracted support within the United Free Church: Taylor Innes, 3 Hibbert Journal 217, at p. 234 n. 1; Taylor Innes, pp. 237–9.
69. Taylor Innes, pp. 235–7.
70. Lord Kinross was the son of an Established Church minister. Having been widowed in 1872, five years later he married Eliza, the second daughter of (the Free Church) Lord Justice Clerk Moncreiff and the sister of the Second Division judge, Lord Moncreiff.
71. *The Scotsman*, 8 June 1904, p. 8.
72. G. M. Reith, *Reminiscences of the United Free Church General Assembly (1900–1929)* (The Moray Press, Edinburgh and London, 1933), p. 17.
73. Letter from John Sinclair, dated 24 May 1904, *The Times*, 2 June 1904, p. 4, reprinted in (1904) 12 Scots Law Times (News) 31–2. The Procurator, Mr Guthrie, had described the advice in these terms in the Free Church General Assembly debate on 31 May 1900: *Proceedings and Debates of the General Assembly of the Free Church of Scotland, held at Edinburgh, May 1900* (Macniven & Wallace, Edinburgh; James Nisbet & Co., London, 1900), p. 161. See further pp. 106–7.
74. The only change in the representation was that Mr Salvesen KC, who had been instructed in the Court of Session but omitted at the first hearing in the House of Lords, was restored to the appellants' team. Lord Salvesen's biographer does not

explain why this happened: H. F. Andorsen, *Memoirs of Lord Salvesen* (W. & R. Chambers, London and Edinburgh, 1949), pp. 66–7. His omission may have been to save costs.

75. As explained by the Lord Chancellor at the start of the hearing: Free Church Appeals, p. 173. A curious feature of the first hearing was that there was an even number of judges (six): the Lord Chancellor, Lords McNaghten, Shand, Davey, Robertson and Lindley. The rumour was that they were divided 3–3, presumably with the Lord Chancellor, Lord Davey and Lord Robertson being in favour of allowing the appeal, the rest being against. On that footing the appeal would have been dismissed. If the House had pronounced judgment after Lord Shand's death, however, there would have been a majority in favour of allowing the appeal. So it was decided to hold a fresh hearing. Curiously, however, the Lord Chancellor's original intention was to add three new judges, Lords Alverstone, James of Hereford and Kinross, to the surviving five, so as once again to produce an even number (eight). It was only because Lord Kinross stood down that, at the second hearing, the House comprised the more usual, odd, number of judges (seven).
76. *The Scotsman*, 9 June 1904, p. 6.
77. *The Scotsman*, 10 June 1904, p. 4. Lord Kinross died the following year without ever sitting judicially in the House of Lords, but he had sat in the Privy Council at the end of April and beginning of May 1904. See, for example, *Smith* v *Macarthur* [1904] A.C. 389 and *Newfoundland Steam Whaling Co. Ltd* v *Government of Newfoundland* [1904] A.C. 399. Cf. (1904) 12 Scots Law Times (News) 3.
78. It was noticed at the time that Lord Kinnear and Lord Moncreiff, both peers, would have been eligible, but neither had been asked to sit. So far as the last-minute problem is concerned, replacing Lord Kinross with either of them in time for the start of the hearing would have been, at best, problematical.
79. (1904) 12 Scots Law Times (News) 30. *The Scotsman*, 10 June 1904, p. 4, approved of Lord Kinross's decision. See the interesting note in (1904) 16 Juridical Review 205–6 referring to *Hall* v *Hall* (1891) 18 R. 690, where Lord Low's name appears both as counsel for the second party and, at p. 697, as one of the consulted judges. As counsel, he had signed the minute of debate. See also pp. 69–71 and 72–3.
80. 'Notes from London' (1904) 20 Scottish Law Review 182; McNeill, *The Free Church Case*, p. vi. The arguments were, however, reported extensively in *The Scotsman*, 10 June 1904, p. 7; 17 June, p. 6; 18 June, p. 10; and 24 June, p. 6.
81. Cairns, pp. 227 and 230, letters from Dr MacEwen of 10 and 14 June 1904. He was a former United Presbyterian member of the United Free team, the other non-legal members being Dr Rainy and Dr Archibald Henderson: Cameron, p. 103.
82. Letters from Dr MacEwen to his wife, dated 10 and 11 June 1904: Cairns, pp. 227–8. Dr MacEwen actually told his wife that their Lordships fell asleep. *Quod raro accidit*.
83. Ibid., pp. 226–7, letters of Dr MacEwen to his wife dated 9 and 10 June 1904. See also ibid., p. 228, letter of 11 June.
84. Ibid., p. 226, letter of Dr MacEwen to his wife, dated 9 June 1904; Free Church Appeals, pp. 308 and 405.
85. Cairns, pp. 227 and 231, letters from Dr MacEwen of 10 and 16 June 1904. By contrast, a Free Church observer 'greatly admired the way in which the Lord Chancellor held in hand counsel for both sides …': Cameron, p. 87.
86. Free Church Appeals, pp. 374–5, 410, 459 and 471–7 (the Dean); 53, 529–32, 544–6 (Haldane).

87. Diary of Sir Edmund Gosse, 21 June 1904, as reproduced in R. F. V. Heuston, *The Lives of the Lord Chancellors* (Clarendon Press, Oxford, 1964), pp. 195–6. Almost certainly, Lord Robertson had already made up his mind after the first hearing. Sheriff Guthrie's impression after the first day of the first hearing had been that 'Robertson wants to be against us if he possibly can': letter of 26 November 1903 to Mrs Guthrie, reproduced in Orr, *Lord Guthrie*, p. 137. After the first day of the second hearing, 9 June 1904, Dr MacEwen wrote to his wife that the Lord Chancellor and Lord Robertson were palpably against them, Lord Davey mainly so; Lords Lindley and Macnaghten were in their favour and so the case would turn on the views of Lords James and Alverstone: Cairns, p. 226.
88. Life of Rainy vol. 2, p. 322.
89. Dr MacEwen in his letter to his wife, 11 June 1904: Cairns, pp. 228–9. A brilliant description.
90. Life of Rainy vol. 2, p. 312.
91. Cameron, p. 87.
92. In the Free Church Appeals volume, the speeches of counsel for the appellants (Johnston KC and Salvesen KC) occupy roughly 164 pages, plus 11 pages of reply by Mr Johnston, while the speeches of counsel for the respondents (the Dean of Faculty [Asher KC] and Haldane KC) take approximately 213 pages. The substance of Johnston's speech is denounced by Carnegie Simpson, Principal Rainy's henchman and biographer: Life of Rainy vol. 2, pp. 316–21. In a letter to his wife dated 10 June 1904, Dr MacEwen reported that Johnston had been as effective as he could have been – although there was a good deal of misrepresentation: Cairns, p. 227.
93. Letter of Dr MacEwen to his wife, 11 June 1904: Cairns, p. 229.
94. Life of Rainy, p. 227; R. B. Haldane, *An Autobiography* (Hodder & Stoughton, London, 1929), p. 76.
95. Stewart and Cameron, p. 205. See, however, Haldane's retort in a speech in East Lothian: *The Scotsman*, 13 October 1904, p. 7. See also p. 106.
96. E.g., R. B. Haldane, 'The Appellate Courts of the Empire' (1900) 12 Juridical Review 1, reprinted in R. B. Haldane, *Education and Empire: Addresses on Certain Topics of the Day* (John Murray, London, 1902), p. 131 (an address to the Scots Law Society, with Lord President Balfour presiding, on 8 January 1900: (1900) 7 Scots Law Times (News) 139); Viscount Haldane, 'The Work for the Empire of the Judicial Committee of the Privy Council' (1921) 1 Cambridge Law Journal 143 (an address to the University Law Society on 18 November 1921); Viscount Haldane, 'The Judicial Committee of the Privy Council' (1923), reprinted in R. B. Haldane, *Selected Essays and Addresses* (John Murray, London, 1928), pp. 218–37.
97. Haldane, *An Autobiography*, p. 52. Accepted uncritically by Heuston, *The Lives of the Lord Chancellors*, pp. 189–90.
98. Note, however, that at the first hearing the Dean and Haldane both favoured Guthrie making the second speech for the United Frees: Orr, *Lord Guthrie*, pp. 137–8.
99. Haldane, *An Autobiography*, p. 76.
100. Letter from Dr MacEwen dated 11 June 1904: Cairns, p. 229.
101. At the first hearing Haldane's argument does not seem to have been so elaborate and he did not, apparently, encounter so many problems with the judges: *The Scotsman* 5 December 1903, p. 7, and 8 December 1903, p. 7.
102. Diary, 21 June 1904, as reproduced in Heuston, *The Lives of the Lord Chancellors*, pp. 195–6. The reference is to R. B. Haldane, *The Pathway to Reality: Stage the First: being*

the Gifford lectures delivered in the University of St Andrews in the Session 1902–1903 (John Murray, London, 1903) and *The Pathway to Reality: Stage the Second: being the Gifford lectures delivered in the University of St Andrews in the Session 1903–1904* (John Murray, London, 1904).

103. Life of Rainy, vol. 2, p. 322.
104. Not least the astute Free Church team: Stewart and Cameron, pp. 207–8.
105. Afternoon of 20 June 1904, Free Church Appeals, p. 486. 'Haldane did not begin very effectively this afternoon': Letter of Dr MacEwen to his wife dated 20 June 1904: Cairns, p. 232.
106. 21 June 1904, Free Church Appeals, pp. 493–4. The date of Sir Edmund's diary entry would suggest that this was the session that he was describing.
107. A. E. Taylor, *Elements of Metaphysics* (Methuen & Co., London, 1903).
108. F. H. Bradley, *Ethical Studies* (Henry S. King & Co., London, 1876).
109. W. Vatke, *Die menschliche Freiheit in ihrem Verhältniss zur Sünde und zur göttlichen Gnade wissenschaftlich dargestellt* (G. Bethge, Berlin, 1841), i.e. 'Human Freedom in its Relationship to Sin and to the Mercy of God scientifically described'.
110. Free Church Appeals, p. 494.
111. A. J. Balfour, *The Foundations of Belief, being Notes Introductory to the Study of Theology* (Longman, Green & Co., London, 1895).
112. R. F. V. Heuston, 'Judicial Prosopography' (1986) 102 Law Quarterly Review 90, at p. 104.
113. Free Church Appeals, p. 495. See also Haldane, *An Autobiography*, p. 77. But the sense that Haldane is failing to communicate runs right through the report of his speech and the interventions of the judges.
114. Free Church Appeals, p. 502. Although Dr MacEwen thought that Haldane's metaphysics might read as overdone and 'so it was in a way', he also thought that it had brought over Lord Alverstone: 'Indeed, things look a little brighter, not much': Letter dated 21 June 1904: Cairns, p. 233. In hindsight, at least, not his most perceptive comment.
115. Elizabeth S. Haldane, *From One Century to Another* (Alexander Maclehose & Co., London, 1937), pp. 211–13. As she records, sitting in the gallery opposite was Lady Frances Balfour, the formidable Churchwoman, biographer of Lord Balfour of Burleigh, and daughter of the eighth and first Duke of Argyll who, as Marquis of Lorne, had supported the non-intrusionist position in the events leading to the Disruption. See George Douglas Eighth Duke of Argyll, *Autobiography and Memoirs* (edited by the Dowager Duchess of Argyll, John Murray, London, 1906) vol. I, Chapter VIII.
116. *The Times*, 2 August 1904, p. 11. The order was drafted by Lord Robertson: Taylor Innes, pp. 243–4.
117. The result, including the majority, had leaked out: Life of Rainy vol. 2, p. 327. Lord Davey apparently told Dr Rainy that he had originally written an opinion in favour of the United Frees, but became convinced that it was not sound in law: ibid. vol. 2, p. 334. Taken as a whole, Simpson's account gives some impression of the atmosphere in the House when the speeches were being delivered and of the manner of their delivery: ibid. vol. 2, pp. 327–43.
118. On the decision, see N. J. D. Kennedy, 'The Free Church Cases' (1904) 12 Scots Law Times (News) 75–7 (hostile, despite the fact that – as Cameron, pp. 82–3, notes – the House was reversing the Second Division whose performance in other cases he

had so much criticised); J. R. Christie, 'The Free Church Cases' 12 Scots Law Times (News) 77–80 and 84–8 (favourable, by the junior counsel for the Free Church) and C. N. Johnston (Lord Sands), 'The "Obiter" of the Free Church Case' (1904) 12 Scots Law Times (News) 122–3 (by the Procurator of the Church of Scotland). There is a brief editorial at 12 Scots Law Times (News) 73. See also A. T[aylor] I[nnes], 'Church Law and Trust Law' (1904) 16 Juridical Review 314–16 (mixed); A. Taylor Innes, 'The Creed Crisis in Scotland' (1904–5) 3 Hibbert Journal 217–36 (critical, but mainly on the Model Trust Deed point, which was not pressed by counsel); J. Ferguson, 'The Scottish Church Case' (1904) 16 Juridical Review 347–60 (balanced); M. Williamson, 'The Free Church Case' (1904) 20 Law Quarterly Review 415–26 (balanced). The most interesting legal critique of the decision is to be found in F. C. Lowell, 'The Free Church of Scotland Case' (1906) 6 Columbia Law Review 137–60. The criticism is based, however, on a wholly different approach to the working of trust law in these circumstances and really presupposes (at p. 145) that the House should not have applied the *Craigdallie* case. That is, of course, a legitimate point of view for an academic writer to take, but *Craigdallie* had long been regarded as settling the law on the point in Scotland.

119. *Journals of the House of Lords* 1 August 1904, pp. 298–302.
120. The Lord Chancellor's disquisition on the subject was much criticised, but even Dean Asher had clearly found the point very difficult. See Life of Rainy vol. 2, pp. 329–33. For contemporary criticism, see also Macpherson, *The Scottish Church Crisis*, pp. 7–30.
121. For the reaction of the United Free supporters to the disposal of this point, see Life of Rainy vol. 2, pp. 344–51.
122. *Craigdallie* v *Aikman* (1813) 5 Paton 719; (1820) 6 Paton 618.
123. D. G. Mitchell, *Life of Robert Rainy, D.D.* (John J. Rae, Glasgow, n.d. [1907]), pp. 206–7.
124. G. F. Barbour, *The Life of Alexander Whyte D.D.* (Hodder & Stoughton, London, Toronto and New York, 1923), p 443, quoting a speech by Whyte.
125. Life of Rainy vol. 2, pp. 351–2.
126. Haldane, *An Autobiography*, p. 75.
127. R. Mackintosh, *Principal Rainy: A Biographical Study* (Andrew Melrose, London, 1907), Appendix, p. 134. Referring to Haldane and the judges, he says, at pp. 132–3: 'Bluff Englishmen do not like to have acrobatic feats forced upon their minds. They thought it jugglery when he explained, very fully, that opposite statements may, and indeed must, both be true. He frightened them, but he persisted; and then he irritated them. All this made them less than ever likely to listen to his evidence. The plainest bit of common-sense, from him, was suspected as a new mystification.' John Buchan thought that 'there cannot have been many cases where the Bench received less assistance from the Bar'. He singled out Haldane's philosophical argument 'based upon familiar Hegelian formulas' for criticism and observed that 'Lord Haldane's masculine intelligence dealt harshly with Mr Haldane's metaphysics.' See J. Buchan, 'The Judicial Temperament', in J. Buchan, *Homilies and Recreations* (Thomas Nelson & Sons, London, 1926), p. 207, at pp. 228–9, reprinted in (1999) 73 The Australian Law Journal 260, at p. 268. The essay is omitted from the third edition of *Homilies and Recreations* published in 1939.
128. *The Times*, 2 August 1904, p. 8.
129. A suitably pathetic account of the practical effects of the judgment is to be found in Life of Rainy vol. 2, pp. 473–6 – a pale imitation, however, of Brown's *Annals of the Disruption*.

130. For United Free criticism of the judgment as unnecessarily causing a great national scandal, see Life of Rainy vol. 2, pp. 354–8. On the reaction of Lord Chief Justice Alverstone to the furore, see The Right Hon. Viscount Alverstone, *Recollections of Bar and Bench* (Edward Arnold, London, 1914), pp. 263–4, with the comments of Lord Shaw of Dunfermline, *Letters to Isabel* (Cassell & Co., London, 1921), pp. 190–2, and *Thomas Shaw (First Lord Craigmyle): a Monograph by his Son*, pp. 47–8. As Lord Shaw points out, Lord Alverstone's account is astonishing in that he appears to be unaware that the United Presbyterian Church, so far from being a party, had been absorbed into the United Free Church and was not involved in any way in the proceedings. For Lord Davey's idea of what should be done, see the letter from X to *The Times*, 26 September 1904, p. 8. The correspondent was actually Taylor Innes: Taylor Innes, p. 244; Life of Rainy vol. 2, pp. 381–2.
131. See Cameron, p. 91 and further, at pp. 93–6.
132. On 18 October 1904 the proceedings before the Second Division of the Court of Session on the petitions to apply the judgment of the House of Lords were unusually lively and protracted, the aim of the United Frees being to delay in the hope that Parliament would come to the rescue. See Life of Rainy vol. 2, pp. 383–4. On that occasion the court made avizandum on the question of whether to send the case to the Summar Roll for debate. See *The Scotsman*, 19 October 1904, p. 9. On Saturday, 22 October the Division, Lord Young dissenting, decided that the case should not be sent to the Summar Roll since the court's function in applying the judgment of the House was purely ministerial. The court granted the prayer of the petition: *The Scotsman*, 24 October 1904, p. 10. On this stage in the dispute, see Cameron, Chapter VII.
133. The Free Church brought interdict proceedings against Principal Rainy and others to prevent the United Free Church from using the college. The case first came before the Lord Ordinary on the Bills (Lord Pearson) in a hearing at his residence on the evening of 18 October 1904 after the Second Division had made avizandum, earlier that day, on the petition to apply the judgment of the House of Lords. On that occasion he refused interim interdict and ordered answers: *The Times*, 19 October 1904, p. 8; *The Scotsman*, 19 October 1904, p. 10. After an opposed hearing, on 27 October, he granted interim interdict: *General Assembly of the Free Church* v *Rainy* (1904) 12 Scots Law Times 387. For a case concerning the use of the church at Strathpeffer, which, it was argued, was not within the very terms of the judgment of the House of Lords, see *General Assembly of the Free Church of Scotland* v *Johnston* (1905) 7 F. 517.
134. Morrison, *Manual of the Church Question in Scotland*, pp. 37–87; Stewart and Cameron, pp. 267–8, 283–4 and 293–4. Morrison's *Manual* contains an extraordinary amount of detailed information about the property in dispute.
135. See, in particular, Life of Rainy vol. 2, Chapter 26; also Haldane, *An Autobiography*, p. 75; Lord Shaw of Dunfermline, *Letters to Isabel*, pp. 182–90, trying – as always, unsuccessfully – 'to keep [himself] out of all this story'. See also *Thomas Shaw (First Lord Craigmyle): a Monograph by his Son*, pp. 47–50.
136. Life of Rainy vol. 2, pp. 393–7, 407–10, and 413–17. A second Commission under Sir John Cheyne dealt with the temporary arrangements needed to deal with the immediate problems facing congregations: Life of Rainy vol. 2, pp. 410–13.
137. For a one-sided account of the Commission and its elaborate proceedings, see Stewart and Cameron, Chapters XIII–XV; Cameron, Chapter IX.
138. 20 Scottish Law Review 182.
139. Stewart and Cameron, p. 208.

140. Cameron, p. 87.
141. Cairns, p. 232, letter of Dr MacEwen to his wife, 17 June 1904.
142. Orr, *Lord Guthrie*, p. 137. In letters at the time he tended to indicate that all might not be lost: Life of Rainy vol. 2, pp. 325–6.
143. *The Scotsman*, 2 August 1904, p. 4.
144. So, surely correctly, Stewart and Cameron, pp. 245–7. As already mentioned, Guthrie, the legal adviser of the Free Church before the Union, had been very conscious of the risks: Orr, *Lord Guthrie*, p. 136.
145. E.g., by *The Scotsman*, 5 August 1904, p. 8: 'The leaders of the Free Church [i.e. Principal Rainy, etc.] know that a few years ago legal opinions were given against the Union. Apparently these are all accounted as of no importance. Yet the then leaders of the Free Church must have known of them, and must have been certain that the resolution to carry out the Union was not unchallengeable.' *The Scotsman* had long been hostile to Rainy.
146. Taylor Innes, p. 227; Life of Rainy vol. 2, p. 213.
147. Life of Rainy, p. 213.
148. Taylor Innes, p. 228 and pp. 229–30.
149. In fact, it was called off at the General Assembly of that year. For the prolonged struggle, see Ross, pp. 14–27; Life of Rainy vol. 1, Chapter VII.
150. J. Begg, *Memorial with the Opinions of Eminent Counsel in regard to the Constitution of the Free Church of Scotland* (Johnstone, Hunter & Co., Edinburgh, 1874), pp. 101–234. In 1873, a proposal was put before the Free Church for mutual recognition of certain ministries. Dr Begg saw this proposal as posing essentially the same threat as the Union proposal, but eventually the two sides were reconciled. In that connection, Begg prepared a memorial for the opinion of the Solicitor General, William Watson (Lord Watson), but it was not published: ibid., p. VI.
151. Their opinion for Dr Begg, at pp. 246–54, does not bear a specific date in 1873, whereas the two other opinions were dated in April 1873. By 28 April, however, the supporters of union had heard that the anti-unionists had the opinion of *inter alios* Clark and Balfour, 'favourable in some sense or other': N. L. Walker, *David Maclagan F.R.S.E.* (T. Nelson & Sons, London, Edinburgh and New York, 1884), p. 102, reproducing Maclagan's journal entry for that date.
152. Begg, *Memorial*, p. 247.
153. Begg, *Memorial*: opinion of John Millar (Lord Craighill), pp. 234–5, and of Edward Gordon (Lord Gordon), p. 238. Excerpts from Millar's opinion were reproduced in a letter from Vindex, *The Scotsman*, 10 August 1904, p. 10.
154. Taylor Innes, pp. 205–6; see also Life of Rainy vol. 1, pp. 188–94.
155. Walker, *Donald Maclagan*, pp. 107–8, Maclagan's journal entry dated 20 May 1873. Counsel did not consider that the proposal on mutual recognition involved any question on establishment and thought that opponents of the plan would find it most difficult to raise any question as to the Church property. Maclagan's journal shows that Carnegie Simpson was wrong to say that the question of establishment was not raised with counsel: Life of Rainy vol. 1, at p. 194.
156. See *The Scotsman*, 22 September 1874, p. 4, and 26 September, p. 4, and McCrie, *The Church of Scotland: Her Divisions and Re-Unions*, p. 258 n. 1.
157. Taylor Innes, pp. 212–13.
158. Taylor Innes, pp. 210–13.
159. Begg's book had been sent along with the memorial to Haldane and Balfour: Orr, *Lord*

Guthrie, p. 145. The British Library copy comes from the library of Viscount Haldane.

160. Life of Rainy, pp. 226–7; Taylor Innes, p. 230–1. Taylor Innes hints that there was some difficulty in getting agreement that Asher should be consulted. Asher was not asked about the property held under the Model Trust Deed.
161. Life of Rainy, p. 227. See p. 101.
162. As he explained to the Assembly in May 1900, the Procurator had deliberately consulted Balfour because he was the only survivor among the counsel consulted in 1873: *Proceedings and Reports of the General Assembly of the Free Church of Scotland 1900*, p. 161
163. Taylor Innes, p. 232.
164. Life of Rainy, pp. 227–8; Stewart and Cameron, p. 101; cf. also Ne Obliviscaris, 'The Appeal to Caesar', *The Scotsman*, 4 August 1904, p. 5.
165. (1872) 26 L.T. (N. S.) 704, at p. 706.
166. Letter of 26 August 1904 from Guthrie to Mr John Nicholson reproduced in Orr, *Lord Guthrie*, pp. 144–5.
167. *The Scotsman*, 18 August 1904, p. 5.
168. Indeed, if this had not been so, the attitude of that most stout of all defenders of spiritual independence, Dr Begg, in obtaining and publishing the opinions of counsel on the property question, would have been incomprehensible.
169. See, in particular, pp. 14–15 above. As explained at pp. 26–7, the Claim of Right departed from this position, to some extent.
170. *The Scotsman*, 10 August 1904, p. 6.
171. Stewart and Cameron, pp. 257–60.
172. Life of Rainy vol. 2, pp. 423–40; Taylor Innes, pp. 242–6.
173. 1906 Act I.
174. See Lord Sands, *Dr Archibald Scott*, Chapter 9. The opinion had been given in 1900 by Dean of Faculty Asher QC, Professor (later Sir John) Rankine QC and Mr Constable. Part of the opinion is reproduced in Taylor Innes, *The Law of Creeds in Scotland*, pp. 137–40.
175. The proposed Bill raised an issue of principle since it involved Parliament passing an Act to reverse, with retroactive effect, the decision of the House of Lords and, in large measure, to hand victory to the losing party. Such legislation is, of course, not unknown, but it is rare. See, for example, section 3 of the Compensation Act 2006, reversing, for victims of mesothelioma, the effect of the decision of the House of Lords in *Barker* v *Corus UK Ltd* [2006] UKHL 20; [2006] 2 A.C. 572. In 1905 Lord Robertson's protest against the legislation attracted no support: Second Reading Debate, 31 July 1905, The Parliamentary Debates, 4th Series, vol. 150, columns 849–58.
176. The clause became section 5 of the Churches (Scotland) Act 1905. On the steps by which the Act was eventually passed, see Life of Rainy vol. 2, Chapter 28. The idea of taking advantage of the situation occurred to figures in the Church of Scotland within a few days of the judgment: Lord Sands, *Dr Archibald Scott*, pp. 130–4. The various steps by which section 5 was eventually secured are very fully discussed in chapter 10 of the same work. See also Lady Frances Balfour, *A Memoir of Lord Balfour of Burleigh K.T.* (Hodder & Stoughton, London, 1925), pp. 147–50. For the Free Church perspective on this move, see Stewart and Cameron, pp. 302–4. The Free Presbyterian view was that the section was 'skilfully though not creditably engineered by astute ecclesiastics': Synod's Statement of Differences between the Free Presby-

terian Church and the other Presbyterian Churches in Scotland, reprinted as Appendix III in *History of the Free Presbyterian Church of Scotland*, pp. 228–52, at p. 229.

177. The social background to the move for reunification is well described in Henderson, pp. 135–42.
178. D. M. Murray, *Rebuilding the Kirk: Presbyterian Reunion in Scotland 1909–1929* (T. & T. Clark, Edinburgh, 2000), pp. 32–4.
179. See R. Sjölinder, *Presbyterian Reunion in Scotland 1907–1921* (T. & T. Clark, Edinburgh, 1962); D. M. Murray, *Freedom to Reform: The 'Articles Declaratory' of the Church of Scotland 1921* (T. & T. Clark, Edinburgh, 1993).
180. For an account of those days, see, for instance, Lady Frances Balfour, *Life and Letters of the Reverend James Macgregor D.D.* (Hodder & Stoughton, London, 1912), Chapter XIV.
181. Sjölinder, *Presbyterian Reunion*, especially pp. 182–5, 290–6 and 363–7.
182. (1870) 8 M. 921, at p. 925.
183. Bayne, p. 218. For a survey of the decisions, by an author with very different sympathies, see Macgeorge, in Story (ed.), *The Church of Scotland Past and Present* vol. IV, pp. 104–7.
184. The public interest in the topic can be gauged by the packed hall and the special editions of the newspapers which were run off to give the latest news of the debate in the 1912 General Assembly: Balfour, *A Memoir of Lord Balfour of Burleigh K.T.*, p. 152.
185. This was not the first attempt to deal with the matter. For instance, in 1886, as part of his campaign against the disestablishment of the Church of Scotland, Mr R. B. Finlay, MP – the future Lord Chancellor, Viscount Finlay – introduced a Bill to declare the Constitution of the Church of Scotland. Similar bills were introduced in three sessions down to 1896. The aim was to identify 'matters spiritual' and to declare that the Church courts had the sole and exclusive right to regulate, determine and decide all such matters within the Church, with the procedure, regulations and decisions of the Church courts on these matters not being subject to any manner of review by any court of civil jurisdiction.
186. On the Act, see Lyall, *Of Presbyters and Kings: Church and State in the Law of Scotland*, Chapter V.
187. S.I. 1926 No. 841, which came into force on 28 June 1926.
188. 2006 S.C. (H.L.) 1, at p. 12, para. 40; [2006] 2 A.C. 28, at p. 43, para. 40.
189. So, in effect, Lord Justice Clerk Aitchison in *Ballantyne* v *Presbytery of Wigtown* 1936 S.C. 625, at p. 654, rejecting the view that the Act 'did nothing to recognise the wider claims of the Church … to legislate and adjudicate finally in all matters of doctrine, worship, government and discipline, as matters that lay peculiarly within its own province.'
190. Auchterarder Report vol. 2, p. 10. See pp. 71–2 above.
191. In fact, however, because the reform took place gradually as charges fell vacant, even fifty years later, the Teind Judge – the second most junior Lord Ordinary – still sat briefly every few weeks to deal with routine motions.
192. Murray, *Rebuilding the Kirk*, Chapter 5. Haldane, by now Viscount Haldane, turned up again, this time chairing the departmental Committee on the Property and Endowments of the Church of Scotland, which was set up in April 1922 to explore the problems. It reported in April 1923. He carried the matter forward when he was Lord Chancellor in the short-lived Labour Government of 1924.

193. The United Free Church obtained the opinion of H. P. Macmillan KC (the future Lord Macmillan and a son of the Free Church manse) and Oswald Dykes on whether the United Free Church would carry its whole rights and property into a union on the proposed basis. Counsel confirmed that it would: Memorial for the Law Committee of the United Free Church of Scotland for Opinion of Counsel, printed as an Appendix to the Report on the Conference with the Church of Scotland, in *Reports to the General Assembly of the United Free Church of Scotland 1928*, pp. 13–31.
194. Their position, and their unhappiness at the way that they were treated, can be seen in J. Barr, *The United Free Church of Scotland* (Allenson & Co. Ltd, London, 1934), especially Chapters XV and XVI.
195. Murray, *Rebuilding the Kirk*, pp. 1–2, contains a brief description of the day's events.
196. Lord Osborne considered that position in more detail in *Logan* v *Presbytery of Dumbarton* 1995 S.L.T. 1228.
197. This formulation deliberately omits the now defunct intermediate appeal to the synod.
198. 2006 S.C. (H.L.) 1, at p. 40, para. 152; [2006] 2 A.C. 28, at p. 75, para. 152. There is no indication of the reasons why the special commission procedure was thought not to meet the requirements of the Directive.
199. Lord Justice Clerk Aitchison long ago warned that 'If past history affords any guidance for the future, such an interference could not be other than calamitous': *Ballantyne* v *Presbytery of Wigtown* 1936 S.C. 625, at p. 658.
200. 2006 S.C. (H.L.) 1, at p. 12, paras 40–1; [2006] 2 A.C. 28, at pp. 43–4, paras 40–1.
201. *Marleasing SA* v *La Comercial Internacional de Alimentación SA* C–106/89 [1990] E.C.R. I–4135.
202. 2006 S.C. (H.L.) 1, at p. 32, para. 124, and pp. 33–4, paras 130–3; [2006] 2 A.C. 28, at pp. 65–6, para. 124, and pp. 67–8, paras 130–3.
203. It might be said that the more broadly the Article is worded, the greater the extent of the exclusive jurisdiction of the Church.
204. Section 82(1) of the Sex Discrimination Act 1975.
205. Above, p. 92.
206. 2006 S.C. (H.L.) 1, at p. 30, para. 118; [2006] 2 A.C. 28, at p. 63, para. 118.
207. A. Taylor Innes, *Church and State: A Historical Handbook* (2nd edition., T. & T. Clark, Edinburgh, 1890), p. 226 n. 1 at p. 227.
208. A. Macgeorge, in Story, *The Church of Scotland Past and Present* vol. IV, p. 1, at pp. 76–104.
209. A. Taylor Innes, *Mr. Finlay's Bill and the Law of 1843* (Macniven & Wallace, Edinburgh, 1886), p. 34, quoted by Macgeorge in Story, *The Church of Scotland Past and Present* vol. IV, p. 1, at p. 120.
210. *Of Presbyters and Kings: Church and State in the Law of Scotland*, pp. 48–9.
211. Auchterarder Report vol. 2, p. 4. See also *Presbytery of Strathbogie* (1840) 2 D. 585, at p. 606. See p. 16 above.
212. See, for instance, the powerful passage in the dissenting judgment of Lord Moncreiff in the *Stewarton* case: Stewarton Report, pp. 123–7; also *Cruickshank* v *Gordon* (1843) 5 D. 909, at pp. 971–3, per Lord Ivory (dissenting).
213. *Cuninghame* v *Presbytery of Irvine* (1843) Stewarton Report, p. 62. See the comments of Lord Moncreiff: Stewarton Report, p. 125. In *Middleton* v *Anderson* (1842) 4 D. 957, at p. 1010, Lord Gillies was reduced to imagining 'cases that can never happen.' Which is as good a way as any of describing the situation envisaged by Lord

Justice Clerk Hope. In the first *Auchterarder* case Lord Corehouse was more cautious, not going further than indicating that damages would be available in his rather more complex hypothetical situation: Auchterarder Report vol. 2, pp. 235–6.

214. 10 March 1812, 16 Faculty Collection 544.
215. E.g., 'It has been said that there must be a sovereign jurisdiction in every country to which, as controlling all inferior judicatories, a right of appeal must lie': 16 Faculty Collection 544, at p. 546. In the *Stewarton* case, referring to the *Corstorphine* case, Lord President Boyle commented that 'the exclusive jurisdiction of the Church courts was strenuously, though unsuccessfully maintained, in a most able and elaborate argument by one of your Lordships' number in the other Division, in which almost the whole authorities referred to in the present case were brought to bear upon the question': Stewarton Report, p. 142.
216. 16 Faculty Collection 544 at p. 549.
217. (1829) 3 W. & S. 441.
218. 3 W. & S. 441, at p. 448.
219. Auchterarder Report vol. 2, p. 250, per Lord Fullerton. Lord Gillies made the point that, when the presbytery failed to perform a ministerial duty, there was really no exercise of judgment to appeal to the higher ecclesiastical courts, ending with the General Assembly: Auchterarder Report vol. 2, p. 43.
220. See, for instance, Auchterarder Report vol. 2, p. 76, per Lord Justice Clerk Boyle, and pp. 447–8, per Lord Cuninghame; Stewarton Report, p. 142, per Lord President Boyle.
221. For the evolution of his thinking, compare A. Dunlop, *Law of Patronage and Settlement of Parochial Ministers* (William Blackwood, Edinburgh, T. Cadell, London, 1833), Chapter VIII, especially paras 296–305, and A. Dunlop, *Parochial Law* (2nd edition, William Blackwood, Edinburgh, T. Cadell, London, 1835), Chapter VIII, paras 296–304, with A. Dunlop, *Parochial Law* (third edition, William Blackwood & Sons, Edinburgh and London, 1841), Chapter VIII, especially paras 297–305.
222. The question of the relationship of the Court of Session and the Justiciary Court is argued with great sophistication in the judgment of Lord Jeffrey in the first *Auchterarder* case: Auchterarder Report vol. 2, pp. 363–4 and 373–7. See also Lord Cockburn: Auchterarder Report vol. 2, p. 409. For an analysis of Lord Jeffrey's position, see Robertson, pp. 238–46.
223. Robertson, pp. 239–40.
224. Intervention in the abortive proceedings on 26 May 1838 relating to the Rev. Robert Young's protest against the Presbytery of Auchterarder: *The Scotsman*, 30 May 1838, p. 3. For the proceedings, bordering on farce, see Buchanan vol. 1, pp. 486–90; Bryce vol. 1, pp. 68–72.
225. Stewarton Report, p. 179. The argument was criticised at the time on the not wholly convincing ground that it ignored the role of the ever changing juries in preventing the Justiciary Court from persisting in an erroneous course: *The Scotsman*, 25 January 1843, p. 2.
226. Stewarton Report, p. 162.
227. Indeed in the first *Auchterarder* case Lord Moncreiff emphasised that 'the General Assembly is a body of quite another character from any court which has merely the powers of a court of justice. It not only can decide judicially the cases which come before it, but it has power *to pass laws*, from time to time, on all the subjects which belong to *its own jurisdiction* and *that of the presbyteries*; and to deny this is, with

submission, to remove one of the essential foundations of the constitution': Auchterarder Report vol. 2, p. 345 (emphasis as in the original).

228. XX, 'The Scotch Church Question: Letter II', *The Times*, 22 May 1843, p. 7.
229. R. S. Candlish, *Tracts on the Intrusion of Ministers No IX* (J. Johnstone, Edinburgh, 10 August 1840), pp. 3–4.
230. See p. 21 above.
231. Macfarlane, p. 92.
232. *A Letter to the Lord Chancellor*, pp. 35–9, referring, in particular, to populist passages in Dr Chalmers' speech on the Veto Act in the General Assembly of 1839.
233. *A Letter to Lord Melbourne*, p. 139: 'It is impossible not to sympathise with a Scottish peasant, when, with regret, but at the same time, with firmness, he turns his steps away from the parish church where his fathers worshipped, and resorts to the dissenting meeting-house, where the word of life is faithfully and earnestly preached. There are many such peasants in our land. …' Dr Bryce too spoke of Scotland's 'pious and religious peasantry': Bryce vol. 2, p. 418. The rural population was seen as pious by comparison with the unchurched urban masses whom Dr Chalmers aimed to reach through his Church Extension schemes.
234. Chalmers, *What ought*, p. 25 and, more generally, pp. 25–7.
235. Turner, p. 5 – one of the Forty Thieves.
236. Chalmers, *What ought*, p. 26.
237. Stewarton Report, pp. 128–9.
238. Letter of Lord Jeffrey to Lord Cockburn, 12 April 1838, Adv. Ms. 9.1.10 f. 952, at f. 957. The text, as copied out by Lord Cockburn's daughter, Jane, gives 'fiat': 'Thus I foretell. And let it come to pass.' But it may be that Lord Jeffrey, whose writing was notoriously difficult to read, wrote 'fiet'. That would be more consistent with him just predicting future events, without wanting them to come to pass: 'Thus I foretell. And it will come to pass.'
239. Hanna vol. 4, p. 339. The accuracy of the report of this famous, and supposedly private, remark is presumably confirmed by Lord Cockburn's allusion to it: *Life of Lord Jeffrey with a Selection from his Correspondence* vol. 1, p. 391.
240. So described by Macfarlane, p. 83.
241. The impossibly complicated negotiations and setbacks are elegantly summarised by Henderson, pp. 86–91. See also, Brown, *The National Churches of England, Ireland, and Scotland, 1801–1846*, pp. 303–4 and 355–6.
242. Chadwick, *The Victorian Church* Part I, Chapter III.
243. H. J. Laski, 'The Political Theory of the Disruption' (1916) American Political Science Review 437, reprinted as H. J. Laski, *Studies in the Problem of Sovereignty* (Yale University Press, New Haven; Oxford University Press, London, 1917), Chapter II.

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