defender, and remitted to the Lord Ordinary to allow the parties a proof of their averments, and to proceed further in the case.

Counsel for the Pursuer—D.-F. Mackintosh—C. S. Dickson—Sir L. Grant. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Defender—Sir C. Pearson—Graham Murray. Agents—John Clerk Brodie & Sons, W.S.

Wednesday, July 18.

SECOND DIVISION.

[Lord Fraser, Ordinary.

EDINBURGH ECCLESIASTICAL COMMISSIONERS *v.* KIRK-SESSION OF THE HIGH KIRK OF THE CITY OF EDINBURGH.

Church — Ecclesiastical Commissioners — Kirk-Session of St Giles—Seat Rents—Annuity-Tax (Edinburgh and Montrose) Act, 1860 (23 *and* 24 *Vict. c.* 50), *secs.* 5 *and* 6—42 *and* 43 *Vict. c.* 221.

By the Act 23 and 24 Vict. c. 50, section 5, the whole rights of administration and custody of the parish churches in the city of Edinburgh, which previously belonged to the Magistrates and Council of Edinburgh, were vested in the Ecclesiastical Commissioners created and constituted by that Act. Section 6 provided that the pews or seats in these churches should be let by or at the sight of the kirk-session of each church, subject to any directions which the Commissioners might issue, and that the kirk-session should keep an account of the whole moneys received by them for the pew or seat rents, and of the sums retained by them for payment of expenses, and should lay them before the Commissioners, and should pay over the proceeds to the Commissioners, to be applied by them according to the statute. At the date of the Act, St Giles, which came within the provisions of the 5th section, consisted of three churches under one roof, which were divided from each other by partition walls. In 1879 the Act 42 and 43 Vict. c. 221, was passed to carry out a scheme for the restoration of St Giles'. The preamble of this Act sets forth that "whereas at the passing of the Act 23 and 24 Vict. c. 50, the ancient Church of St Giles' was divided for congregational purposes, by walls which formed no part of the original structure, into three churches, viz.—(1) the choir or High Kirk, (2) the southern transept or Old Kirk, and (3) the nave or New North Church (usually called West St Giles' Church) . . . . and whereas the part of the building formerly known as the Old Kirk has now been added to and incorporated with the High Kirk, the division walls between them having been removed; and whereas it is now proposed that a complete restoration of the said church should be effected, ... and for this purpose it is necessary that the West St Giles' Church should cease to be occupied as a separate place of worship, the division wall between it and the other parts being removed, and provision being made for the erection of a suitable church for the congregation presently worshipping there." Then follows section 1, which provides—"Whenever there shall be paid over to the Ecclesiastical Commissioners the sum of £10,500, the congregation at present worshipping in the New West St Giles' Church shall vacate the same, which shall thereupon be incorporated with and form part of the High Church . . . . 2. The Commissioners shall apply £10,000 in the purchase of a site for a church in lieu of it, and shall invest £500 and apply the interest *pro tanto* in the maintenance of the fabric of that part of the building presently occupied by the said West St Giles' Church." The money was obtained, and a new church built. The division walls between the three churches were accordingly removed, the area of the Old Church being provided, under the scheme of restoration, with pews or seats with consent of the Commissioners, while the area of West St Giles' Church was provided with chairs by the kirk-session, who received payments from persons using them.

In an action at the instance of the Ecclesiastical Commissioners against the kirk-session of St Giles', the summons concluded that the defenders should be ordained to account to the pursuers for the whole moneys levied and received by them as rents for seats or pews "in the High Kirk, including therein the area of the church formerly known as the Old Church and the area of the church formerly known as West St Giles', now incorporated with the said High Kirk and forming part thereof." The Court granted decree in terms of this conclusion of the summons, being of opinion (1) that the whole area of St Giles' must be held to be incorporated with the High Kirk under the Act 42 and 43 Vict. c. 221; and (2) (*diss.* Lord Rutherfurd Clark) that under the 5th and 6th sections of the Act 23 and 24 Vict. c. 50, the pursuers were entitled both to the rents for seats or pews in the area of the Old Church, and to the sums received for the use of the chairs in the area of West St Giles'.

Lord Rutherfurd Clark was of opinion that the chairs in the area which was formerly West St Giles' were not seats or pews within the meaning of the 6th section of the Act of 1860, and that the pursuers were therefore not entitled to receive the payments made for them.

In this case the pursuers were the Edinburgh Ecclesiastical Commissioners constituted by the Act 23 and 24 Vict. cap. 50, and the defenders were the Moderator, members, and Clerk of the Kirk-Session of the High Kirk of the City of Edinburgh. The conclusions of the summons were to have it declared that the defenders were bound in terms of the Statutes 23 and 24 Vict. c. 50, 33 and 34 Vict. c. 87, and 42 and 43 Vict. c. 221, to pay over to the pursuers "the whole moneys levied and received by them,

or that shall hereafter be levied and received by them, as rents for seats in the said High Kirk, including therein the area of the church formerly known as the Old Church and the area of the church formerly known as the New North Church or West St Giles' Church, now incorporated with the said High Kirk, and forming part of it, and th atwithout any deductions whatever; and the defenders ought and should be decerned and ordained, by decree foresaid, to exhibit and produce before our said Lords a full and particular account of the whole seat rents levied and received by them, and of their intromissions therewith from the date at which the said West St Giles' Church was incorporated with the said High Kirk, and became part thereof, whereby the true amount due by the said defenders to the said pursuers may appear and be ascertained by our said Lords, and to exhibit and produce annually hereafter to the said pursuers a full and particular account of the whole seat rents levied and received by them, and of their intromissions with the same." Then followed a conclusion for payment of £1000, or such sum as should be ascertained to be the amount of rents received by the defenders since the date of the incorporation, with interest at 3 per cent., under deduction of a sum to meet the cost incurred by the defenders in providing the said seats, and arranging and fitting them up, "or in the event of the defenders failing to produce an account as aforesaid, they should be decerned and ordained, by decree foresaid, to make payment to the pursuers of the sum of £1000 sterling, which shall in that case be held to be the whole amount of the seat rents so drawn by them, with the legal interest thereof from the date of citation hereon until payment."

The attitude taken up by the defenders as regards this demand, generally stated, was that they were neither bound to account (1) for the sums they received for the use of a number of chairs placed by them in the area of West St Giles' Church, nor (2) for rents obtained by them from pews located in the area of the Old Kirk.

The Act 23 and 24 Vict. c. 50, contains these provisions — Section 5. "The whole rights of administration and custody as respects the following parochial churches in the city of Edinburgh, viz." (here follows a list of the city churches, including the High Church, Old Church, and New North Church), "which the Magistrates and Council have in or pertaining to the same or any of them . . . . shall be, and the same are hereby from and after the 11th day of November 1860, transferred from the Magistrates and Council and vested in the Commissioners for the like public uses and purposes, and under the like conditions for and under which the said churches are at present administered by the Magistrates and Council, provided that nothing in this Act shall prevent the Magistrates and Council from causing the bells of said churches to be rung on suitable public occasions." Section 6—"The pews or seats in the said several churches shall, from and after the 11th day of November 1860, be let by or at the sight of the kirk-session of each church respectively, with the exception of not less than one-tenth of the number, which shall be reserved as free sittings, but subject to any directions which the Commissioners may issue from time to time, and subject also to any rights or conditions presently attaching to such pews or seats, or in case the Commissioners shall think it necessary or expedient by or at the sight of the Commissioners or their secretary, and at such rents for the said pews or seats as the Commissioners, subject always to the rights and conditions aforesaid, may from time to time determine or approve with reference to the circumstances of the said churches respectively . . . and the kirk-session shall keep an account of the whole moneys received by them for pew or seat rents, and of the sums retained for payment of expenses, and shall lay the same before the Commissioners yearly, or as often as the Commissioners shall direct."

At the date of the Act the Old Kirk, the High Kirk, and the New North Church or West St Giles', were under one roof, and separated from each other by dividing walls. The history of the "Old Kirk," which occupied the southern transept, and of the "New North" or "West St Giles' Church," which occupied the nave, about which respectively the present controversy arose was as follows:—

I. *As regards the Old Kirk.*—On 9th August 1870 the Annuity Tax Abolition Act Amendment Act, 1870 (33 and 34 Vict. cap. 87), was passed, which, by section 19, provided that the Old Church was no longer to be provided with ministers or maintained as a charge endowed by law, and it thus ceased to exist as a separate church. It was occupied by the Trinity College Church congregation—then without a church—till 1878, when that congregation removed to a new church built for them in Jeffrey Street. An attempt was made to create a parish *quoad sacra* of the former Old Church parish, and to designate the church under the roof of West St Giles' as the parish church. This was opposed by the Magistrates and Council of Edinburgh, and the application, which was made with the concurrence of the Ecclesiastical Commissioners, was refused on the ground that the church not being the property of the petitioners it was incompetent to designate it the church of a new *quoad sacra* parish. Subsequently the Old Church parish was erected into a parish *quoad sacra*, and a new church in St John Street was designated by the Court of Teinds as the parish church of that parish. The fabric of the church itself, after being thus temporarily occupied, with the consent of the pursuers, by another congregation, ceased to be used as a church till 1879. In that year the committee for the restoration of St Giles' applied to the Town Council of Edinburgh and the pursuers for permission to carry out the restoration by removing the division walls between the High Church and the Old Church, and restoring the latter. The former agreed, but the latter only on condition that part of the area of the Old Church lying contiguous to the High Church was to be seated, and the rents thereof paid to them. Ultimately the matter ended in the division wall being taken down and the area being provided with pews or seats, and since then the rents derived from them were paid to the pursuers.

II. *The New North or West St Giles' Church* was occupied by its own congregation till 1879. In that year, with a view to a complete restoration of St Giles', Dr William Chambers offered to finish the whole at his own expense on two conditions (1) that the public should buy

out the congregation of West St Giles' by providing funds to build a new church; and (2) that all the bodies interested should, as soon as the restoration was completed, concur in the formal appointment of a managing committee, which should receive and disburse all payments. These conditions were agreed to, and on 15th August 1879 the Act 42 and 43 Vict. cap. 221, was passed, entituled "an Act to make provision in regard to the restoration of the ancient church of St Giles' in the city of Edinburgh." The preamble, after reciting the Acts 23 and 24 Vict. cap. 50, and 33 and 34 Vict. cap. 87, set forth—"And whereas at the passing of the last-recited Act the ancient church of St Giles' in the said city was divided for congregational purposes by walls which formed no part of the original structure into three distinct churches, viz.—(1) The choir or High Kirk, (2) the southern transept or Old Kirk, and (3) the nave or New North Church (usually called West St Giles' Church), and whereas the part of the building forming the southern transept thereof, and formerly known as the Old Kirk, has now been added to and incorporated with the High Kirk, the dividing wall between them having been removed: And whereas as it is now proposed that a complete restoration of the said ancient church should be effected, so that it shall form, as originally designed, one undivided building, and for this purpose it is necessary that the New North Church (usually called West St Giles' Church) should cease to be occupied as a separate place of worship, the dividing walls between it and the other parts of the said ancient church being removed, and provision being made for the erection of a suitable church for the congregation presently worshipping there, and for all other vested rights therein: Be it therefore enacted . . . (1) whenever as the result of public voluntary subscription, or of contributions from any source other than municipal funds or revenues, there shall be paid over to the Edinburgh Ecclesiastical Commissioners, or when security shall be found to the satisfaction of the said Commissioners for the sum of £10,500 sterling to be applied as hereinafter provided, the congregation at present worshipping in the New North Church, usually called West St Giles' Church, shall, within twelve months from the date of such payment or acceptance of security, vacate the said New North Church, usually called West St Giles' Church, which shall thereupon be incorporated with and form part of the High Kirk; (2) the Edinburgh Ecclesiastical Commissioners shall apply £10,000 in the purchase of a site to be selected by the Presbytery of Edinburgh, and in the erection thereon, according to plans to be approved of by the said presbytery, of a church in lieu of the New North Church, usually called West St Giles' Church, and shall invest the sum of £500 on such separate security as they shall consider proper, the interest whereof shall be accumulated and applied *pro tanto* in the maintenance of the fabric of that part of the building presently occupied by the said New North Church, usually called West St Giles', but declaring that nothing herein contained shall limit the obligation of the said Edinburgh Ecclesiastical Commissioners to maintain the fabric of the whole building as provided by the said recited Act."

The sum of £10,000 was raised by voluntary subscription, and paid over to the pursuers in terms of the Act. The pursuers applied the sum in the purchase of a site and in building a new church for the West St Giles' congregation "in lieu of the New North Church." The congregation removed to it on its completion. The pursuers also invested the sum of £500 for the upkeep of the fabric of that part of St Giles' which was previously the New North Church or West St Giles'.

By deed of agreement dated 10th December 1880 the Ecclesiastical Commissioners and the kirk-session of St Giles' agreed to appoint a committee. Under this agreement the committee were to have power—"(*Fourth*), To apply any moneys derived from permission to erect monuments or windows or the admission of the public, towards improvements on the interior of the building, and cleaning, lighting, and heating the portions of the same other than those at present used for service as aforesaid, improving or providing of a new peal of bells in the belfry of the High Kirk, and all other expenses of every kind connected with said portions of the building other than the portion at present used for service as aforesaid, of all which expenses the said Edinburgh Ecclesiastical Commissioners are to be expressly relieved by the said committee, with the exception of the expense of maintaining the fabric thereof, especially laid upon them by the said Statute 42 and 43 Vict. cap. 221, and in respect of which maintenance they are to receive under said statute a sum of £500."

The work of restoration was completed in West St Giles' Church in 1882. The whole of the pews and galleries were cleared away. When the work of restoration began as regarded the High Church the congregation removed to that part known as West St Giles' Church, occupying chairs which the kirk-session purchased and placed there during this temporary occupancy of West St Giles' Church. When the High Church congregation returned to their own building these chairs remained in the nave, and were used by strangers who came to St Giles'. After the re-opening of the whole building on 23d May 1883 the congregation increased so much that the kirk-session allowed the new comers to occupy the chairs until seats could be provided for them, a payment being made to the funds of the church in return for this accommodation, which was handed over to the committee of finance.

In regard to these chairs the pursuers averred—"The portion of the said High Church, which formerly was the New North or West St Giles' Church, was after its incorporation with the High Kirk furnished by the defenders, or under their directions, with chairs or seats. These chairs are placed in rows, and are fastened together in each row by a beam of wood passing underneath them. The same portion of the area has always been occupied by these seats. The defenders have, ever since this part of the church was so furnished, received rents from persons for the right of occupying these seats, in the same way as for the pews and seats in other parts of the High Kirk. The statements in the defenders' answers are denied. These seats have been let in the same way and at the same rates as the other seats in the High Kirk." The pursuers further averred that the sum available for the repair and maintenance of the several churches

after fulfilling the requirements of the Act 33 and 34 Vict. cap. 87, sec. 25, as regarded a payment of fixed amount into the stipend fund account, and the payment of feu-duties and insurance premiums upon the churches, was not adequate. They were often unable to comply with demands for grants for the cost of maintenance, &c., which they would otherwise be bound to allow in the due administration of their powers.

They pleaded—"(1) In terms of the Statutes 23 and 24 Vict. cap. 50, 33 and 34 Vict. cap. 87, and 42 and 43 Vict. cap. 221, the pursuers are entitled to decree of declarator, count, reckoning, and payment, as craved. (2) The defenders having occupied with seats the areas which formerly were the areas of the Old Church and the New North or West St Giles' Church, but are now part of the area of the High Kirk, are bound in terms of the statutes referred to, to let the said seats, and to account to the pursuers for the sums received by them therefor."

The defenders replied as follows—As regards the agreement between the restoration committee and the pursuers to restore the Old Kirk they had been no parties to it, and were not bound by it. There was no process instituted for increasing the size of the High Kirk. The Old Kirk had never been incorporated with the High Kirk by an Act of Parliament or otherwise, all that was done being to remove the dividing walls between the two churches. The pursuers had contributed no part of the cost of the chairs, although they were required to supply to the congregation seats in lieu of those of which they had been deprived, and the rents of which they had paid to the pursuers. These chairs were the exclusive property of the defenders, and could be removed by them at pleasure from St Giles'. As regards the donations for these seats, they were entered separately and particularly by the committee of finance in their report as "donations from members for the use of chairs." "No one was allowed the use of a chair in this way until every seat or pew which the pursuers could let was occupied, and the rent paid to the pursuers." Since 1878 the annual expenses of keeping up the services in the High Church had largely increased owing to the necessity which arose of appointing two assistant ministers, and in increasing the choir. The sums actually received as donations for the use of the chairs did not amount to a fifth part of the increased expenses. These sums, the defenders explained, had been handed to the committee of the congregation, and had been expended by that committee in *bona fide* keeping up the services of the church.

The defenders pleaded—"(1) The statements of the pursuers are irrelevant and insufficient in law to support the conclusions of the summons. (2) In the circumstances condescended on the defenders should be assoilzied. (3) In any view, the sums hitherto drawn by the defenders for the chairs having been *bona fide* paid over by them to the congregational committee, no decree of payment ought to pass against them."

The correspondence in process showed that the defenders had each year since 1879 sent to the pursuers a cheque for the amount which they deemed to be due to the pursuers, and that it was accepted by the latter.

The Lord Ordinary (Fraser) on 16th March 1888 pronounced this interlocutor:—"Finds and declares that the defenders are bound to pay over to the pursuers the whole moneys levied and received by them, or that shall be levied or received by them, as rents for seats in the High Kirk of the city of Edinburgh, including therein the area of the church formerly known as the Old Church, and the area of the church formerly known as the New North Church or West St Giles' Church, now incorporated with the said High Kirk, and forming part thereof, and that without any deductions whatever: Decerns and ordains the said defenders to exhibit and produce annually hereafter to the said pursuers a full and particular account of the whole seat rents levied and received by them, and of their intromissions with the same: Appoints the case to be put to the roll for further procedure, and reserves all questions of expenses.

"*Opinion.*—From the correspondence produced by the parties, and founded upon in the record, it appears that the dispute between the pursuers and the defenders originally was restricted to the point as to whether the pursuers were entitled to demand from the defenders an account of the rents or donations that they received for the use of chairs, supplied to persons who occupied them in the area of the Old West St Giles' Church. The defenders maintained that these were donations which they were entitled to apply in defraying the general expenses of the congregation, and which they were not bound to account for to the Ecclesiastical Commissioners, in terms of the Act 23 and 24 Vict. cap. 50, sec. 6. But the subject of dispute has been enlarged after the parties came into Court under this action; and now it is maintained that not merely are the defenders not bound to account for the sums they receive for the use of the chairs in the area of West St Giles' Church, but also for the rents that they obtain from the pews located in the area of the Old Kirk. The pleas-in-law stated for the defenders do not bring out distinctly the subjects in dispute—their only plea-in-law, upon which they maintained the discussion before the Lord Ordinary being simply that the pursuers' action is not relevant.

"I. As regards the Old Kirk, the matter stands as follows—By the Act 33 and 34 Vict. cap. 87, sec. 19, it is enacted that, 'It shall not be competent to the Ecclesiastical Commissioners, or to any patron or patrons, or to any presbytery, to nominate or present a minister to any of the five churches or charges specified in sec. 21 of the said Act 23 and 24 Vict. cap. 50, or to the parish of New Canongate, and the said churches and charges and the said parish of New Canongate, shall not be provided with ministers or otherwise maintained as churches and charges endowed by law.' Among the churches and charges so referred to in the Act 23 and 24 Vict. cap. 50, sec. 21, was included the Old Church. Thus the Old Church became extinguished. It was no longer to be provided with ministers or maintained as a charge endowed by law. Provision was made by 33 and 34 Vict. cap. 87, sec. 19, for the erection of the Old Church as a parish *quoad sacra* on a sufficient endowment being procured for it to the satisfaction of the Teind Court, and such endowment having been procured, and a church having been built, the

Court assigned a district, erecting it into a *quoad sacra* parish under the name of the Old Church Parish, Edinburgh—*Stevenson and Others* v. *MacNair and Others*, 24th November 1879, 7 R. 270. The erection of this into a *quoad sacra* parish has no bearing upon the questions now to be determined, and is here merely referred to for the purpose of indicating the ultimate fate of the Old Kirk parish.

"The fabric of the church itself, after being temporarily occupied, with the consent of the pursuers, the Ecclesiastical Commissioners, by another congregation, was disused as a church, and it was in this condition when the Act of Parliament 42 and 43 Vict. cap. 221, was passed in the year 1879, which is an Act to 'make provision in regard to the restoration of the ancient Church of St Giles in the city of Edinburgh.' This Act has a preamble which is important. It recites the Statute 23 and 24 Vict. cap. 50, and then it narrates that the ancient church of St Giles had been 'divided for congregational purposes, by walls which formed no part of the original structure, into three distinct churches, viz.—(1) the choir or High Kirk, (2) the southern transept or Old Kirk, and (3) the nave or New North Church (usually called West St Giles' Church), and then it thus proceeds, 'and whereas the part of the building forming the southern transept thereof, and formerly known as the Old Kirk, has now been added to and *incorporated with the High Kirk*, the dividing walls between them having been removed,' and then the statute proceeds to deal with West St Giles' Church area, and with provisions for turning the whole fabric into one church, which will be referred to immediately. Thus at the date of the statute in 1879 the dividing wall between the Old Kirk and the High Kirk had been removed, and incorporation, as the statute says, thereby made with the High Kirk. There was thus constituted not two but one church in point of fact. What was the effect of this upon the legal right of the Ecclesiastical Commissioners as regards the pew rents of the incorporated kirks? The case in fact and in law was just the same as if an addition had been built to the High Kirk. Their right to the pews in such additional building could not have been disputed, nor can there be any distinction drawn between such a case and what happened. The fabric of the Old Kirk was made separate from the rest of the ancient kirk of St Giles simply by the wall, and when the wall was removed there was just one church. Accordingly the parties so arranged matters. On the area of the Old Kirk fabric *pews* were placed, and the rents derived from them were regularly paid to the pursuers. It is only since this dispute as to the *chairs* in West St Giles' area has arisen that it has occurred to the defenders to take up the position that the statement in the Act of Parliament is wrong when it declares that the Old Kirk area is incorporated with the High Kirk, and that the physical removal of the wall does not legally incorporate the two, and that some process is necessary before that can be accomplished. The Lord Ordinary is not aware of any process that would effect this purpose, and none was suggested by the defenders. He therefore prefers the interpretation which the defenders and all parties put upon the matter, by holding that there was here an incorporation, and that consequently the pursuers are entitled in terms of their conclusions to levy rents for *pews* in the area of the church formerly known as the Old Church.

"II. As regard West St Giles the question turns upon the construction to be put upon the Act of 1879 (42 and 43 Vict. cap. 221). This Act was passed in order to enable the restoration of the whole ancient church of St Giles to be carried out in accordance with the generous scheme of William Chambers. By that scheme no interference was to be made with the High Kirk; and the Old Kirk, as we have seen, had been incorporated with the High Kirk. But there was a congregation worshipping in West St Giles' which it was necessary to buy out. The preamble of the statute narrates the necessity for this in order that the ancient church should all be restored as originally designed. It was necessary, according to that preamble, that provision should be 'made for the erection of a suitable church for the congregation presently worshipping there.' The first section of this statute enacts as follows—'Whenever, as the result of public voluntary subscription or of contributions from any source other than municipal funds or revenues, there shall be paid over to the Edinburgh Ecclesiastical Commissioners, or when security shall be found to the satisfaction of the said Commissioners for the sum of ten thousand five hundred pounds sterling, to be applied as hereinafter provided, the congregation at present worshipping in the New North Church (usually called West St Giles' Church) shall, within twelve months from the date of such payment or acceptance of security, vacate the said New North Church (usually called West St Giles' Church), which shall thereupon be incorporated with and form part of the High Kirk.' Now, the £10,000 was obtained, a new church has been built, and it constitutes the church of the New North or West St Giles' parish. The result of this is stated in the conclusion of the section, which declares in unambiguous language that the area of the former West St Giles' Church shall be 'incorporated with and form part of the High Kirk.'

"Now, the pursuers are entitled to draw the whole of the rents of the pews of the High Kirk, and are entitled in consequence of this to draw the rents of pews on the area of the former West St Giles' Church, which is now a part of the High Kirk, unless there be some specialty which prevents this legal consequence. The defenders find such a specialty to exist in the 2nd section of this Act, which directs the Ecclesiastical Commissioners to apply £10,000 in the purchase of a site, and in the erection thereon of a church 'in lieu of the New North Church (usually called West St Giles' Church), and shall invest the sum of £500 on such separate security as they shall consider proper, the interest whereof shall be accumulated and applied *pro tanto* in the maintenance of the fabric of that part of the building presently occupied by the said New North Church (usually called West St Giles'), but declaring that nothing herein contained shall limit the obligation of the said Edinburgh Ecclesiastical Commissioners to maintain the fabric of the whole building as provided by the said recited Acts.' The argument by the defenders upon this section is—(1) That a new church has been erected in lieu of the old church, and the pursuers draw the

rents of the pews in that new church, and consequently they cannot draw rents for pews in the area of the old church. It is quite true that the pursuers do draw the rents of the pews in the new church, but still that does not derogate from their right to draw the rents of all the pews of all the parish churches in Edinburgh, of which the High Kirk of Edinburgh is one, enlarged no doubt by incorporation with the area of the former West St Giles' Church. In the second place it is said that the rents of the pews from that area cannot be demanded by the pursuers, because they have obtained a specific fund for keeping up the fabric of the old West St Giles' Church, and do not need the pew rents to assist them in that particular. It is quite true that the pursuers did get a sum allocated to them under the Act, viz., £500, the interest whereof they were to apply 'in the maintenance of the fabric of that part of the building,' but the interest of this £500 was only to be '*pro tanto*,' and any deficiency arising therefrom they were obliged to make up from their 'general purpose' fund in terms of the obligations laid upon them by the Act 23 and 24 Vict. cap. 30. There is nothing in the fact that they did obtain this aid in keeping up the walls of the old church that will deprive them of the right to exact pew rents from sitters in a portion of the area of what is now the High Kirk.

"The original dispute arose about a matter which has disappeared in the course of the discussion, viz., whether the sums paid for the use of the chairs placed in the area of the old West St Giles' Church were to be considered as pew rents claimable under the 6th section of the Act 23 and 24 Vict. cap. 50, or whether they were donations or gifts with which the kirk-session could deal as they pleased. It was admitted by the counsel for the defenders that he could not maintain the latter proposition, and therefore nothing more need be said upon the subject.

"The summons has a conclusion to the effect that the defenders shall be decerned to produce a full and particular account of the 'whole seat rents levied and received by them, and of their intromissions therewith from the date at which the said West St Giles' Church was incorporated with the said High Kirk, and became part thereof, whereby the true amount due by the said defenders to the said pursuers may appear and be ascertained by our said Lords, and to exhibit and produce annually hereafter to the said pursuers a full and particular account of the whole seat rents levied and received by them, and of their intromissions with the same.'

"Then follows a conclusion for payment of £1000, or such sum as should be ascertained to be the amount of rents received by the defenders since the date of the incorporation, with interest at five per cent., under deduction of a sum to meet the cost incurred by the defenders in providing the chairs and arranging and fitting them up. Now, this statutory provision in regard to keeping and furnishing an account is contained in section 6 of 23 and 24 Vict. cap. 50—'The kirk-session shall keep an account of the whole moneys received by them for pew or seat rents, *and of the sums retained for payment of expenses*' [the words in italics are now repealed by 33 and 34 Vict. cap. 87, sec. 32], 'and shall lay the same before the Commissioners yearly, or as often as the Commissioners shall direct.' This is a very plain and peremptory enactment, and entitles the pursuers to have at least a yearly account from the defenders. How far back the account shall be made to run is another question. The details stated in the correspondence which preceded the action are not set forth upon the record. From that correspondence it appears that the defenders regularly every year sent a cheque for the amount of the money which they considered to be due to the pursuers, which was accepted as sufficient by the pursuers; and the defenders, it is contended, were thereby left to conclude that no further claim lay against them, and conducted their expenditure accordingly. If this conclusion for a back accounting be insisted upon, and still more, if personal liability be sought to be imposed upon the defenders, some addition is necessary to the record with corresponding pleas, and in the meantime the Lord Ordinary has not pronounced any further finding in regard to the accounting except that the defenders are bound to furnish a yearly account.

"But still the Lord Ordinary thinks he may indicate the tendency of his opinion in regard to this claim for back accounting. This claim, and still more the claim to impose personal responsibility upon these defenders, is one which would require more reasons to support them than are at present visible, before they can be entertained. The Ecclesiastical Commissioners, if they were dissatisfied with the cheques sent to them, had a right to look into the accounts and make further investigation. The books of the defenders were offered for their inspection. But they did not take advantage of this offer. They accepted the cheques sent them, and allowed the kirk-session to deal with the funds upon the footing that all accounting was clear between the two parties. Is there not then an end for any further accounting, and still more is there not an end for enforcing personal responsibility against the persons composing the kirk-session, who are here sought to be made personally responsible as if they were speculating trustees? It would require something more than is disclosed by the record or the productions in process to warrant a judge in imposing such personal liability. No doubt the counsel for the pursuers stated that in all probability such a decree would not be enforced. But matters cannot be allowed to rest on that footing. The pursuers must satisfy the Court that they have a right to ask such a decree. When the interlocutor 'appoints the case to be put to the roll for further procedure,' one object is to give the pursuers an opportunity, if they can see their way so to do, to put in a minute abandoning these conclusions of the action, and stating that they are contented with the affirmance of their declaratory conclusions."

The defenders reclaimed, and argued—The Act of 1860 dealt with two bodies—the Ecclesiastical Commissioners, whom it created, and the kirk-session. The rights of administration and custody were vested in the pursuers, and the kirk-session had imposed upon it the duty of letting the seats, and, after certain deductions, handing over the money to the pursuers. In 1870 the Act 33 and 34 Vict. cap. 87, was passed, section 13 of which practically suppressed several churches, including the Old Church, and provided, if deemed expedient, for the erection of two of them, includ-

ing the Old Church, into *quoad sacra* churches. If that had been done with respect to the Old Church, what would have been the right of the pursuers? It was clearly in the contemplation of the Legislature that the Old Church might be erected into a *quoad sacra* church, and in 1874 a petition was presented to the Court of Teinds with the concurrence of the pursuers, as provided by the Act, for the erection of that Kirk into the church of a *quoad sacra* parish. That petition was refused on the ground that the parties applying had not acquired the church in property, and could not do so, because it belonged to the Crown or the Magistrates. Supposing it had been granted, the pursuers, without any compensation, would have been debarred for ever from drawing a penny of seat rents in respect of that area, because the moment it was erected into a parish *quoad sacra* the seat rents would have been paid to the managers of that church for the purposes of that church and parish. From that time onwards, with regard to the Old Church area, the pursuers' right to draw revenue for letting the seats was negatived by the Legislature. Then came Dr Chambers' benevolent scheme for the restoration of St Giles', which more directly applied to West St Giles' Church. It was dealt with by the Act of 42 and 43 Vict. c. 221, which proceeded upon the preamble that in order to the complete restoration of the building as one individual whole, West St Giles' should cease to be a separate place of worship. It was accordingly enacted that as soon as the Ecclesiastical Commissioners received £10,000, collected by voluntary subscriptions, to be applied in building of a new church, the congregation of West St Giles' should vacate the area commonly known as West St Giles', which should then be "incorporated" with the High Church. It was to be incorporated exactly in the same way as the Old Kirk had been incorporated with the High Kirk. The statute plainly contemplated nothing more than the removal of the physical division between the Kirks, and that the legal character of the areas was not to be altered. In the case of West St Giles', the argument came out stronger than in the case of the Old Church which was suppressed, and nothing put in lieu of it. In the case of West St Giles', a new church was to come in lieu of the Old West St Giles' Church, and was to be a revenue-yielding subject to the Commissioners, and the Old West St Giles' was to be no longer within the jurisdiction of the Commissioners as a rent-producing subject. The pursuers had also obtained under the Act a specific fund—£500—for keeping up the fabric of the Old West St Giles' Church, and did not need seat rents to assist them in that particular. The defenders were then not bound to account to the pursuers in the past or in the future for seat rents in either the Old Church or West St Giles'.

The pursuers replied—They were required to maintain the fabric of certain churches, and were unable to meet all the demands upon upon them in consequence of the want of funds. With regard to the Old Church, it was part of the High Church. The wall dividing the two churches had been removed, and necessarily they became one church. The arrangement did not require any legal powers whatever. Suppose an addition were made to a church, or a gallery built, could it be said that it would require a process before the Presbytery or an Act of Parliament to put it under the control of the Commissioners? Just in the same way the removal of the wall threw the Old Church into St Giles', and brought it within the pursuers' jurisdiction. That it was so regarded was evidenced by the agreement and by the Act of Parliament dealing with West St Giles'. With regard to that church, it was intended that it should form part of the High Kirk. The fact that there was a new church of West St Giles' had nothing to do with the matter, and therefore the Commissioners were entitled to the seat rents of the West St Giles' area.

At advising—

Lord Justice-Clerk—In this case some questions of very considerable interest are raised, but I cannot say that I have found any difficulty in deciding them in the way in which the Lord Ordinary has done. I have read his note attentively, and it appears to me that both the narrative and the grounds of his Lordship's judgment are set out with great clearness, and exceedingly satisfactorily.

The real question is, whether this area—which at one time in the history of the High Kirk was the Old and West Kirks—is or is not incorporated with the High Kirk as it exists now. I do not understand the words of the statute that have been referred to, if that area is not incorporated, for it is declared to be incorporated in the clearest possible terms.

The case really stands thus—Originally when the High Kirk of Edinburgh was a Cathedral the whole area was undivided. After the Reformation, and for the purpose of accommodating several congregations, divisions were erected in the old fabric. These divisions did not form part of the original structure. They existed down to a comparatively recent period. A movement was set on foot lately for the purpose of having them cleared away. That movement was successful, and thereafter the whole fabric was united into one place of worship as it had originally been intended to be. This work was carried out by the munificence of private enterprise. It is now completed, and the entire fabric forms but one church.

The Ecclesiastical Commissioners are a body who were appointed for the purpose of providing machinery for the payment of the ministers of Edinburgh after the abolition of the Annuity Tax in 1860. As from time to time there had been modifications of that statute, so the functions of the Ecclesiastical Commissioners have to a certain extent also been modified. But one of their duties is to collect from the kirk-sessions of the city churches the amount received on account of pew rents or seat rents—rents paid by the members of congregations for the accommodation which all of them enjoy in the churches. These seat rents go into the general fund administered by the Ecclesiastical Commissioners, and are applied for the purpose of the maintenance and sustenance of the ministers of the town. The Ecclesiastical Commissioners have a right to require from the kirk-sessions an account of the amount received, and they are also entitled to have that amount when ascertained paid over to them.

Now, in the clearing away of the sub-divisions which formerly existed in the High Church an amount of space was necessarily thrown into the rest of the fabric. Both the Old Church, which had existed in one corner of the building, and the New North and West Church, were thrown into and incorporated with the building in this way. The result was that the High Church as it had formerly existed, was enlarged to the extent of this space. Part of the space thus rendered vacant the kirk-session of the High Kirk have used for the purpose of providing chairs for the members of the congregation, and for the use of these chairs they have charged a certain amount per annum. The Ecclesiastical Commissioners think that the sums thus received are nothing but pew rents or seat rents, and that accordingly the kirk-session are bound to account to them for the amount. Well, I see no good reason why they should not, for most certainly if this space or area is incorporated with the High Church these are simply seat rents in one of the city churches which fall under the clause that has been referred to in the Act which established the Ecclesiastical Commission. I quite understand the view of the kirk-session upon this subject. They think that this additional space is without their jurisdiction, and so it was as far as their jurisdiction extended before the additions were made. But for all that I do not see any ground upon which the demand of the Ecclesiastical Commissioners can be resisted. The object which the kirk-session had in view was a very good one, and an intelligible one, and in some respects a right one, if it could be done consistently with the rights of others. Their object was simply to obtain a fund by which various contingencies might be met, out of which various incidental expenses might be defrayed for the benefit of the congregation and the benefit of the administration of the church. All that was quite legitimate, praiseworthy, and laudable, but the question we have now to deal with is a pure question of the construction of the Acts of Parliament, and the powers of those who act under those Acts, and whose rights are defined and limited by the statutes referred to. Upon that question I am of opinion that the Lord Ordinary is right. He has very distinctly and accurately explained all these matters, and I think we should adhere to his judgment.

Lord Young—This case presents to us a dispute between two public bodies regarding their respective rights and duties, and the question is purely a legal one depending upon the construction of the Acts of Parliament. I think of one Act of Parliament. Two public bodies having differed upon it, it was very fitting that the question should be submitted for the consideration of this Court; indeed, there is no other authority to determine it. I only wish that it had been presented in a less combative form. I think on the whole that it would have been better if it had been presented to us for our determination in the form of a case stated, rather than in an action betwixt these two public bodies. A special case, however, would of course have required consent and co-operation of both parties, and unfortunately some heat and feeling seem to have arisen upon the subject.

The question really is, whether two parts and portions of what one would upon inspection pronounce to be one church differ with respect to the seat rents or anything else from the rest of the church; indeed, whether in a legal point of view or with reference to any legal question whatever, it is possible to divide the church into parts, and to deal with those parts separately?

The question is regarded as of so much interest that I make no apology for stating quite fully my own views upon it. I have already said it is a question between two public bodies regarding their public rights and duties, and about which, therefore, there ought in my view to be no feeling whatever. One of these public bodies is the Ecclesiastical Commissioners of Edinburgh, a body which was brought into existence by the statute 23 and 24 Vict. passed in 1860. The other body is a constitutional court of the church, the kirk-session of the High Kirk, but it is not in that capacity that it appears here except in so far as a special duty is put upon it by this same Act of Parliament which called the Ecclesiastical Commissioners into existence.

I need not say, for it is too universally known in Scotland to require me to say, that kirk-sessions have no concern with the pews or seats or seat rents of churches, or indeed with the administration of church buildings in any way. Kirk-sessions are courts of the church, and their duties are purely ecclesiastical. They are within the church, but they have no concern with the church itself—none at all. The kirk-sessions of the parochial churches of Edinburgh are put in a quite exceptional position in this respect by the statute to which I have referred imposing certain duties upon those kirk-sessions. Indeed, I need hardly observe that by the law of Scotland, whether civil or ecclesiastical, there are no seat rents in the parochial churches of the Establishment. These churches are supported and endowed from quite other sources. They are endowed out of the teinds. There are no seat rents at all for supporting them. The churches themselves are supplied by the heritors, and the areas are apportioned out amongst the various heritors who contribute to the cost of erecting and maintaining the church. These heritors may make any bargains they like, I suppose, about the seats allocated to them. Into the question whether it may be lawful for them to do that or not I do not enter, but whether lawful or not, certain heritors who do not require the seats which are allocated to them allow their friends the use of them either gratuitously or upon such terms as they think fit to make. But there are no seat rents exacted.

The parochial churches of Edinburgh stand upon quite a different footing. As many of us remember, they used to be chiefly endowed by means of a tax, which one is glad to know has ceased to exist, called the Annuity Tax. As long as it existed—and particularly in the latter period of its existence—it led to a great deal of controversy and heart-burning, and indeed to riotous and lawless proceedings. It was therefore the great object to substitute some other endowment fund for that which was giving so much dissatisfaction and creating so much actual disturbance. Even at that time, however, there were seat rents in the city churches of Edinburgh. The churches were in the administration and custody of the

Magistrates and Town Council, and they levied the seat rents. I suppose the seat rents were part of the funds—part of the common good in the hands of the Magistrates, and were applied by them in the course of their ordinary duty as Magistrates. Indeed the Magistrates had expended in former times a great deal of the public and city money upon these churches. There was a great deal expended on St George's, St Stephen's, and others. Indeed what was expended in this way contributed largely to the unsatisfactory state into which the city finances got.

Well, in 1860, when the first great step was taken towards putting an end to the then existing and unsatisfactory state of things to which I have referred, all the churches with respect to custody and administration were vested in the Magistrates and Town Council of the city. It is quite needless to consider any other matter of title, which would be the merest technicality and have no interest or importance whatever, because, with respect to the parochial churches—churches devoted to that use of being parish churches—there could be nothing but simple custody and administration. There is no property in them so long as they are devoted to that use, and it would be an idle and uninteresting question to consider what was to become of them when that use ceased. As long as they are parochial churches they must be held and administered as such, and no right of property can exist in them—I mean except as mere technicality and to satisfy a title, and how far that might lead I do not know. The first Lord Curriehill used to refer to parish churches as examples of allodial property which were not feudal at all—to which the feudal law was not applicable. At all events they could not be sold, alienated, or burdened. Nothing could be done with them except to hold and administer them for the use to which they were devoted—the use, namely, of being parochial churches.

Well, by the 5th section of the Act of 1860, to which I have referred, the whole rights of administration and custody of these churches which the Magistrates theretofore had in them were from and after 11th November 1860 transferred from the Magistrates and Council and vested in the Ecclesiastical Commissioners. The Magistrates and Council were thus completely divested of the only custody and administration which they ever had with regard to them. They were severed from these churches altogether, except in one very trifling particular, the mention of which shows how complete the severance and separation is—"Provided that nothing contained in this Act shall prevent the Magistrates and Council from causing the bells of the city churches to be rung on suitable public occasions." That is the only thing remaining to the Magistrates and Council of the connection which formerly existed betwixt them and the parochial churches of the city of Edinburgh. Everything else which was previously in them was transferred to and vested in the Ecclesiastical Commissioners created and constituted by that Act of Parliament.

Well then, how are these churches endowed? Not by the Annuity Tax as theretofore, but by special funds vested in the hands of those same Commissioners for that purpose; and here—and here only—is there any necessity for referring to the subsequent and only other Act requiring to be noticed at all—the Act, namely, of 1870, which made the abolition of the Annuity Tax more complete and the funds in the hands of the Commissioners for the endowment of those city parochial churches more ample and satisfactory. After that the parochial churches of the city of Edinburgh, all of them without distinction, were vested with respect to custody and administration in the Ecclesiastical Commissioners, and every shilling provided for their endowment was vested in their hands also. That is the condition of the Established Church of Scotland with reference to the city of Edinburgh at this present moment.

Now, one of the sources of revenue in the hands of the Ecclesiastical Commissioners provided by the Act of Parliament of 1860 for the endowment of the clergy in these churches consists of seat rents, and it is just herein, as I have already pointed out, that the parochial churches of the city of Edinburgh stand distinguishable from all the other parish churches in Scotland. I should rather say that it is herein that they are distinguishable from the ordinary parish churches of Scotland, because a somewhat similar state of things exists, I think, in Montrose, and possibly elsewhere. However, one of the funds in the hands of the Commissioners for the endowment of these churches is the seat rents of the churches of which they are the administrators. And that is not upon the footing of the seat rents of each church, but on the footing of the seat rents of all the churches going into the hands of the Ecclesiastical Commissioners as the common fund out of which they have to pay all the clergy. One church is a considerably larger source of revenue than another in this respect. We were told that one church yielded £800 a-year of revenue, while others yield very much inferior sums; and this High Church—which is in no respect distinguishable from any other church in Edinburgh, for it is just one of the parochial churches of the city of Edinburgh, large as it is—yields a very small sum to these Ecclesiastical Commissioners compared with the sum of £800. That church stands upon the endowment in the hands of the Commissioners exactly in the same way as any other church. In no respect whatever is it different.

That church—the High Church—has been referred to as a Cathedral. Well, the very name is repugnant to Presbyterian views. There could be no such thing as a Cathedral in a Presbyterian Church. It so happened—as every one knows, who is instructed in the subject at all—that in Roman Catholic times before the Reformation this Church of St Giles' was no Cathedral. Indeed Edinburgh was no Diocese at that time. There was no Bishop of Edinburgh before the Reformation, and there was no Diocese of Edinburgh. Edinburgh was comprehended within the Diocese of St Andrews, and the Bishop of St Andrews was the Bishop of Edinburgh—that is to say, Edinburgh was within his See. In 1633 the Protestant Episcopacy was set up in Scotland, and St Giles' was declared to be the Cathedral for that Church, and a Bishop of Edinburgh was then appointed, and there was then a See of Edinburgh. That See did not last long; I think a few years brought it to an end. I am not sure

that the people of Scotland are generally proud of that period of their history, but be as that it may, it was during that brief period that by statute and by statute only—and for a very short time—St Giles' was made a Cathedral. After the establishment of Presbyterianism there is no See and there is no Bishop; there is therefore no *cathedra;* a cathedral cannot exist. The High Church therefore is simply one of the parish churches of the city of Edinburgh, standing under the Act of Parliament in the custody and under the administration of the Ecclesiastical Commissioners, and endowed exactly like the other churches out of the funds in the hands of these Commissioners.

That being the character of the church, let us see what it consists of. It was originally only the east part of this church or building. There were other two parish churches in the building. There was the New North or West St Giles', which, I think, I remember being familiarly called "Haddow's Hole." Then there was the Old Church in a different part of the building—that is to say, in another way, that the west and the east ends were parish churches, and also the south transept. Partition walls were made betwixt these different parts of the building, so that the congregations assembled should not disturb each other. The same state of thing exists elsewhere. I rather think it exists in Dundee, in Aberdeen, and in Glasgow. Whether it exists in all those places I do not at the moment remember, but it is sufficient to say that where the building was so large that it was not useful as a place of Presbyterian worship—where they do not go in for temples but for places of worship—the building was divided into two or more places of worship. This is what was done here.

But then an idea occurred, and one is not surprised at it, and if anybody regrets it I am certainly not among the number, for I do not think it regrettable in the least—very far from it—although that is a matter not within our department—I say it was thought that it would be a grand thing and a becoming thing to have this large church restored to its original unity, and declared to be the parish church of the High Church of Edinburgh. Well, like most other things in this world that design required money, and money was got, chiefly from one very beneficent citizen of Edinburgh, but also from contributions received from other sources. Wherever they came from the funds were provided, and West St Giles' and the Old Church were both thrown into one, along with the original High Church—that is to say, the original High Church was enlarged. It is surely as familiar an idea as can be expressed in language, the enlargement of the parish church. It is very familiar to us all. You may enlarge it by building in one direction or another. A very common way is to pull down the old church and build a new and larger one. The church so built is just the parish church. In the ordinary parishes of Scotland the heritors are charged with that duty. In this particular parish the scheme which I have mentioned recommended itself to the citizens of Edinburgh generally. I suppose not without exception, for very few things commend themselves to a large town such as this without exception. But it commended itself to general acceptance, and the funds were provided and the scheme was carried out. It was necessary to provide a church for the congregation which had been displaced. One of the three congregations had ceased to exist at the time of which I am speaking. Another of the congregations—that of West St Giles—still existed, however. It was the parish church of West St Giles'. Part of the expense incurred, and which had to be met in carrying out the scheme to which I have referred, was to provide accommodation for the congregation of West St Giles' elsewhere, for otherwise their church could not be thrown into the High Church; or, in other words, the High Church could not be enlarged by taking in West St Giles' Church. The Act of Parliament of 1879 was therefore necessary, and in that Act it was enacted that upon the requisite sum being provided to acquire a new site and to erect a new church for that congregation, that congregation was within twelve months from the date of such payment to vacate the said New North Church, usually called West St Giles' Church, and was thereupon to be incorporated with and form part of the High Kirk. With respect to the Old Church, the congregation which had worshipped in it having disappeared, the same statute refers to it in the preamble in these words—"And whereas the part of the building forming the southern transept thereof, and formerly known as the Old Kirk, has now been added to and incorporated with the High Kirk, the dividing walls between them having been removed." These are the two portions of the building to which this action relates, and in regard to which the question is, whether they are part of the High Kirk or not? The statute of 1879, in the preamble with reference to one of them, and in an enacting clause with reference to the other, declares that these are parts of the High Church, and indeed anything else would be extravagant. The church is one, and is not divisible into parts. That was the object of taking down those partitions. The partitions were removed and the parts were thrown into one, so that they might not longer be separate or distinguishable parts from the rest of the building.

The question thus immediately raised regards the seat rents in these two parts. That part of the church formerly occupied by the Old Church congregation—that is, the south transept—has been seated in the usual way. I suppose seating it with more or less ornamental pews was done out of the same beneficent sources—beneficently contributed—that I have referred to, and which provided funds for the restoration of the church. Wherever the money came from, that part of the church was seated in the usual way. With respect to the west end—the nave, as it would have been, of the Cathedral—it was not seated with pews. It was seated in another way. It is curious to remark the difference of language used by the parties respectively. In condescendence 8 the pursuers say—"The portion of the said High Church, which formerly was the New North or West St Giles' Church, was after its incorporation with the High Kirk furnished by the defenders or under their directions with chairs or seats. These chairs are placed in rows, and are fastened together in each row by a beam of wood passing underneath them. The same portion of the area has always been occupied by these seats. The defenders have, ever since this part of the

church was so furnished, received rents from persons for the right of occupying these seats in the same way as for the pews and seats in other parts of the High Kirk. The statements in the defenders' answers are denied. These seats have been let in the same way and at the same rates as the other seats in the High Kirk." The contrast in the language used is a little striking, for the defenders, in their statement 13, say:—"The sums actually received as donations for the use of chairs did not amount to one-fifth part of the increased expense." Then in statement 14—"As regards the past, the defenders desire to explain that the donations for the chairs handed to the committee of the congregation referred to have been expended by that committee in *bona fide*." Well, for my part, I do not care very much whether you call them donations for the use of chairs or seat rents. You may as well speak of donations for the use of pews—for pews are just seats—and if you were asked to refer to a specimen seat, I rather think you would say a chair. I do not doubt that if those having the custody and administration are so minded, and such a body as the Ecclesiastical Commissioners would, I daresay, greatly defer to the opinions and views of the congregation worshipping in any church, and would not offer any objection to seating this or any place of worship with chairs all through, rather than with pews, if that was preferred by those worshipping in the church. Then in such a case it would be a church entirely seated with chairs, or partially seated with chairs and partially seated with pews. Nor do I think it signifies to any legal question that we have to consider here how the money was provided—whether it was provided by subscription among the congregation, or by the Magistrates out of the town funds before 1860, or by a beneficent citizen like Mr Chambers. I repeat, I do not think it signifies how the money was provided. This parochial church of the Establishment is in fact seated, and that is the fact that we have to consider. There is a congregation worshipping in it under a minister. It is a church of the Establishment endowed by the public law, and standing as a charge upon the funds in the hands of these Ecclesiastical Commissioners.

Now, what does the statute provide with respect to the duties of the Ecclesiastical Commissioners in regard to that matter? I have already pointed out that the seat rents of all the churches are part of the endownment fund, and indeed an important part of the endowment fund in their hands. Clause 6 of the Act of 1860 provides:—"The pews or seats in the said several churches shall, from and after the 11th day of November 1860, be let by or at the sight of the kirk-session of each church respectively, with the exception of not less than one-tenth of the number which shall be reserved as free sittings." One is glad to observe that there is provision made for free sittings in all the churches. The section goes on—"But subject to any directions which the Commissioners may issue from time to time, and subject also to any rights or conditions presently attaching to such pews or seats, or in case the Commissioners shall think it necessary or expedient, by or at the sight of the Commissioners or their secretary, and such rents for the said pews or seats as the Commissioners, subject always to the rights and conditions aforesaid, may from time to time determine or approve with reference to the circumstances of the said churches respectively."

Now, it was to this I referred when I said that there were duties put upon the kirk-sessions of these parochial churches which were not imposed on kirk-sessions by law or put upon the kirk-sessions of any other churches. I do not think there are any rights conferred upon them at all. Duties are imposed upon them, but they are statutory duties. They are to levy and collect the seat rents—the pew or seat rents—as the Commissioners may direct, it being reserved to the Commissioners, if they think right, to levy and collect these rents themselves; but the Commissioners are empowered to direct the kirk-sessions to levy and collect them. I do not read the remainder of the clause. It is to the effect that they shall keep an account of the seat rents which they may collect, and render it to the Commissioners, and they must pay over the proceeds to the Commissioners to be applied by them according to statute.

Now, the question is, can we distinguish in the first place between that part of the church which was formerly occupied by the Old Church and the High Church itself? I am of opinion, and that clearly, that we cannot. Indeed counsel for the defenders found themselves in this somewhat absurd dilemma, that if this was not part of the parish church—part of the High Church—the kirk-session had no right there at all, for they are the kirk-session of the High Church, and in that view not the kirk-session of the Old Church at all. If that part of the church is not part of their church, they are not the kirk-session of it. That particular part has no kirk-session or minister. In short, they say that the minister and kirk-session of the High Church are minister and kirk-session of so much of the area as was formerly occupied by the High Church before its enlargement through the addition of the Old Church. And so also with respect to the part of the area which was formerly occupied by the West St Giles' congregation. It is now, just as one must admit the Old Church is, part of the enlarged High Church. Therefore it is within these provisions which I have just quoted, and the duties imposed upon the kirk-session are imposed upon them with respect to this part of the church just as much as with respect to any other. The kirk-session must levy and exact the seat rents under the directions of the Ecclesiastical Commissioners, and they must render an account of their proceedings to the Ecclesiastical Commissioners. I am totally unable to distinguish between one part of the church and another, and to say that only that part which before the recent enlargement formed the High Church—the High Church Parish of Edinburgh, excluding the portions by which the High Church has been enlarged—has a minister and a session, is not in my view tenable. I think the whole enlarged area has got a minister and a kirk-session without distinction, and that all of it is without distinction subject to the Act of Parliament.

I must repeat my regret that there should have been any feeling in the matter. For this is a matter which cannot signify to the Ecclesiastical Commissioners. I do not know who they are. I have not an idea who they are. I do not know the name of one of them in reality, unless it be

that of Dr Grant. I think he was a Commissioner, and I think he must continue to be one of the Commissioners. But whoever they are, they are a popularly elected body of considerable number, and it cannot signify a straw to them whether this High Church yields them any revenue or not, or whether it yields them more or less. The endowment fund in their hands under the Act of Parliament is just so much more by what the churches contribute ; if they contribute less, then their revenues are so much less, and the Commissioners in that case have just so much less to pay the clergy. It is out of the funds at their disposal that the stipends of the ministers are paid. They have to pay the ministers, but beyond the fact that they have this payment to make I imagine they are not interested or concerned in the matter in any way. At the same time it is clear they conceive it to be their duty, and I think it is their duty, to exercise their judgment in this matter. If they tell us that in the exercise of their judgment they think it is fitting to direct that seat rents shall be exacted from those who occupy the part of the church referred to, then I think that is within their right, and it is according to their duty if it is within their judgment that that course ought to be followed. I could not assent for one moment to the contention that what is paid for these chairs is donation for the mere rest and luxury of the seat. That is not the idea of seat or pew rents. People pay for being recognised members of a congregation worshipping in this church as under a particular minister who is endowed as the minister of the church. That is what seat rents are paid for. Seat rents are not paid for the mere rest or luxury of a chair or pew by whatever name you may choose to call the seat. It is for being in the church, attending and taking part in the services in the church, that those who are vested with the custody and administration of a church, and who hold the endowment fund of the church, are required to exact seat rent or pew rent, in so far as they see fit to make that charge, and under such directions as they think fit to impose, from those who go and worship there. The kirk-session are in respect of the duty put upon them by the Act of Parliament bound to aid them in that matter. It is said that the Commissioners got a sum of £500 under the Act of 1879. I cannot inquire into that. They did get £500 under the Act of 1879, and I suppose the Legislature were satisfied that that was the proper thing to be paid to them. At all events it was paid to them, and it was admitted, for I put the question, that that money was invested by the Commissioners and was applied by them exactly as the statute directs. They take no benefit by that fund. They could do nothing but take it and invest it and apply it as they are doing.

On the whole matter, I am of opinion with your Lordship that the interlocutor of the Lord Ordinary ought to be affirmed.

Lord Rutherfurd Clark—I am satisfied that for the purpose of this action the whole area within the walls of St Giles' must be held to be the High Kirk. It is true that the southern transept, which was formerly known as the Old Kirk, was thrown into the High Kirk by private arrangement without any judicial or other legal sanction. But the Act of 1879 in its recital recognises the Old Kirk as having been now added to and incorporated with the High Kirk. Whether the incorporation is legally complete I do not stop to inquire. The incorporation exists *de facto*, and has been accepted by the defenders. Therefore, as matters now stand, and in the question with which we are concerned in this action, the area so added must in my opinion be regarded as a part of the High Kirk. This point is, however, of little importance, because the defenders have all along been willing to account for the seat rents drawn from the pews placed in the southern transept of the former Old Kirk.

In regard to the area which was formerly the New North or West St Giles' Church, there can, I think, be no doubt. The Act discloses that on the occurrence of certain events, which in fact have occurred, the foresaid area shall thereupon "be incorporated with and form part of the High Kirk." The defenders urged that the statutory declaration meant nothing more than that the New North Church should be incorporated with the High Kirk in the same sense and to the same effect as the Old Kirk. I cannot so hold. The statute is express. There may have been some omission in obtaining further legal sanction for the incorporation of the Old Kirk with the High Kirk. But that circumstance cannot in my opinion deprive the statute of its power, nor can it entitle us to construe it in a manner contrary to the plain meaning of its words.

Being then of opinion that for the purposes of this question the whole area of St Giles' must be held to be the High Kirk, I also think that the defenders are bound to account for the pew or seat rents which are drawn by them.

But the true question which has arisen between parties relates to the rents drawn from chairs placed in the nave or in that part of St Giles' which was formerly the New North Church.

When the restoration of St Giles' was completed through the liberality of the late Dr Chambers, the church was seated in this manner. Pews were placed in that part of the area which had formerly been the High Kirk and the Old Kirk, but no pews or seats of any kind were placed in the nave. We were told that on the opening of the restored church the kirk-session put chairs in the nave for the accommodation of the public, and that these chairs have been allowed to remain ever since. They are the property of the kirk-session, who have thought proper to draw a rent for the use of them. The question is, whether they are bound to account for that rent to the pursuers.

In my opinion St Giles' is seated only in those parts which I have mentioned, viz., the former High Kirk and the Old Kirk. It was left in that condition after the restoration. No proposal or attempt has been made to alter it. The nave is unseated. It is certainly unseated in the ordinary sense in which that word is used in regard to an Established Church in Scotland.

The Act of 23 and 24 Vict. cap. 50, which created the Ecclesiastical Commissioners, provides by the 6th section "that the pews or seats in the said several churches shall be let by the several kirk-sessions," and that the rents therefrom arising shall be accounted for to the pursuers. This is the title of the pursuers to draw the pew or seat

rents, and it is under that title that they demand the rents which the defenders have received for the chairs. If the claim of the pursuers is well founded, they must show that the chairs are pews or seats. Within the meaning of the clause which I have cited I do not think that they can. It appears to me that these pews or seats referred to in the Act can only mean the pews or seats which are put into the church by the owners or administrators of the building. It is true that St Giles' was seated at the expense of Dr Chambers. But in restoring the church he was acting with the authority of the owners and administrators, and in seating it as it was actually seated he was in my opinion performing their function. Thus the pews and seats which were placed in the church, though at his expense, must in my judgment be held to be placed therein by the body responsible for the seating of the church, and therefore that in the nave there are no pews or seats within the meaning of the Act.

If any one of the public desired to attend divine service in St Giles' Church I think that he might have brought his chair with him, and sat in the nave free of charge. The pursuers cannot charge for the use of the building. They are only entitled to draw the rents of the pews or seats which are furnished by the body responsible for the proper seating of the church. Neither they nor any other person, so far as I can see, could exclude an intending worshipper from the church, or prevent him from making provision for his comfort during the service. But what each individual might do for himself has been done by the kirk-session. They have provided chairs, and they draw a money payment or rent, if the word be preferred, for the use of them. But as in my opinion these chairs are not pews or seats within the meaning of the Act, the defenders are not bound to account to the pursuers for these moneys.

We are not called on to decide whether the pursuers are entitled to seat the nave, or even to put chairs therein in order that they may draw rents for them. That point cannot be decided in this case, nor can it be decided without calling other parties than the present defenders. For the purposes of this action I think that I am bound to take the church as it is, and while it remains in its present condition the defenders are in my opinion bound to account for such rents as they receive for the pews and seats in the area of the former High Church and Old Church, but they are not in my judgment bound to account for the rents which they receive for chairs which they have placed in the nave.

The Court adhered, with expenses from the date of the Lord Ordinary's interlocutor, and remitted the cause to the Lord Ordinary.

On 20th July 1888 the Lord Ordinary pronounced this interlocutor :—

> "In respect the pursuers do not insist in the remaining conclusions of the summons, assoilzies the defenders therefrom and decerns: Finds the pursuers entitled to expenses."

Counsel for the Reclaimers—Sir C. Pearson—Graham Murray. Agent—Lindsay Mackersy, W.S.

Counsel for the Respondents—Gloag—Gillespie. Agent—Sir John Gillespie, W.S.

Thursday, July 19.

FIRST DIVISION.

(Before Seven Judges.)

[Lord M'Laren, Ordinary.

MACLEAN *v.* TURNBULL.

Trust—Personal Liability of Trustee for Imprudent Investment.

Trust funds, amounting to £3000, which were left by will primarily for the purpose of making payment of the interest as an alimentary provision, were lent in 1881 by the sole trustee, who acted as law agent in the trust, upon a bond and disposition in security over an estate. The trustee did not, before making the loan, obtain a report from a man of skill in regard to the estate. There were, at the date of the loan, fourteen prior bonds over the estate, amounting in all to £49,525, the interest upon which was about £1845. There was also an existing annuity of £260, and a contingent annuity of £300, the capitalised value of both of which in 1885 was £7700. The trustee had acted as agent for the lenders in five previous loans, between 1865 and 1879, for the total amount of £12,000. In 1881 a statement of particulars in regard to the estate had been prepared with a view to a sale, which was sent to the trustee by his country correspondent, who was factor for the proprietor. The rental as appeared from this statement was £3137. This included £200, the annual value of the mansion-house and shootings, and £650, the rent of a farm, which were in the proprietor's hands. It also included £650, the rent of another farm, the lease of which was to terminate by arrangement at the following Whitsunday. In the case of other farms the rents had been fixed before the agricultural depression commenced. The statement made no deduction for property tax, prospective assessments under the Roads and Bridges Act, or expenses of management and upkeep. The estate was exposed for sale in 1881, previous to the loan being granted, at the upset price of £100,000, and in 1882 at the upset price of £90,000. Sums of £85,000 in 1881 and £80,000 in 1882 were mentioned as possible prices by parties desirous of purchasing, but these figures were considered by the proprietor to be too small. The rental of the estate fell so much that in 1884 payment of interest on the bond stopped.

Held, in an action at the instance of the beneficiary, that the investment was not a safe one for trust money, and that the trustee was personally liable to replace the sum of £3000.

This was an action at the instance of Mrs Camilla Soady or Maclean, wife of John Dalziel Maclean, residing at 5 Spring Gardens, Kelvinside, Glasgow, with consent of her husband, and John Dalziel Maclean for his interest, against John Turnbull, Writer to the Signet, Edinburgh, sole accepting and surviving trustee under the last will and testament of the late Mrs Dickson Soady, mother of the female pursuer, dated 29th January 1863, as such trustee and as an individual,