

Friday, Dec. 8.

FORBES *v.* EDEN (*ante*, p. 21).

Church—Dissenting Establishment—Reduction—Declarator—Reparation—Breach of Contract—Jurisdiction—Relevancy. In an action of reduction, declarator, and damages, by a minister of the Scotch Episcopal Church, against the Synod of that Church, founded on an alleged breach of their contract with him in making alterations in the Code of Canons, averments which held (aff. Lord Barcuple) irrelevant, and action dismissed.

Counsel for the Pursuer—The Lord Advocate, Mr E. S. Gordon, and Mr D. B. Hope. Agent—Mr W. Peacock, S.S.C.

Counsel for the Defenders—The Solicitor-General and Mr Shand. Agents—Messrs Ronald & Ritchie, S.S.C.

Judgment was given in this case to-day. The Court unanimously adhered to the interlocutor of Lord Barcuple.

The LORD JUSTICE-CLERK said—The pursuer, who describes himself as "a clergyman of the religious denomination known as the Episcopal Church in Scotland," and "minister of the Scotch Episcopal congregation at Burntisland," brings this action against a large number of persons who are also clergymen belonging to the same communion, and several of them holding the office of bishop in that communion, all as members of a General Synod of the body, held at Edinburgh in the end of 1862 and beginning of 1863. His complaint against them is, that in making certain alterations on the code of canons they have violated the constitution of the religious body to which both parties belong, and have thus committed a breach of contract. He alleges further that he cannot conscientiously obey or conform to the new and altered code; and as by that altered code itself he is taken bound to do so, under heavy penalties, including degradation from the office, functions, and character of a clergyman, he has a material interest, personal and patrimonial, to challenge the legality of the alterations complained of, and to seek the protection of the law against their enforcement. To the general relevancy of such an action it does not appear to me that any good objection can be stated. If a society, whether for secular or religious purposes, is bound together by articles of constitution, and an attempt is made to alter any fundamental article of the constitution, the general rule of law undoubtedly is, that the majority may be restrained on the application of the minority, from carrying the alteration into effect. The rule may be illustrated by an example which comes readily to hand. This religious body effected a union with various congregations of English Episcopalians, on the footing of taking the Thirty-Nine Articles of the Church of England as their formulary and standard of faith and doctrine. They might nevertheless now propose to abrogate that standard, and revert to the Confession of Faith originally prepared by Knox and the other early reformers, and sanctioned by Parliament in 1567, which was their only standard or formulary, if they had any except the Apostle's Creed, during the eighteenth century. The whole body would have power to make the change, if they were unanimous (though they might thereby individually lose some statutory privileges). But a majority, I apprehend, would have no power to do so against the wishes of a minority, however small. Again, if the Synod, whose acts are here complained of, had passed an ordinance prohibiting the use of all set forms of prayer, the result would be the same. If all the members of the communion agreed or acquiesced, the change would be perfectly lawful; but any one having sufficient interest might complain of it as a breach of contract,

because in this communion it seems to be a fundamental article of the constitution, since 1811 at least, that set forms of prayer shall be used in public worship and in the administration of the sacraments. There may, no doubt, be breaches of contract, where the party complaining has no such interest to enforce the contract as can be recognised by a court of law. Thus an association may be formed for mere sport or amusement, which every member is at liberty to leave as soon as he feels inclined, and which he can leave without any pecuniary loss. In such a case the law will not interfere. And though the subject matter of this contract be as far removed as possible from sport or amusement, still if the complaint here were at the instance of a mere lay member of the Scottish Episcopal communion, his interest and title to defend the constitution of the society might be seriously questioned; for he would be met with the ready answer that, as soon as the practice of the religious body became disagreeable to him, he was at liberty to bring his connection with it to an end. It may seem that the distinction between a lay and a clerical member of such a voluntary association is scarcely so substantial as to justify giving to the one and refusing to the other a legal title to complain of any violation of the fundamental articles of association. But there are some weighty considerations which support such a distinction. The possession of a particular *status*—meaning by that term the capacity to perform certain functions, or to hold certain offices—is a thing which the law recognises as a patrimonial interest; and no one can be deprived of its possession by the unauthorised or illegal act of another without having a legal remedy. The position of a minister or clergyman in a dissenting communion differs, no doubt, from that of a minister of the Established Church, and from that of a member of any of the law or medical corporations, inasmuch as he has no legal or recognised *status*. But it is beyond question that where a religious society embraces a numerous and wealthy section of the community, the position of a minister of religion in that society is an object for the attainment of which men are specially educated at considerable cost, and for the sake of which they throw away, it may be, other and more profitable prospects. When, therefore, one has by competent authority been ordained a minister in such a communion, I hesitate to come to the conclusion that he has not obtained something which is of appreciable value, even according to the vulgar standard of money. If, therefore, the pursuer can show that he became a minister in the Episcopal communion under one law, and now finds himself by the proceedings of the defenders under a new law—the enactment of which is a breach of the fundamental constitution of the society—which he cannot conscientiously obey, and which, if he disobey, he is liable to be deprived of his position as a minister and of the character impressed on him by his ordination, I am not prepared at once to say that he is without legal remedy. That he has not yet been challenged for his disobedience to the new law, and has suffered no actual injury, seems to me of little importance. If he can satisfy the Court that injury is surely impending, he is as much entitled to the exercise of preventive justice to stop the infliction of a wrong as he is to reparation when the wrong has been done and the injury suffered. Holding these views as to the general nature of the action before us, I hesitate to adopt the course of reasoning in the note of the Lord Ordinary, and to give judgment against the pursuer solely or mainly on the ground that he has no sufficient title or interest to sue, apart from a full consideration of the grounds of this complaint on its merits. I think we can scarcely do justice between the parties in this case unless we carefully consider what are the terms of the contract alleged to subsist between them, and what are the alleged breaches of that con-

tract. When the pursuer became a member, or at least when he became a minister, of the Episcopal communion, the canons in force were those prepared and enacted in 1838. But he alleges that by the new code enacted in 1862 material alterations have been made. By the 21st canon of the code of 1838, the "Scotch communion office" is declared to be "the authorised service of that Church in the administration of that sacrament;" and while permission is given to retain the use of the English office where it was previously in use, "it is also enacted, that in the use of either the Scotch or English office, no amalgamation, alteration, or interpolation whatever shall take place, nor shall any substitution of the one for the other be admitted, unless it be approved by the bishop. From respect, however, for the authority which originally sanctioned the Scotch liturgy, and for other sufficient reasons, it is hereby enacted that the Scotch communion office shall continue to be held of primary authority in this Church, and that it shall be used not only in all consecrations of bishops, but also at the opening of all general synods." The pursuer complains that by the 29th canon of 1863, the Book of Common Prayer of the Church of England is declared to be the "service-book of their Church for all the purposes to which it is applicable; and that no clergyman shall be at liberty to depart from it in public prayer and administration of the sacraments, or in the performance of other divine offices, except so far as the circumstances of this Church require, and as specified in the canons of the Church." The 30th canon of 1863 farther permits to those congregations who use the Scotch communion office to continue its use. But the communion office in the Book of Common Prayer of the Church of England is to be used in all new congregations unless, on special application, the bishop shall permit the use of the Scotch office; and the office in the Common Prayer is to be used at all consecrations, ordinations, and synods. The pursuer, who has always used the Scotch office in the congregation of which he is minister, maintains that that office was the authorised doctrinal formulary to which appeal was to be made in all questions of eucharistic doctrine and practice; and that the effect of the canons of 1863 is not only to degrade the Scotch communion office from its place of authority, and to substitute in its stead the English office, but to subject the pursuer to the necessity of taking part in the service of the holy communion, particularly at Episcopal synods, at which he is bound to attend, according to the forms of the English office. This is the first head of his allegation of breach of contract, and that which was dealt with in argument as by far the most important part of his case. Is there, then, before the Court a relevant allegation of breach of contract? In reading and construing the 21st canon of the code of 1838, which is said to have been illegally altered, it is of importance to have reference to the time of its original preparation and the circumstances which led to it. The statute passed in 1792 conferred on Episcopalian ministers in Scotland various immunities and advantages—upon this among other conditions, that they should subscribe the Thirty-Nine Articles of the Church of England. In the year 1804, "a convocation of all the bishops and clergy of the Scotch Episcopal Church was held at Laurencekirk, at which it was resolved by the Scotch clergy to sign the Thirty-Nine Articles." The old Scottish Episcopalians who, during the greater part of the eighteenth century, had been supporters of the house of Stuart, and had most of them been in close alliance with the English non-jurors, seem to have thought that the time was now come when they might, without compromising any of their old principles, invite the Episcopalians of the English Church, of whom there were several congregations in Scotland, to form a union with them. This union was finally accomplished in the year 1811, and it was at this time and under these circumstances that the canon, which forms No. 21 of the code of 1838, was first

made a law of the Scottish Episcopal Church. What, then, is the precise import and effect of this canon as an article of constitution, or a condition of the association then formed, and still confessedly existing? To enable the Court to answer this question with safety and satisfaction, it is further quite necessary that we should understand the meaning of the terms made use of. The parties did not seem very willing at first to enlighten us on this matter. But I think we have it now admitted that by "the authority" which originally sanctioned the Scotch liturgy is meant the proclamation of the Privy Council of Scotland, dated the 20th December 1636, enjoining the use of the service-book which had been compiled for the use of the National Church of Scotland by command of King Charles I.; that by the "Scotch liturgy" is meant either that service-book or the communion office contained in that book; that by the "Scotch communion office" is meant the office for the celebration of the communion which was in use among the Scottish Episcopalians in 1811. So far the parties are agreed. But they are widely at issue regarding the meaning of the words "primary authority," the pursuer representing that these words import that the Scotch office is of primary and over-ruling authority in all questions of doctrine and practice regarding the Eucharist; the defenders, on the other hand, maintaining that these words either have no meaning at all, or that they mean only that the major part of the Scottish Episcopalians for the time prefer the use of the Scotch office in the celebration of the communion. To any one acquainted with the ecclesiastical history of Scotland in the seventeenth century, the appeal to the authority of Charles I., embodied in the proclamation of the Privy Council of 1636, must seem very strange. The bishops of the Scottish Episcopal communion in 1811 and since that time represent themselves as the legitimate successors of those bishops who were established and appointed by James VI. in the early part of that century, and who, down to the year 1638, were bishops of the National Church of Scotland. But that National Church had a rooted aversion to any service-book which prescribed the precise forms of words in which public worship should be conducted, and still more to any service book compiled in or borrowed from England; and this feeling was not confined to any particular party in the National Church. The parties in the Church at that time were divided on questions of ecclesiastical government almost exclusively. The controversy arising out of the Five Articles of Perth can hardly, with any propriety, be said to be a controversy regarding doctrine—the observances which they enjoined had not been generally used or rigidly enforced, and the excitement which they had at first created had almost died away before the attempt was made to introduce a service-book. The doctrine of the Church was in all respects substantially the same from the time when it was settled at the establishment of the Reformation, in terms of the Confession of Faith, ratified by King James VI.'s first Parliament in 1567. This Confession continued to be the only special standard of faith and doctrine of the National Church of Scotland till the Revolution, with the exception of the short period between 1647 and the Restoration, during which the Westminster Standards prevailed. In the almost entire absence of proper doctrinal controversy, the form of church government was no doubt a constant subject of discussion and of violent irritation, not between two parties in the Church primarily, but between the King and his subjects. The restoration of bishops by King James VI. was a purely political movement on his part, and was not subversive of the form of church government then existing; for the kirk-sessions, presbyteries, and synods consented, and worked together in the government of the Church with the archbishops and bishops, from the restoration of the Episcopal order by King James till its abolition in 1638 by the Estates of Parliament in the time of King Charles. But in 1636 and

1637 the controversy respecting the comparative merits of Episcopal and Presbyterian government did not occupy the minds of most men as it had in former times done; and the violent storm which was raised by the attempt of King Charles by his own authority alone to introduce the service-book, though it led in its results to the abolition of Episcopacy and the triumph of the Presbyterian party, was at first the protest of the whole nation in its religious and ecclesiastical aspect, or, in other words, of the National Church against an exercise of the prerogative which all alike, whether attached to Presbytery or Episcopacy, regarded and denounced as Erastian and subversive of the true liberties of a National Church. Nor did the service-book of King Charles ever recover from the obloquy thus attaching to it. From the Restoration to the Revolution, the Church of Scotland remained as completely without a liturgy as it had been in the end of the previous century. Indeed, the only book of any legitimate authority in the Church at that time which contains any directions for public worship was the Book of Common Order, founded on the Order of Geneva, which had been adopted at the Reformation, and which had never been formally deprived of authority—nor had grown out of general use. It was not until after the Revolution, and somewhere in the beginning of the eighteenth century, that a feeling and practice favourable to set forms of public prayer and worship became prevalent among the Scotch Episcopalians, then a small and persecuted sect. But even then it was not the service-book of Charles that was generally adopted, but the Common Prayer Book of the Church of England. The high profession of respect "for the authority which originally sanctioned the Scotch liturgy" is therefore not very intelligible in the canons of 1811, if by the liturgy is meant the whole service-book which the Church of Scotland would not and never did, accept for use. On the other hand, if the term "liturgy" is to be understood in its stricter and more limited sense, as equivalent to "communion office," the statement becomes more intelligible; for the Scottish Episcopalians, when they left the Established Church at the Revolution, and became an independent body of Dissenters, did adopt the communion office of King Charles' service-book; and a reference to the fact that it is contained in the service-book of King Charles may be made in this canon only for the purpose of showing that it was a service originally intended and compiled for the use of the Church of Scotland. But in whatever sense the reference to King Charles' proclamation is to be understood, it remains to be seen whether it explains the enactment which follows, that the Scotch communion office shall be of primary authority. Is it the office as it appears in King Charles' service that is to be appealed to as a doctrinal standard on the subject of the Eucharist; or is it the Scotch communion office as was in use in 1811? and if the latter, then what is the authorised form of this office in 1811? The great importance of these questions in the present case will be at once apparent by attending to the differences which exist in the different editions of this office. The pursuer informs us that fifty-four or more editions of this office have been published, all bearing the same name. I have not examined the whole of these; but in those which I have had an opportunity of seeing, there is such a want of uniformity that I am not able to say, and I am not informed by anything on record, which is the office meant by the pursuer when he contends that it shall continue to be of primary authority. If, indeed, the discrepancies were immaterial, they might not go so far as to invalidate the pursuer's case, though even then the want of any distinctly authorised and standard copy or edition would be very embarrassing. But it will clearly appear that the discrepancies are not small nor immaterial. In the service-book of 1637, the prayer of consecration differs from that of the communion office in the Common Prayer Book of the Church of England, by

the introduction, after the first complete sentence, of these words:—"Here us, oh merciful Father, we most humbly beseech Thee, and of Thy almighty goodness vouchsafe so to bless and sanctify with Thy Word and Holy Spirit these Thy gifts and creations of bread and wine, that they may be unto us the body and blood of Thy most dearly beloved Son, so that we receiving them," &c. Another marked difference is a rubrical direction in the service-book, that "immediately after" the prayer of consecration "shall be said this memorial or prayer of oblation." The first portion of this "oblation" is as follows:—"Wherefore, O Lord and Heavenly Father, according to the institution of Thy dearly beloved Son, our Saviour, Jesus Christ, we Thy humble servants do celebrate and make here before Thy Divine Majesty, with these Thy holy gifts, the memorial which Thy Son hath willed us to make, having in remembrance His blessed passion, mighty resurrection, and glorious ascension, rendering unto Thee most hearty thanks for the innumerable benefits procured unto us by the same." The remainder of the memorial or prayer of oblation consists of the words of one of the prayers or collects appointed in the English service to be said after the people have all communicated. The first edition of what has since been called the Scotch communion office, published in 1723 and 1724, for the use of those who had been led by their preference for the Episcopal form of church government, and the importance they attached to Episcopal ordination, to leave the National Church at and after the Revolution, was apparently an exact and faithful copy of the communion office in the service-book of 1637. But this was not of long continuance. The first change appears in the edition of 1735, in "The Oblation," where, after the words "celebrate and make" with these Thy holy gifts," the following words are introduced:—"Which we now offer unto Thee." In 1755 these additional words are retained; but another change was made. The words introduced in the prayer of consecration in the Book of 1637, praying that the elements "may be unto us as the body and blood," &c., are omitted, but they are introduced in the prayer of oblation. In one of the editions of 1764 these words are restored to their old place in the prayer of consecration, as in 1637; and in the prayer of oblation the words "which we now offer unto Thee" are omitted. But in another edition of the same year the words "which we now offer to Thee" are retained. The prayer in which they occur is called on the margin "The Oblation." What immediately follows is, for the first time, on the margin called "The Invocation," and prays "to bliss and sanctify with Thy Word and Holy Spirit these Thy gifts and creations of bread and wine, that they may become the body and blood of Thy most dearly beloved Son." In 1796 another change is introduced, and the prayer is that the elements "may become the spiritual body and blood," &c. In 1800 the word "spiritual" is dropped out, and the form is the same as in 1764. In 1801 the word "spiritual" is restored, and the sentence in which it occurs is thus explained in a foot-note:—"That is to say, in spirit and power or in virtue and efficacy, and so as to convey to devout communicants all the spiritual blessings purchased by Christ's death and passion." In 1804 the edition of 1764 was reprinted verbatim. But in 1814 the word "spiritual" is once more restored but without the foot-note. From this time forward the form of 1764 seems to have been generally followed. Now, it seems to me to require no argument to show that the differences then existing among the different editions of this office are such as may by many conscientious persons be considered of the most serious importance, as expressive or suggestive of certain doctrines, or as involving certain practices. It is quite unnecessary to dwell on this matter. For the question always recurs with increasing force, which of these numerous editions is it that the parties to the contract of 1811

agreed to hold as of primary authority? According to which of these numerous editions is it that the pursuer contends that the authorities of the Church are bound to test the soundness of his doctrine on eucharistic grace—the real presence, and the nature of the commemorative sacrifice? To this question no answer has been, or indeed under the record before us, can be given; and the result is that this so-called fundamental article of the constitution, this essential condition of the contract, cannot be enforced, because there is no certainty what is the formulary or office to which appeal is to be made as of primary authority. The gravamen of the pursuer's complaint is, that he is compelled to receive the Church of England communion office in place of the Scotch office, and he has shown wherein they differ in their language. But it is unfortunately just in those very parts of the service in which the Scotch office differs from the English that the Scotch office presents those variances in its different editions, and thus constantly up to 1811 differs from itself. A doctrinal formulary, which is constantly or frequently shifting in its expression, can hardly be of any, much less of primary, authority, and no real injury can be done to the interests or to the conscience of anyone by substituting in its place a more distinct and unvarying standard, unless, indeed, it could be alleged that the new standard expresses or suggests something unsound in doctrine, or involves something objectionable in practice. But the pursuer has carefully abstained from making any such allegation against the communion office contained in the English Book of Common Prayer. I am therefore of opinion that there is no relevant allegation of breach of contract in so far as regards the matter of the communion office—(1) Because I think, notwithstanding the apparently strong language of the 21st canon, it is impossible to hold the parties to the contract of 1811 to have intended to make appeal in matter of doctrine to a formulary or form of service, as to the terms of which they were not themselves agreed, and that the meaning of the canon must be taken to be (as contended for by the defenders) that the Scotch office was the office most extensively recognised and used for the time, and not that it was of primary authority in questions of doctrine. (2) Because, even if the intention of the parties had been to appeal in matters of doctrine to such a vague and uncertain standard, it would be impossible to enforce this as a condition of a contract, or as a fundamental article in the constitution of a religious association. What remains of the case is easily disposed of. The pursuer complains that the new canons of 1863 make a change in the limitation of the power of general synods, the limitation in the canons of 1838 being that their power to alter or abrogate canons shall be "in conformity with the recognised constitution and acknowledged practice of the Church," while in the canons of 1863 the words "and acknowledged practice" are dropped out. The pursuer has not explained what he holds to be the precise meaning of the omitted words; and it is difficult, if they be taken in their natural meaning, to give them any effect consistently with a general synod having any power to abrogate a canon unless it has already fallen into desuetude, or to alter or amend a canon unless it has already been virtually altered and amended by the practice of the Church. Alteration and abrogation of canons to any other effect must necessarily be an interference with the acknowledged practice of the Church prevailing up to the time when the change is made. The words therefore are either useless, or the pursuer must attach to them a meaning which is unreasonable and contrary to the principles of sound construction. But further, in the case of so ambiguous a phrase, it is plainly premature to determine whether their omission enlarges the power of a general synod until it be seen what shall be the effect of the change in the practical exercise of the powers of a general synod. A court of law is in use to deal with such questions

only in the concrete, not in the abstract. The pursuer, lastly, complains that the services in the English Prayer-Book appointed for baptism, visitation of the sick, and burial of the dead, contain passages which he has a conscientious objection to read. But his averments on this subject are devoid of relevancy, because he does not state, and plainly could not state consistently with fact, that the canons of 1863 introduce any material change as regards these services. The Scotch Episcopal Church were accustomed long before the ordination of the pursuer to use these services of the English Prayer-Book, having no forms of their own for the performance of any of these services. It is altogether out of the question to say that a canon which enjoins nothing more than greater uniformity in the use of a service which has been already for a long time a recognised service of the Church constitutes a breach of contract and a violation of the constitution of the religious society. It is unnecessary for me to say anything in detail of the conclusions of the pursuer. The sole grounds of action being, for the reasons which I have stated, irrelevant, according to my opinion, I am necessarily led to the same conclusion with the Lord Ordinary, and am for adhering to his interlocutor.

LORD COWAN said the first inquiry to which he had directed his attention was as regarded the extent to which this Court was called upon to deal judicially with the questions that had been argued; and the more consideration he had given to the case he had become the more satisfied with the manner in which it had been disposed of by the Lord Ordinary. Both parties concurred in the statement that no point affecting the jurisdiction of the Court to entertain this action had been raised. But while making this admission, the defenders stated that "having regard to the subjects and terms of the canons which are complained of, they respectfully maintain that the canons are not liable to be reduced by this Court." This statement appeared to him to suggest very important matter for preliminary consideration. For, on the same grounds that the reductive conclusions were thus objected to, the competency of a judgment on the declaratory conclusions of the summons might be challenged. These conclusions were twofold—(1) That it was, and is, *ultra vires* of the Synod to alter, amend, or abrogate any of the canons contained in the code of 1838, or to make new canons except in so far as in conformity with the constitution and acknowledged practice of the Church at the time of the pursuer's ordination as a minister; and (2) that the pursuer is entitled to celebrate divine worship and to administer the sacraments in conformity with the canons of 1838, and is entitled to the free exercise and enjoyment of all the privileges conferred on him by these canons. These were very wide conclusions, and, as he apprehended, could be entertained for judgment only if the canons themselves, to which the pursuer objected, could be completely reduced. For, assuming the code of 1863 to be the standing law of this Church, it was impossible to see how, on any good ground, the Court could be called on to declare either that the alterations it made on the prior code of 1838 were *ultra vires* and inoperative, or that the pursuer was entitled to continue a minister of the Scottish Episcopal Church, on the footing of the law of the Church being the abrogated code of 1838. It was material to observe that all the canons, or parts of canons, proposed to be set aside related to matters alleged to modify or change the doctrines of the Church, or to matters touching its internal arrangements or discipline. He could not but regard it as an entire novelty to ask the Courts of law to determine whether the ruling judicatory of a voluntary church acted within its powers in matters so purely and exclusively relating to the government of the body, as a church, its doctrine and discipline. It surely could not be pretended that anyone of the laity of the Church, connected with it only as in the enjoyment of its

ordinances, could thus evoke the jurisdiction of the civil court. When the ecclesiastical governing body had recognised changes, either in doctrinal matters or in the rites and ceremonies of the Church, dissentient laymen might leave its communion. Their remedy could not be to bring the resolutions of the Church judicatory into a court of law as a court of review. Some civil wrong justifying a demand for redress, or some patrimonial injury entitling the party to claim damages, must be alleged and instructed before the civil court entertained and adjudicated in such cases. This principle led directly to the solution of what he had ventured to state as the primary inquiry under this record—namely, had the pursuer set forth that by and through the synodical acts of which he complained he had suffered civil wrong or patrimonial injury to support and justify his demand on the civil court to investigate and adjudicate upon those acts of this spiritual court in matters ecclesiastical, and connected with the government of their Church, as in themselves right or wrong, or as within or beyond the powers of this synod? As regarded the petitory conclusions, it appeared to him that the Lord Ordinary had established beyond controversy the irrelevancy of this part of the case. The case must therefore be decided as if the only conclusions were reductive or declaratory. The pursuer must show that his position or rights as a clergyman of this Church had been affected or violated in such a manner and to such an extent as to justify his demand for redress as for a civil wrong. Certain it was that he had yet suffered no patrimonial loss; and as for the statement that he might be exposed to loss, it was difficult to imagine how such a state of things could ever exist as would support an action like this at the pursuer's instance. The bishop's right to institute a mission in any locality could not touch the position of the pursuer as instituted to the pastoral charge of a particular congregation; and congregations desiring, after 1863, to continue in the use of the Scotch communion office were left at full liberty to do so. But apart from that, the anticipated loss was dependent, in the first place, on the pursuer's actual disobedience of the canons of 1863, and on action being taken against him by his bishop for such disobedience. But neither the one nor the other of these contingent events could be predicted to be so probable as to justify and support legal proceedings not otherwise maintainable. Lord Cowan then went into the question how far as a presbyter the pursuer was entitled to step in to protect the Church from innovations, or how far the code of 1838 formed the basis of a contract with him which was violated by the code of 1863. His Lordship quoted the *dictum* of Lord Eldon that the civil court would not take notice of religious opinions with a view to decide whether they were right or wrong, or whether regulations for the internal administration and discipline of a religious body had been rightfully and properly adopted; but it would notice them as facts, pointing out the ownership of property, or as supporting a claim for civil redress for civil wrong. This *dictum*, he said, did not lose its force by the assertion that in the new regulations or declarations of doctrine there was a departure from the old principles to which some of the body might still tenaciously adhere. When no patrimonial right was to be settled, or no injury patrimonially was to be redressed, it was vain for dissentients to plead breach of contract with them on the part of the ruling authorities within the Church. It was the province of the civil courts to redress civil wrongs; it was not their province, and had not been their practice, to interfere as courts of review with the theological dogmas or the internal regulations or discipline of religious sects or denominations. He concurred with the Lord Ordinary in saying that the canons of the Church were not enacted for the purpose of constituting a contract, but for the purpose of establishing and regulating its doctrine and discipline. As to the question how far the canons of 1838 constituted the

basis of a contract, his Lordship went on to show that the Thirty-nine Articles which the pursuer had subscribed and the code of 1838 both recognised the power of the Church to alter rites and ceremonies so far as regards the forms which rested on human authority. It would be a strange inconsistency, he said, to say that while the constitution of the Church enabled a general synod in 1838 to pass the regulation it did with regard to the communion office, the right should be denied to the synod of 1863 to modify or alter that regulation. Dealing with the pursuer's argument as to the limiting terms of canon 33, founded on by the pursuer, his Lordship said he could not hold that they were intended to deprive the Church of its inherent power through general synods to regulate such matters in such a way as might seem to be for the good of the Church; and he desiderated no better *prima facie* evidence of the changes effected by the code of 1863 being in conformity with the construction and practice of the Church than their having been adopted by the unanimous voice of the ecclesiastical authorities in general synod assembled. On the whole case, he was of opinion that no sufficient interest was stated by the pursuer to justify his demand on the Court to exercise its judicial powers in the matters complained of; and second, that at any rate there was no averment in the record to support the demand in the summons on the alleged ground of want of power in the members of the general synod of 1863 to act as they did.

LORD BENHOLME said the present question related to the relevancy of the summons. The Lord Ordinary had found the summons irrelevant, and he (Lord Benholme) would state the grounds upon which he was of opinion that his Lordship's judgment was well founded. The pursuer alleged that the new canons of which he complained were not in conformity with the recognised constitution of the Church. The pursuer's statement set forth that when he was ordained he understood that the Scotch communion office was the primary authority in his Church on the holy communion, and that by the new code of canons the forms of communion in the Episcopal Church in Scotland were substantially altered. If the pursuer's allegation was to be read absolutely, and to import that the recognised constitution of the Church had been altered by the introduction of new doctrine, the allegation would require to be followed up by some distinct and intelligent statement of the old doctrine which had been changed, or of the new doctrine which had been introduced. The pursuer had shrunk, however, from making any such statement, although called upon to make it. In these circumstances, the argument of the defenders had commended itself to his mind. The doctrines of this Church were not to be found set forth either in the English or Scotch office. These offices being both either sanctioned or permitted by the canons of the Church, must be held to be consistent with the doctrines of the Church as to the solemn subject to which they related, but they could not be considered as creeds or as exclusive expositions of doctrinal truth. The differences in point of form and expression between them might well give rise to a preference for the one or the other amongst the different members of the Church. He thought it could not be held that the pursuer had relevantly set forth that the canons of 1862-1863 were not consistent with the recognised constitution of the Church. It remained therefore to inquire whether they were consistent with the acknowledged practice of the Church. Now, the practice of the Scottish Episcopal Church had peculiarly varied in regard to its forms of worship. The pursuer argued that it was *ultra vires* of the legislative body to alter the canons of 1838 except conformably to the practice of the Church. But he had not ventured to set on record that the adoption of the English Prayer-Book as the service-book of the Episcopal Church in Scotland was not in accordance with the general practice of the Church in 1862. His Lordship

was therefore of opinion that the pursuer had entirely failed to point out any excess of power on the part of the general synod of 1863. The defenders had done no wrong, in his opinion, upon the pursuer's own showing of the case, consequently they could not be liable for damages to him. He considered the pursuer's statement of pecuniary loss to be as irrelevant as were his grounds of reduction. The pursuer complained that his bishop had refused to license his curate; and he stated that in an appeal to the Episcopal Synod the refusal was confirmed. It appeared to his Lordship that this exercise of ecclesiastical discipline on the part of the bishop, under the superintendence and review of the ecclesiastical court of appeal, could not be made the subject of a claim of damages in the Court of Session. As to the prospective inconveniences and disabilities which the pursuer contemplated, and the sentence of censure or degradation which he seemed disposed to incur, it was premature to enter upon their discussion. He was clear for adhering to the Lord Ordinary's interlocutor.

LORD NEAVES said—In considering this case it is proper and even necessary to take a general view of the historical events with which it is connected. The position in Scotland of those religious reformers who were in favour of Episcopacy, meaning thereby Prelacy, or a difference in degree between a bishop and a presbyter, has long been attended with difficulties and embarrassments which, I am sorry to see, are not yet wholly at an end. As few or none of the Roman Catholic bishops took part in the Reformation, the nation considered itself in this manner as having reformed "from Popery by presbyters," and it was natural that the Church should be established on a Presbyterian basis, which was considered to embrace all the elements essential to the institution of the Christian ministry. A tendency, however, all along existed in influential quarters to return to Episcopacy, and it became a favourite maxim with James VI. that Episcopacy and monarchy were inseparable. His attachment to that view was, no doubt, heightened when his accession to the English throne gave him an opportunity of contrasting the dutiful subserviency of the English bishops with the troublesome boldness of the Edinburgh ministers. Various steps were accordingly taken for restoring Episcopacy, and introducing a greater amount of ritualism into the Scottish Church, and it is not improbable that the object in view might have been accomplished if the gradual and cautious procedure of James had not been exchanged for the more eager and less prudent innovations of his son. The rash and unwarrantable attempt of Charles as to his service-book entirely frustrated the design it was intended to promote, and thus in a single day, as Archbishop Spottiswood is reported to have said, the labour of thirty years was at once thrown down. The Restoration re-established Episcopacy, but not in a manner or on a footing of which its modern admirers would feel very proud. Lauderdale, who was the unwilling instrument employed to do so, had himself been an active Covenantanter, and is believed to have remained to the last a decided Presbyterian, and it almost seems as if the measures he adopted to establish Episcopacy were purposely intended to bring it into discredit. The condition of the Church, indeed, from the Restoration to the Revolution was most anomalous. It was Episcopal, but many, if not most, of its presbyters had no Episcopal ordination. The Episcopalians claimed for Episcopacy a divine origin, but the character on which it was then rested was an Act declaratory of the King's supremacy, and an ordinance asserting his absolute right to regulate Church government as he pleased, and by virtue of which he might, when he pleased, have changed or abolished what he had established. The Church, though reformed, had no symbol of belief later than the Apostles' Creed, unless it were John Knox's Confession; and finally, though it professed

to favour a liturgy, it had no set form which it could produce beyond the Lord's Prayer. As has well been said, the service-book attributed to Laud, at least as a general liturgy, made its first and last appearance in 1637. It never was adopted by the Church: it never was ratified by any lawful authority, and even the King's sanction to it was soon withdrawn. At the Revolution the Episcopal party had again a chance of ascendancy. King William was a Presbyterian, but he was a man of the world and no bigot, and he would doubtless have been well pleased if he could have maintained a uniformity of Church government and public worship throughout the empire. But the Scottish Episcopalians were all, to a man, adherents of the exiled family, and there can be no doubt that a vast preponderance of the well-affected part of the nation were in favour of Presbyterianism, and had too bitter a remembrance of the persecutions they had suffered under Episcopacy to allow of any compromise on the subject. For a century after the Revolution the Episcopalians were subjected to serious disabilities, and at times to severe persecution, stimulated no doubt by their implication in the two successive rebellions that took place. But when they thus became an unestablished sect, and for some time afterwards, they were not possessed of any settled liturgy. The service-book of Laud, attempted to be introduced in 1637, had not been again brought forward in 1662, and at the Revolution was possessed of no position or authority in Scotland. The Revolution, in the first instance, made no change in this respect. As many Presbyterians had conformed to the Established Church while it was Episcopal, so many Episcopalians adhered to it while it was Presbyterian, and many of the Episcopal clergy were willing to remain in their benefices under a Presbyterian form of Church government if they had been allowed to do so. The obstacle to their so remaining was not the existence of Presbytery, still less the absence of a liturgy, but was the compulsion put upon them of acknowledging and taking the oaths to a Government to which they could not conscientiously transfer their allegiance. But when the Episcopalians became by degrees a separate and independent sect they had free scope to indulge that tendency to liturgical observances which seems often, or always, to accompany the Episcopal theory. In their new position, too, the Scottish Episcopalians, being a non-juring body, were thrown into communication and communion with the English Non-jurors, who included among their numbers men of great virtue and piety, and of great talent and learning, but some of whom at the same time entertained very high notions as to the dignity of the priesthood and the authority of tradition. The English Non-jurors used, of course, as a rule, the English Prayer-Book; but the extreme party among them were dissatisfied with the English communion service, as being too much of a commemorative and too little of a sacrificial ceremony. In particular this was the feeling of three eminent men among them, Hicckes, Collyer, and Brett, and by the two last-named, accordingly, a non-juring office for the holy communion was prepared and published in 1718. This service differs from that which is contained in the English Prayer-Book in several particulars, being based partly on the first liturgy of King Edward VI., and partly on an ancient liturgy, said to have been used in the Church of Jerusalem under St James. Some of these peculiarities I shall afterwards notice. In connection with this ritual the extreme party among the Non-jurors advocated the adoption of certain usages, said to be supported by ancient tradition, among which were the mixture of water with wine in the Eucharist, the use of the chrism in baptism, and of unction in the visitation of the sick, and the practice of prayer for the dead. The English Non-jurors endeavoured to enlist the Scottish Episcopalians on their side in regard both to the new communion office and to these usages, and several of the Scotch bishops adopted

their views. Bishop Campbell, who lived in London, went warmly along with them; and Bishop Gadderar, who was at one time a suffragan of Campbell's, is said to have carried away to Scotland a number of copies of the Non-jurors' communion service. These discussions revived among the Scottish Episcopalians the natural predilection that many of them had for a liturgy, but as their people were very favourable to this restraint, and as the clergy were not unanimous in siding with the extreme Non-jurors in England, it seems to have been thought better to build their foundation, in so far as regarded the Eucharist, upon the service-book attributed to Laud, which had a semblance of authority to support it, and which had at the same time a peculiar connection with the Scottish Church. Several reprints accordingly of this service were then published in Scotland, and one in particular by Ruddiman in 1724. The extreme party, however, among the Scottish Episcopalians were not satisfied with Laud's communion office as it stood, and changes were partially and gradually introduced into it. A copy of it belonging to Bishop Campbell was lately in existence with several prayers interpolated in his handwriting, and the words "militant here on earth" erased from the invitation to pray for the whole state of the Church. The Scottish Episcopalians never adopted an express prayer for the dead such as that which occurs in the so-called Liturgy of the Church of Jerusalem, as well as in the first liturgy of Edward VI., and in the Non-jurors' office of 1718. But the words "militant here on earth" were proposed to be omitted from Laud's service by the Scottish Episcopalians in order undoubtedly that the prayer for the whole Church might not be thought to exclude departed saints. Other changes upon Laud's service were also introduced; in particular, without noticing mere differences of arrangement, an explicit oblation of the gifts or elements by the words "*which we now offer to Thee*" was introduced in imitation of the English Non-juror service, instead of a mere reference to the memorial of which Laud's service makes mention. The significance of that addition is obvious from what somebody has called a sort of stage direction, found in Bishop Alexander's Prayer book, by having the word *eleva* written over against the words of offering. The differences now mentioned—namely, the omission of the words "militant here on earth," and the insertion of the express offering of the elements, were introduced into an edition of the "Scotch office," printed in 1733, and ascribed to Bishop Gadderar. Editions containing the same changes were published in 1755 and 1764, and other changes were then made. In the former of these the words in the invocation, "unto us," were changed into "to us," and in the edition of 1764 both "unto us" and "to us" are omitted, so as to make the invocation run thus—"that they may become the body and blood of thy most dearly beloved Son." This form, agreeing in this respect with the non-juror's office and the office of the Church of Jerusalem, came ultimately to prevail among the Scotch Episcopalians, particularly in the north-east of Scotland; but other forms continued to be published, and, in particular, in an edition printed in Edinburgh in 1796, the prayer in the invocation is that the gifts "may become the *spiritual* body and blood of thy most dearly beloved Son." I have not examined all the editions of the Scotch liturgy or service, but those I have mentioned are enough to show the variations that existed. Such, generally, is the history of the transition and changes through which the Episcopal Church passed in Scotland during the century that followed the Revolution. It had begun without a liturgy, but it ended with a form of a communion office of a very fluctuating and Protean character, but which was sufficiently distinguished from the communion office of the English Prayer book. On this Scotch office many of the Scotch Episcopalians set a high value, on the double ground, probably, that it formed a national distinc-

tion, and that it seemed to enunciate a higher doctrine on the subject of the sacrament. They clung to this peculiarity with something of that fervent zeal which is generally the effect of persecution when it does not amount to extermination. Their persecutions had indeed been severe, particularly from the time of the rebellion of 1745, and it might well be wondered that any remnant of them had at all survived. It might not have been inappropriate if they too had, like the Established Church, assumed the emblem of the burning bush, and the motto, "Nec tamen consumebatur." But other trials were at hand for them in the season of prosperity with which they were about to be visited. The accession of George III. brought a considerable mitigation of their hardships, and the death of the last lay member of the Stewart family in 1788 was thought to leave them at liberty to transfer their allegiance to the House of Hanover. The Scotch Episcopalians ceased to be non-jurors, and overtures were made to relieve them of the penalties under which they laboured. The traveller held fast his cloak against the assaults of the north wind, but surrendered it when the sun began to shine. The Scotch Episcopalians were now willing so far to abate their nationality as to adopt the English articles of religion, and they declared themselves to be in full communion with the Church of England, while before they had only apparently been in communion with the non-juring branch of it. They professed also their admiration of the English liturgy which they constantly used on ordinary occasions, and explained that though their Eucharistic service was the Scottish office nearly as authorised by King Charles the First, they did not make it a condition of communion, but allowed their clergy to use either the Scottish or the English office, and that some of them actually used the latter. (Grub. IV., p. 103.) On the faith of these conciliatory assurances, which we know from history were given by the Scotch bishop to the Primate of the English Church, the Act of 1792 was introduced and passed, repealing the penal laws as to those Episcopalian ministers who might subscribe the Thirty-nine Articles, and take the oath to Government; but a declaration was added that they should be incapable of holding any benefice in England unless they should be ordained by an English or Irish bishop. The Scotch Episcopalian Church adopted the English articles without qualification. Another step followed, by which a union was effected between the Scotch Episcopal Church and those persons and congregations in Scotland who were connected with the Church of England under ministers ordained by English or Irish bishops. Articles of Union were framed with this view, by which the English Episcopalians in Scotland came under the authority of the Scotch bishops, but reserved liberty to use the liturgy of the Church of England in all its offices. This union brought a great addition of strength to the Scotch Episcopalians, but like other alliances, it brought consequences with it that were not fully anticipated. The allies—like the Saxons who came to help the Britons against the Picts—soon came to gain an ascendancy over the friends who had invited their aid. The new congregations, and still more the additional adherents that were in process of time gained from England by the immigration of English families and the education of young persons in English schools and universities, were all prejudiced in favour of the English as compared with the Scotch communion office. The old Scotch Episcopalians took the alarm, and by the canons of 1811 and 1838 asserted the primary authority, and tried to preserve the practice of the Scotch office. The English office, however, confessedly gained ground, while the Scotch service became with many persons a stumbling-block and cause of offence. Its reputation perhaps suffered as much from its extreme admirers, who magnified the importance of its peculiarities, as from the attacks of its most eager opponents. This state of things not unnaturally led to the canons of 1863, by which the Scotch

office, though still allowed and authorised, is placed on a lower pedestal than it occupied before. The change coincides remarkably with the passing of the Act of 1865, removing the disability that previously attached to Scotch orders, and the passing of that Act, there is little doubt, was facilitated by the terms of the new canons. It is in these circumstances that the present action has been brought. It is difficult not to sympathise in some degree with the feelings of the pursuer, and others who may agree with him. An important feature in the service of his Church, distinguishing it from the Established Church of England, and at the same time thought to connect it with a tradition of remote antiquity, has been treated with some appearance of disparagement—not indeed obliterated, but thrown into the shade, and made subordinate to a different service, less distinctive and, as he thinks, less catholic; and this has been done upon the ground partly that this Scotch service is liable to the imputation of containing errors in doctrine and practices approaching to superstition, accusations to which countenance seems in some degree to be given by the recent changes. But the question for us to decide is not whether the pursuer's feelings are intelligible and natural, but whether his action is relevant and tenable. There is certainly a general relevancy in the case which the pursuer professes to make. He says that the Synod, whose members are here convened, have made a change in the constitution of the Scotch Episcopal Church which they had no right or power to make, either under the functions committed to them or in reference to the contract which the Church had entered into with the pursuer; and he alleges that he has thereby suffered a civil wrong. But a case that has a general relevancy may break down upon details, by failing to specify any facts and circumstances which support the general averment; and this, I think, is the case here. The Lord Ordinary has found that the grounds of reduction and averments on record are not relevant, or sufficient to support the conclusions of the action. His Lordship refers, in the first place, to the conclusions of the summons, in which damages are sought, and he explains the grounds on which he holds the pursuer's case to be here irrelevant. In all of the Lord Ordinary's remarks upon this part of the case I fully concur, and have nothing to add. With regard to the reductive and declaratory conclusions, the Lord Ordinary seems to me to rest his judgment upon the ground mainly that the questions raised relate to an ecclesiastical matter which involves no civil right. I do not say that the Lord Ordinary's views in this respect are erroneous. On the contrary, I concur in them generally. But there is one aspect of the case on which I entertain some doubt, and would wish to reserve my opinion. Suppose it could be held that the pursuer as he alleges was placed by the canons complained of in imminent peril of being deprived of or degraded from his orders, I am not satisfied that that may not involve a matter of civil injury from which the pursuer might seek protection. If, contrary to the canons and to the contract with him, the pursuer was threatened with the immediate prospect of degradation, there seems to me to be room for considering whether the possession of holy orders, and the loss of them through a wrongful act, do not involve privileges and capabilities that may infer civil or patrimonial consequences. Clerical orders conferred by a non-established church may have little or no civil effect in this part of the island. But they may possibly confer benefits elsewhere which may entitle the pursuer to have them preserved by the interference of a civil court. The pursuer may not be in a situation personally to urge this plea, or his complaints may be groundless, or his action premature, or not directed against the proper parties, but at present I should hesitate to throw it out on the mere ground that it involved no civil interest. It was suggested at the bar that the pursuer's orders could not be taken away. But this is a mistake.

The Church that confers orders can take them away; and the new canons contemplate the exercise of this power. The ground on which I am prepared, without difficulty, to adhere to the Lord Ordinary's interlocutor, is that the pursuer has not shown any excess of powers in the acts of the defenders, or any contract of which they have committed a breach. In these respects I consider the pursuer's statements to be wholly irrelevant and insufficient. The complaints of the pursuer are twofold—1. As to the way in which the Scotch office has been dealt with in the new canons; and 2. As to the position in which the pursuer is now placed as to the other services of the English Liturgy—1st. And first with regard to the Communion office. In this question and between these parties I consider one point to be clear—viz., that each of the two communion services referred to must be regarded, first, as resting upon sound doctrinal views; second, as in accordance with the Thirty-nine Articles of Religion: and, third, as being adequate and sufficient to convey the grace and exercise the sacred influence which are held to accompany this holy celebration. One service may please some tastes more than the other; one of them may be thought to express more clearly what is meant, or the other to guard more cautiously against the possibility of misconstruction. But both must be held by all the members of this community to be safe, sufficient, and orthodox. None of the parties here can be heard to say that either of the two is defective in essentials or at variance with scripture. Whether the preference be given to the one or to the other, both are sanctioned by all the canons, old and new, and it cannot be supposed that the Church would sanction what is defective or erroneous. Whatever its words may be, they must be construed in an orthodox sense. I wish to judge no man, but if there be any minister or bishop of the Scotch Episcopal Church that thinks the Scotch office superstitious or unscriptural, it humbly appears to me that the sooner he leaves this Church the better for his own peace of mind, as under the second section of the 30th canon of 1863 he may be compelled, if he becomes a bishop, to sanction it, which it might be difficult for him to do. On the other hand, I cannot listen to any allegations by the pursuer that the English office is defective or unsound. He has not said so on record, but in the course of debate his counsel said something to that effect, and suggested, in particular, that he could not conscientiously be present at synods or other meetings at which the English office might be used. Are we to understand from this that the pursuer could not worship or partake of the communion in a congregation which uses the English office, and that in this way one part of the Scottish Episcopal Church is not in communion with the other? This is a kind of schism which I do not understand, and which is not to be supposed or countenanced. I hold, then, that according to the canons of this community both services are substantially the same, and are different forms of the same observance. This, I think, was assumed and implied in the transactions that led to the Act 1792, to the union that took place in 1804, and to the canons of 1811 and 1838, which last the pursuer subscribed, and to which he refers as containing the charter of his rights. This being the case, the question is whether the alteration made by the canons of 1863 as to the relative position of these offices was *ultra vires* or contrary to contract. On this point it seems almost sufficient to refer to the 21st canon of 1838, which is the same also as the corresponding canon of 1811. It is there set forth as the right of the Church at large, and of every national church in particular, "to ordain, change, and abolish ceremonies or rights of the Church ordained only by man's authority." This privilege is asserted as the explanation and justification of the Scotch Church having one office while the Church of England has another. The communion service thus referred to is in this way expressly classed as one of those ceremonies or

rites ordained only by man's authority—*i.e.*, although the eucharist in itself is a divine injunction, the manner of celebrating it is a rite or ceremony of merely human authority, which every Church may order or vary as it thinks best. In the face of this declaration it seems impossible to question the right of the Scotch Episcopal Church to deal with the communion office in any manner consistent with sound doctrine; and as I have already shown that both of these offices must here be held to be unexceptionable, I cannot see how we can refuse effect to an enactment which merely alters the relative precedences of these two offices, both of which were already authorised. Reference is made by the pursuer to the 33d canon of 1838, which is said to limit the power of a general synod to alter canons only where the alterations are in conformity with the recognised constitution and acknowledged practice of the Church. But it is part of the constitution that the Church can alter rites and ceremonies, and it is not denied that the Synod represents the Church in this respect. With regard to the acknowledged practice, that can only mean that alterations are not to be at variance with the practice of the Church in essentials. It cannot mean that no practice can be changed, because every change of a canon must infer a change of practice. But what has been the acknowledged practice of this Church as to the communion service? It has been seen that when the Episcopalians formed part of the Established Church in Scotland they had no liturgy or set forms of any kind. Again, after the Revolution, they had no liturgy or settled forms, and when these came gradually to be introduced, it was done in an anomalous and irregular manner by individual bishops and congregations adopting certain forms, among which great discrepancy prevailed down to a very late period; while the form for which the pursuer contends has no sanction of any regular kind, nor any authorised text to which an appeal can be made. The canons of 1811 and 1838 are scarcely intelligible or consistent, and on this matter certainly do not support the pursuer's case. They speak of the authority which introduced the Scotch service, meaning obviously the authority of the King in 1637; but the office for which the pursuer contends, and which, he says, was sanctioned by these canons is not the King's office, but something materially different, and traceable to no authority whatever. The acknowledged practice of this Church indeed in this matter has been not to preserve stability, but to make constant changes in the communion office from time to time—a practice in accordance with the power of change asserted in the canons, however loosely it may sometimes have been exercised. Further, there can be no doubt that, looking to the practice for the period between 1838 and 1863, the tendency has been in the direction of the English office. This is not disputed by the pursuer. The Anglican view has gained ground from the obvious causes already referred to, and the feeling in favour of the Scotch office has diminished in point of extent, although it may not have diminished in point of intensity, where it remained at all. It was not unreasonable in the general synod to give effect to this change of feeling if they had the power to do so, and thus to bring the rule of the Church in conformity with the prevailing feeling. This is the *RATIO* set forth in the new canons, and not contradicted by the pursuer. The case of the pursuer seems to be that, under the canons of 1838 and in a question with him, the terms and position of the Scotch office were *immutable*. This surely cannot be maintained. It cannot be supposed that any Church would tie up its hands in this manner, in the very same breath in which it declares that every Church has an *inherent* right to alter rites and ceremonies, and that the communion service is one of the things to which that power extends. Suppose that the synod of 1863 had gone back to Laud's office itself, and had annulled all the recent additions and alterations to which it had been subjected by individual bishops

or parties in the Church, would that have been *ultra vires* of the synod, or a breach of contract with the pursuer? It would be very strange to say so; and yet the adoption of the English office is only an exercise of the same kind of power, and in the same direction. It may perhaps, indeed, be thought there is more difference between Laud's office and the Scotch office as it now stands than between Laud's office and the English liturgy. It must always, no doubt, be a limitation on the power of the Church or of the synod that any alteration made in the communion office shall be consistent with sound doctrine, and shall not affect the celebration of the sacrament as a divine institution; but if I am right in thinking that the English office must, between these parties, be held to be unobjectionable, no difficulty arises on this head. I can find, therefore, no excess of powers in anything the defenders have here done, and no contract between them and the pursuer which could prevent them from varying the comparative use or relative position of these two services. The utmost that the pursuer could make of this matter seems to be that it is a part of the constitution of this Church that there shall be two authorised services, and not one only; and that individual congregations shall be allowed their choice in this respect. I do not say that even this is clear, but it seems to be the utmost limit to which it is possible to extend the kind of contract on which the pursuer founds. Whether the Church will go farther than they have done in this matter, and seek by some future canon to oust the Scotch office altogether, and deprive it of any authority or observance, is a matter on which it is needless to speculate, and which may depend on whether it may be for the *maius bonum* of the Church that this should be done. It has not been done yet, and the pursuer and others of his way of thinking are by the new canon at full liberty to remain in communion with their brethren and use the Scotch office as long as they can form a congregation of which the majority is in favour of that service. Second, As to the use of the English Prayer Book, which the pursuer complains of having forced upon him in other services, I cannot see that the pursuer is placed by the canons of 1863 in a different position from what he occupied before. With regard to the burial service, many good men have objected to the indiscriminate way in which the deceased person is spoken of as a Christian brother or sister for whom the sure hope of a blessed resurrection may seem to be entertained. But in Scotland, where the pursuer's church is not established, he cannot be called upon to bury any who are not of his own communion, and he cannot surely object to its being supposed that such persons are in a state of acceptance where they have not been excommunicated, but retained in the bosom of the Church. Upon the whole, being clearly of opinion that the pursuer here has not shown any excess of powers, or any breach of contract, I am for adhering to the Lord Ordinary's interlocutor.

Saturday, Dec. 9.

FIRST DIVISION.

BATHIE v. BATHIE AND ANOTHER.

Husband and Wife—Divorce—Adultery, Held (aff. Lord Mure) that allegations of adultery were not proved.

Proof—Registration of Births Act—Extract from Register. An extract from a register of births proves only that the register contains the entry extracted, but does not prove the truth of what is entered.

Proof—Witness—Declinature to Answer. Observations as to the effect of a declinature to answer by an alleged paramour.