Parliament can be taken on the point, but I greatly doubt whether Parliament would sanction a power which, though it might be quite proper in a case like the present case, would in many cases be open to grave abuse.

LORD ADAM—I am of the same opinion, and think that we should instruct the Lord Ordinary to refuse remuneration here. As I understand this is a winding-up under supervision of the Court, and therefore is in the same position as a winding-up by the Court, in respect that any such remuneration requires the sanction of the Court. A committee of advice exists merely by custom, and there is no statutory provision on the subject in Scotland. No doubt it arose from the analogy of commissioners appointed to assist the trustee in a sequestration. There are special directions in England, but they are not applicable here. Now no doubt there have been large sums involved in this liquidation, and the committee of advice have had a good deal of trouble. But when these gentlemen undertook the office they must have foreseen that in the ordinary course of things a good deal of trouble would be involved. It is not alleged that they were asked to perform any special or individual work, and they ask for remuneration generally as a committee of advice. I make that observation because, as your Lordship has pointed out, the English rules provide that it is only where some specific work is asked for that remuneration can be given. A different question might arise if a member of the committee of advice were called upon for some specific and individual work, but I agree with your Lordship that a bad precedent would be created if we were to sanction remuneration in such a case as this. It is said that the shareholders made it a condition in appointing a committee of advice that they should receive remuneration, but in my opinion that was a condition that the shareholders had no right to make. I therefore agree with the opinion expressed by Lord Stormonth Darling in the case of *Brewis* (37 S.L.R. 669).

LORD M'LAREN and LORD KINNEAR concurred.

The Lord Ordinary refused the prayer of the note, so far as craving for authority to make a payment to the members of the committee of advice.

Counsel for the Liquidators—Graham—Stewart. Agents—Davidson & Syme, W.S.

Counsel for the Committee of Advice — Dundas, K.C. — Younger. Agents — Beveridge, Sutherland, & Smith, S.S.C.

Friday, July 4.

SECOND DIVISION.

[Lord Low, Ordinary.

BANNATYNE *v.* THE UNITED FREE CHURCH OF SCOTLAND.

Church—Dissenting Church—Presbyterian Dissenting Church—Property of Church—Union with Another Dissenting Presbyterian Church—Dissent of Minority to Union — Fundamental Principle of Church—Establishment Principle—Voluntary Principle—Claim by Minority to Property of Church in respect of Abandonment of Establishment Principle—Barrier Act—Legislative Power of Dissenting Presbyterian Church.

The Free Church of Scotland and the United Presbyterian Church, two dissenting Presbyterian associations or bodies of Christians in Scotland, entered into a union, and formed the United Free Church of Scotland. A minority of the Free Church dissented from the Union and raised an action in which they claimed declarator that they constituted the Free Church, and as such were entitled to the whole property of the Church, and that the majority had left the Free Church and forfeited their rights in the Church property by uniting with the United Presbyterian Church. The ground of the claim made by the minority was that while the Free Church had maintained as a fundamental principle that the State was bound to maintain and support an establishment of religion, the United Free Church was an association of Christians which did not embody in its constitution, or provide for maintaining the principle of establishment; that the majority of the Free Church who had entered into the union had abandoned the principle of establishment; and that the establishment principle being a fundamental principle of the Free Church was one which a majority of an Assembly of the Free Church had no power to abandon. The Act of Assembly under which the Free Church had entered into the union was passed by the Assembly after the procedure laid down in the Barrier Act of 1697, an Act of the General Assembly of the Church of Scotland, adopted by the Free Church when they quitted the establishment, whereby certain procedure was enacted for preventing any sudden alteration or innovation in "doctrine or worship or discipline or government." On a proof *scripto* the Court *assoilzied* the defenders (in substance *affirming* but *varying* the judgment of Lord Low, Ordinary, who having heard the case as on relevancy, had dismissed the action)—*per* the Lord Justice-Clerk and Lord Trayner on the ground that although at first the Free Church had maintained the establishment principle it was evident from the

very inception and whole history of the Church that it was not a principle which they treated as fundamental and essential, the Free Church having abandoned the establishment because it could not be enjoyed by them consistently with their views on spiritual independence, and that consequently the abandonment of the establishment principle did not infer the forfeiture of the property of the Church in favour of a dissenting minority who continued to maintain it—and *per* Lord Young on the ground that there is no rule of law to prevent a dissenting church from abandoning any principles however essential and fundamental; that although a court of law may be called upon to protect the purposes for which according to the titles Church property is held, the title to property which is held on an *ex facie* absolute title by a church, no specific or otherwise clearly indicated creed being stated in the title as the object for the promotion of which it is held, cannot be limited by reference not expressed but assumed to be implied to the fundamental and essential doctrines of the Church as determined by the Court in the event of dispute; that the renunciation or modification and interpretation of its principles are matters for the determination of the Church and not of the Court; and that in this case no ground had been shown for interfering with the decision of the Churches upon the question of Union.

Opinion per the Lord Justice-Clerk and Lord Trayner that under the Barrier Act the Free Church had power to abandon the establishment principle if it were found, as was the case here, that "the more general opinion of the Church" as ascertained under that Act "agreed thereunto."

This was an action at the instance of (1) the "General Assembly of the association or body of Christians known as the Free Church of Scotland acting through its Commission of Assembly duly appointed," and the Reverend Colin A. Bannatyne, Culter, as Moderator, and others, as members of the said Assembly and its said Commission, and of the said association as such members and as representing said General Assembly, Commissioners of Assembly, and association, and also as individuals; and (2) the members of a committee appointed and authorised by the said General Assembly to sue for and on behalf of said General Assembly of the Free Church of Scotland, against (*first*) the general trustees surviving accepting and acting under certain Acts of General Assembly of the Free Church of Scotland; (*second*) the general trustees of the Free Church of Scotland alleged to have been appointed by the General Assembly of the Free Church of Scotland on 30th October 1900 for holding the whole property of the Free Church of Scotland from and after the 31st day of October 1900, being also general trustees of the association or body of Christians calling themselves the United Free Church of Scotland alleged to have been appointed by Act of a General Assembly of said Church of 31st October 1900; and (*third*) the Moderator, clerk, depute-clerk, and others, members of the General Assembly of the said association or body of Christians calling themselves the United Free Church of Scotland. assembled at Edinburgh on 31st October 1900, and being the members of the commission of said General Assembly . . . all members of said association or body of Christians, as such members and as representing the said association, its said General Assembly, and commission thereof."

The question involved in the case was whether the majority of the ministers and members of the Free Church had left that Church and forfeited all right to the Church property by entering into a union with the United Presbyterian Church.

The conclusions of the action were *in the first place* for declarator—"(1) That the whole lands, properties, sums of money, and others which stood vested as at the 30th day of October 1900 in the defenders . . . (enumerated in the first place) . . . were vested in and held by the said defenders as trustees under various trusts for behoof of . . . the Free Church of Scotland, and that no part of the said lands, properties, or funds so vested in or held by them might lawfully be diverted to the use of any other association or body of Christians, or at least of any other association or body of Christians not professing, adhering to, and maintaining the whole fundamental principles embodied in the constitution of the said Free Church of Scotland, without the consent of the said Free Church of Scotland, or at least without the unanimous assent of the members of a lawfully convened General Assembly of the said Church; (2) that the association or body of Christians calling itself the United Free Church of Scotland is an association or body of Christians associated under a constitution which does not embody, adopt, and provide for maintaining intact the whole principles which are fundamental in the constitution of the said Free Church of Scotland; (3) that the said United Free Church of Scotland has no right, title, or interest in any part of the said lands, property, or funds; (4) that such of the defenders as, having formerly been members of the Free Church of Scotland, have adhered to and associated themselves as members of the said United Free Church, have thereby amitted, lost, and forfeited all right and title to and beneficial interest in the said lands, property and funds (save and excepting . . . vested rights) . . . ; (5) that . . . the defenders first enumerated, being the general trustees for the Free Church of Scotland as at 30th October last, or the defenders second enumerated, or such others of the defenders as may now be possessed of or vested in the said lands, property, and funds, may not lawfully apply the same or any part thereof for behoof of the said . . . United Free Church of Scotland, or (saving as aforesaid) of any of the defenders who may adhere and associate themselves as

members of the same; (6) that the pursuers and those adhering to and lawfully associated with them conform to the constitution of the Free Church of Scotland are and lawfully represent the said Free Church of Scotland, and are entitled to have the whole of said lands, property, and funds applied according to the terms of the trusts upon which they are respectively held for behoof of themselves and those so adhering to and associated with them, and their successors, as constituting the true and lawful Free Church of Scotland, and that the defenders . . . the general trustees foresaid, or the defenders second enumerated, or those of the defenders in whose hands or under whose control the said lands, property, and funds may be for the time being, are bound to hold and apply the same for behoof of the pursuers and those adhering to and associated with them as aforesaid, and subject to the lawful orders of the General Assembly of the said Free Church of Scotland... and in particular that they are bound to denude themselves of the whole of said lands, property, and funds in favour of such parties as may be nominated as general trustees by a General Assembly of the Free Church of Scotland, but subject always to the trusts upon which the said lands, property, and funds were respectively held by the said defenders for behoof of the Free Church of Scotland as at 30th October 1900." *In the second place*, the summons concluded alternatively for declarator, "that the pursuers and those who may adhere to them, have not by declining to adhere to the said association or body of Christians known as the United Free Church of Scotland, and by electing to maintain themselves in separation therefrom as an association or body of Christians under the name and maintaining the whole standards, constitution, and distinctive principles of the said Free Church of Scotland as heretofore existing, thereby lost or forfeited any right, title, or interest which they had at or prior to the 30th day of October 1900 in the said lands, property, and funds, but that they are entitled to the use and enjoyment of the same (subject to the trusts aforesaid), either by themselves or along with such of the defenders as, being formerly members of the Free Church of Scotland, have now associated themselves as members of the said United Free Church of Scotland, or others having right thereto or interest therein, and that in such proportion and upon such conditions as may be determined by our said Lords in the course of the process to follow hereon." The summons further concluded for interdict against the defenders first and second called applying to the uses of the United Free Church any part of the said lands, property, and funds, and for interdict against the whole defenders from molesting or interfering with the pursuers in the enjoyment of the said lands and others.

The United Free Church was formed by a union between the Free Church and the United Presbyterian Church.

The particular principle of the Free Church which the pursuers alleged that the United Free Church did not adopt and embody in their constitution was the establishment principle, according to which it is the duty of the State to maintain and support an establishment of religion. This princible the pursuers averred was a fundamental principle of the Free Church.

The United Presbyterian Church had maintained the voluntary principle. They denied any right or duty on the part of the State to maintain and support the Church, and held that it was neither lawful nor expedient for the State to do so. The pursuers contended that by union with a Church professing this doctrine of voluntaryism the majority of the Free Church had abandoned that Church's fundamental doctrine with regard to the question of establishment.

The Free Church had originally adopted the constitution of the Established Church of Scotland, though parted from it by strict opinions on the subject of spiritual independence; and the pursuers adduced a number of Acts of the Established Church, the Free Church, and the United Presbyterian Church, and other documents, on which they relied in support of their averments that the establishment principle was a fundamental principle of the Free Church, and that it could not be modified or abandoned by a majority of the Free Church Assembly, and that union with the United Presbyterian Church involved abandonment of that principle and secession from the Free Church.

The following statement of the history of the Free Church, and more particularly the history of its attitude towards the establishment principle is taken from the opinion of the Lord Justice-Clerk:—"The community which existed for a long time under the name of the Free Church of Scotland was originally formed by a number of ministers and members of the Established Church of Scotland who held that they could not without sacrificing the Church's liberty and authority in spiritual matters remain associated with the Church as established, seeing that the civil power asserted to itself the right to exercise powers in connection with the induction of ministers in particular, which were—as those who formed the Free Church held—not conferred by the constitution, and were an invasion of the jurisdiction of the Church courts, subverting its government, and attempting to coerce these courts in the exercise of their purely spiritual functions (Claim, Declaration, and Protest of 1842). In seceding from the Established Church they made certain declarations of their faith and beliefs, and among others regarding the propriety of an establishment of religion by the State as being part of the duty of the civil magistrate. The form which these declarations took in the proceedings which led up to the Disruption was that of expression of the high value attaching to the existing connection with the State, and the temporal benefits thereby secured to the Church for the advantage of her

people (Claim, Declaration, and Protest of 1842), and also of expression of 'the right and duty of the civil magistrate to maintain and support an establishment of religion,' and of the reservation of the right to strive to secure the performance of this duty according to the Scriptures and in implement of statute. The declarations thus made before the Disruption are the most strongly expressed which are to be found in any of the documents. There are numerous references in later documents issued by the authority of the Free Church in which allusion is made to the duty of the civil magistrate in relation to the support of religion. In the Model Trust Deed of 1844 a passage is imported from the protest which speaks of 'our enforced separation from an Establishment which we loved and prized.' In a pastoral address delivered to the Free Churches in 1843 the matter is thus referred to—'Long was it the peculiar distinction and high glory of the Established Church of Scotland to maintain the whole Headship of the Lord Jesus Christ, His exclusive sovereignty in the Church, which is His kingdom and house. It was ever held by her, indeed, that the Church and the State, being equally ordinances of God and having certain common objects connected with His glory and the social welfare, might and ought to unite in a joint acknowledgment of Christ, and in the employment of the means and resources belonging to them respectively for the advancement of His cause. But while the Church in this manner might lend her services to the State, and the State give its support to the Church, it was ever held as a fundamental principle that each still remained, and ought under all circumstances to remain, supreme in its own sphere and independent of the other. On the one hand, the Church having received her powers of internal spiritual government directly from her divine Head, it was held that she must herself at all times exercise the whole of it under a sacred and inviolable responsibility to Him alone, so as to have no power to fetter herself by a connection with the State or otherwise in the exercise of her spiritual functions. And in like manner in regard to the State, the same was held to be true on the same grounds and to the very same extent in reference to its secular sovereignty. It was maintained that as the spiritual liberties of the Church bequeathed to her by Her divine Head were entirely beyond the control of the State, so upon the other hand the State held directly and exclusively from God, and was entitled and bound to exercise under its responsibility to Him alone its entire secular sovereignty, including therein whatever it was competent for or binding upon the State to do about sacred things or in relation to the Church, as for example, endowing and establishing the Church, and fixing the terms and conditions of that establishment.'

"In 1851 the Free Assembly passed an Act and Declaration 'anent the publication of the Subordinate Standards and other authoritative documents of the Free Church of Scotland.' In that document it is declared that the Church has 'always strenuously advocated the doctrine taught in Holy Scripture—that nations and rulers are bound to own the truth of God, and to advance the kingdom of His Son'—and again, 'holding firmly to the last, as she holds still and through God's grace will ever hold, that it is the duty of civil rulers to recognise the truth of God according to His Word, and to promote and support the kingdom of Christ without assuming any jurisdiction in it or over it, and deeply sensible, moreover, of the advantages resulting to the community at large, and especially to its most destitute portions, from the public endowment of pastoral charges among them.' In the year 1853 the General Assembly of the Free Church passed a resolution in which they declared 'that it is free to the members of this Church or their successors at any time . . . when there shall be a prospect of obtaining justice, to claim restitution of all such civil rights and privileges and temporal benefits and endowments' as they had been compelled to give up. Later, in 1873, when an Act of Assembly was being passed regarding mutual eligibility of ministers of the United Presbyterian, Reformed Presbyterian, and Free Churches, the Assembly declared:—'In passing this overture into a standing law, the General Assembly think it right to declare, as they hereby do declare, their adherence to the great fundamental principles of this Church regarding—First, the sole and supreme authority of the Lord Jesus Christ, and His exclusive right to rule in and over His own Church, and the consequent obligation of His Church to be regulated in all her proceedings by His Word alone, for which end she claims to be protected in the maintenance of a complete independence in spiritual matters, and immunity from all coercion and control from without; and regarding, secondly, the prerogative of the Lord Jesus Christ as Head over all things to His Church, and supreme over nations and their rulers, who are consequently bound, collectively and officially as well as individually and personally, to own and honour His authority, to further the interests of His Holy religion, and to accept the guidance of His Word as making known His mind and will.' In 1876 the Free Church, after the formal procedure prescribed to which I shall refer later, entered into an incorporating union with the Reformed Presbyterian Church, a community which certainly did not hold the establishment principle, they having all along since 1689 declined to become members of the Church of Scotland as established, and declaring to the last that 'we still abide by our objection to the Revolution Settlement, nor do we commit ourselves to an approval of an alliance of the Church with the British State as at present constituted, having in view especially the unscriptural character of its ecclesiastical relations,' and they stipulated that 'on entering into the union the mem-

bers of the Reformed Presbyterian Church were free to retain and abide by the views and principles hitherto retained by them."

"After this time the Free Church, in contemplation of a possible union with the United Presbyterian Church, made through its General Assembly several declarations in regard to the Standards of the Faith, and as to the sense in which certain declarations of the Confession of Faith might be construed. They also made modifications in regard to the formulas, assent to which was to be required from probationers and deacons before ordination. In regard to these formulas, it may be noticed in passing that in none of them, from the eighteenth century downwards, whether in the Established or Free or United Presbyterian Church, were intending office-bearers required to make any declaration in regard to establishment or endowment by the State, the only declarations being those inserted in some of the later formulas to emphasise the exclusive right of the Church to self-government in all spiritual matters. During the latter years of the last century it appears that the Free Church thought it necessary to pass Declaratory Acts 'to remove difficulties and scruples which had been felt by some in reference to the declaration of belief required from persons who receive licence or are admitted to office,' and in the Declaratory Act of 1892 it was declared 'that while diversity of opinion is recognised in this Church on such points of the Confession as do not enter into the substance of the reformed faith therein set forth, the Church retains full authority to determine in any case which may arise what points fall within this description.' This declaration was undoubtedly made in view of a union with the United Presbyterian Church, and was followed up in 1900 by an overture regarding such proposed union being sent down to the presbyteries, and by a declaration of the Commission of Assembly in October of that year to the effect that 'the negotiations for union have been expressly conducted on the footing that neither of the Churches is required to relinquish any principle it has hitherto maintained,' and that the Free Church in entering on union adhered to her previous declarations as to the Headship of Christ over the Church and to the Headship of Christ over the nations, as set forth in the Confession of Faith. The Uniting Act was passed on 31st October 1900, and the United Assembly then passed a declaration in which the following clauses occur:—

"The Larger and Shorter Catechisms of the Westminster Assembly, received and sanctioned by the General Assembly of 1648, and heretofore enumerated among the doctrinal standards of the United Presbyterian Church, continue to be received in the United Church as manuals of religious instruction long approved and held in honour by the people of both Churches.

"As this union takes place on the footing of maintaining the liberty of judgment and action heretofore recognised in either of the Churches uniting, so, in particular, it is hereby declared that members of both Churches, and also of all Churches which in time past have united with either of them, shall have full right, as they see cause, to assert and maintain the views of truth and duty which they had liberty to maintain in the said Churches.'

"This document containing these declarations closed the proceedings for union, which from that time took effect."

The establishment principle to which the Free Church expressed her adherence in 1843, and which the pursuers relied on as fundamental, was contained in the 3rd section of the 23rd Chapter of the Westminster Confession of Faith in the following terms:—"III. The civil magistrate may not assume to himself the administration of the word and sacraments or the power of the keys of the kingdom of heaven, yet he hath authority, and it is his duty to take order that unity and peace be preserved in the Church; that the truth of God be kept pure and entire; that all blasphemies and heresies be suppressed; all corruptions and abuses in worship and discipline prevented or reformed; and all the ordinances of God duly settled, administered, and observed. For the better effecting whereof he hath power to call synods, to be present at them, and to provide that whatsoever is transacted in them be according to the mind of God."

The Claim, Declaration, and Protest addressed to the Queen in 1842 by the Established Church in reference to the principle enunciated as above in the Confession of Faith, and in consequence of the assertion of the civil courts of jurisdiction in ecclesiastical matters, in particular with reference to the settlement of ministers, proceeded on the narrative that "Whereas it is an essential doctrine of this Church, and a fundamental principle in its constitution, as set forth in the Confession of Faith thereof, in accordance with the Word and law of the most holy God, that while 'God, the supreme Lord and King of all the world, hath ordained civil magistrates to be under him over the people for his own glory and the public good, and to this end hath armed them with the power of the sword' (ch. xxiii. sec. 1); and while 'it is the duty of people to pray for magistrates, to honour their persons, to pay them tribute and other dues, to obey their lawful commands, and to be subject to their authority for conscience sake,' 'from which ecclesiastical persons are not exempted' (ch. xxiii. sec. 4); and while the magistrate hath authority, and it is his duty, in the exercise of that power which alone is committed to him, namely, 'the power of the sword,' or civil rule as distinct from the 'power of the keys' or spiritual authority expressly denied to him, to take order for the preservation of purity, peace, and unity in the Church, yet The Lord Jesus, as King and Head of his Church, hath therein appointed a government in the hand of Church officers distinct from the civil magistrate (ch. xxx. sec. 1); which government is ministerial,

not lordly, and to be exercised in consonance with the laws of Christ and with the liberties of His people. . . . And whereas this Church, highly valuing, as she has ever done, her connection on the terms contained in the statutes hereinbefore recited, with the State, and her possession of the temporal benefits thereby secured to her for the advantage of the people, must nevertheless, even at the risk and hazard of the loss of that connection and of these public benefits—deeply as she would deplore and deprecate such a result for herself and the nation—persevere in maintaining her liberties as a Church of Christ, and in carrying on the government thereof on her own constitutional principles, and must refuse to intrude ministers on her congregations, to obey the unlawful coercion attempted to be enforced against her in the exercise of her spiritual functions and jurisdiction, or to consent that her people be deprived of their rightful liberties."

The Protest of 1843 by the Commissioners, who constituted the First Assembly of the Free Church, following on the rejection by the Legislature of the Claim, Declaration, and Protest of 1842, concluded in the following terms:—"Finally, while firmly asserting the right and duty of the civil magistrate to maintain and support an establishment of religion in accordance with God's Word, and reserving to ourselves and our successors to strive by all lawful means, as opportunity shall in God's good providence be offered, to secure the performance of this duty agreeably to the Scriptures, and in implement of the statutes of the kingdom of Scotland, and the obligations of the Treaty of Union as understood by us and our ancestors, but acknowledging that we do not hold ourselves at liberty to retain the benefits of the Establishment, while we cannot comply with the conditions now to be deemed thereto attached, we protest that in the circumstances in which we are placed it is and shall be lawful for us, and such other Commissioners chosen to the Assembly appointed to have been this day holden as may concur with us, to withdraw to a separate place of meeting for the purpose of taking steps for ourselves and all who adhere to us—maintaining with us the Confession of Faith and Standards of the Church of Scotland as heretofore understood — for separating in an orderly way from the Establishment."

An "affectionate representation" was issued by that First Assembly of the Free Church containing an address delivered by the Moderator, in which the attitude of the Church towards the establishment principle was explained as follows:—"The voluntaries mistake us if they conceive us to be voluntaries— . . . that is to say, though we quit the Establishment, we go out on the establishment principle; we quit a vitiated Establishment, but would rejoice in returning to a pure one. To express it otherwise, we are the advocates for a national recognition and a national support port of religion, and we are not voluntaries."

An Act and Declaration anent the publication of the subordinate standards and other authoritative documents of the Free Church was passed by the Assembly in 1851, in which the course adopted in 1843 was referred to as "publicly renouncing the benefits of the national establishment under protest that it is her being Free and not her being Established that constitutes the real historical and hereditary identity of the Reformed National Church of Scotland."

The Free Church at her inception held herself to be the Church of Scotland quitting the Establishment, and she adopted as part of her constitution, *inter alia*, an Act passed by the General Assembly of the Church of Scotland in 1697 entitled the Barrier Act, whereby "for preventing any sudden alteration or innovation or other prejudice to the Church in either doctrine or worship or discipline or government thereof," the Assembly enacted that before any General Assembly of the Church should pass any Acts which were to be binding rules and constitutions to the Church, certain procedure should be observed, in the terms quoted in the opinion of the Lord Justice-Clerk, *infra*.

In 1844 the General Assembly of the Free Church passed an Act anent a model trust-deed for vesting places of worship in trustees for congregations. The model trust-deed provided that the trustees should hold the property conveyed to them, *inter alia*, "*First*, upon trust, that the building or place of worship erected or in the course of being erected upon the ground hereby disponed, or any building or place of worship that may hereafter be built and erected thereon, with the appurtenances thereof, shall in all time coming be used, occupied, and enjoyed as and for a place of religious worship by a congregation of the said body of Christians called the Free Church of Scotland, or of any united body of Christians composed of them, and of such other body or bodies of Christians as the said Free Church of Scotland may at any time hereafter associate with themselves under the foresaid name of the Free Church of Scotland, or under whatever name or designation they may assume and to be made use of by such congregation occupying and enjoying the same for the time being, in the way and manner in which, by the usages of the said body or united body of Christians, places of religions worship may be or are in use to be occupied and enjoyed , . . *Fourthly*, upon further trust that the said trustees or trustee acting for the time shall at all times be subject in the management and disposal of the said building or place of worship, and appurtenances thereof, and whole subjects hereby disponed, and in all matters and things connected therewith, to the regulation and direction of the General Assembly for the time being of the said body or united body of Christians, and shall be liable and bound to conform to, implement, and obey, all and every the Act or Acts of the General Assembly for the time being of the said body or united body of Christians in reference thereto."

The Act anent the Model Trust-Deed enacted as follows:—"That in the event of

a certain proportion of the ministers and elders, members of the Church courts, separating from the general body and claiming still to be the true *bona fide* representatives of the original protesters of 1843, and to be carrying out the objects of the protest more faithfully than the majority, then whatever the courts of law may determine as to which of the contending parties is to be held to be the Free Church, it shall be competent for each congregation, by a majority of the members in full communion, to decide that question for itself so far as the possession and use of their place of worship and other property are concerned, with or without compensation to the minority, such compensation to be settled by arbitration. It being understood that a disruption of the Church in the sense referred to in this extract shall consist only in the simultaneous separation — that is, the separation from the general body *at once* or within a period not exceeding three months of at least one-third of the ordained ministers of the church having the charge of congregations in Scotland, and that such separation shall take place only on the professed grounds stated in the said deliverance of the Commission of Assembly."

The United Presbyterian Church was formed in 1847 by the union of the Secession Church and the Relief Church.

By the basis of union of the United Presbyterian Church adopted at her constitution in 1847 it was declared—Head 2—"That the Westminster Confession of Faith and the Larger and Shorter Catechisms are the confessions and catechisms of this Church, and contain the authorised exhibition of the sense in which we understand the Holy Scriptures; it being always understood that we do not approve of anything in these documents which teaches or may be supposed to teach compulsory or persecuting and intolerant principles in religion."

In the rules and forms of procedure of the United Presbyterian Church, in which, *inter alia*, her principles were defined, it was declared in reference to the powers of that Church for the administration of her affairs as follows: —"She is entirely distinct from civil governments, and requires nothing from them but that civil protection to which all her members in their civil capacity are fully entitled. She addresses herself to the consciences and hearts of men disclaiming all compulsory power over their persons or property, and the right of private judgment in all matters which relate to religion is universal and inalienable."

In May 1900 the United Presbyterian Synod unanimously adopted a recommendation in the report of a committee on disestablishment and disendowment in the following terms:— "The Synod having heard the report, approves the action of the committee in upholding the Church's testimony on the proper relations of Church and State, and in support of religious equality by disestablishment and disendowment; renews its previous testimonies on these heads, with former instructions and findings of last year on the state of the Church of England. Finally, resolves to petition Parliament for the disestablishment and disendowment of the State Churches of England and Scotland."

No question was raised in the case as to the competency of the action of the United Presbyterian Church in uniting with the Free Church.

The union between the Free Church and the United Presbyterian Church was formally concluded on 31st October 1900, and the Assembly of the United Free Church then held, adopted, *inter alia*, the following declarations:—"1. The various matters of agreement between the Churches with a view to union are accepted and enacted without prejudice to the inherent liberty of the United Church as a Church of Christ to determine and regulate its own constitution and laws as duty may require in dependence on the grace of God and under the guidance of His Word . . . . 3. As this union takes place on the footing of maintaining the liberty of judgment and action heretofore recognised in either of the Churches uniting, so, in particular, it is hereby declared that members of both Churches, and also of all Churches which in time past have united with either of them, shall have full right as they see cause to assert and maintain the views of truth and duty which they had liberty to maintain in the said Churches."

The same Assembly passed an Act anent questions and formula, whereby the following question, *inter alia*, was prescribed to be put to ministers at ordination or induction:—"2. Do you sincerely own and believe the doctrine of this Church set forth in the Confession of Faith approven by Acts of General Synods and Assemblies; do you acknowledge the said doctrine as expressing the sense in which you understand the Holy Scriptures, and will you constantly maintain and defend the same, and the purity of worship in accordance therewith?" The corresponding question prescribed by the Free Church formula in 1846 was as follows:— "Do you sincerely own and declare the Confession of Faith approven by former General Assemblies of this Church to be the confession of your faith; and do you own the doctrine therein contained to be the true doctrine which you will constantly adhere to?" The corresponding question in the formula of the United Presbyterian Church, as adjusted by the Synod in 1879, was in the following terms:—"2. Do you acknowledge the Westminster Confession of Faith and the Larger and Shorter Catechisms as an exhibition of the sense in which you understand the Holy Scriptures?"—this acknowledgment being made in view of the explanations contained in the Declaratory Act of Synod thereanent.

The case was heard before the Lord Ordinary (Low) as on relevancy, and on 9th August 1901 his Lordship pronounced the following interlocutor: — "Dismisses the action, and decerns: Finds the pursuers liable in expenses," &c.

Opinion—"In October 1900 the Free Church of Scotland and the United Presbyterian Church of Scotland united under the name of the United Free Church of Scotland. The pursuers represent a minority of the Free Church who objected to the Union, and refused to be parties to it on the ground that it could not be effected consistently with the standards and constitution of the Free Church.

"The position taken up by the pursuers is that the ministers and members of the Free Church who refused to be parties to the Union now constitute the Free Church of Scotland, and in this action they claim that they are entitled to the means and estate of the Free Church which at the date of the Union were held by trustees for behoof of the Free Church.

"The Union was accomplished after many years of negotiation, and after the procedure by which, according to the laws of the Church, 'the more general opinion of the Church' is ascertained. Thus at the meeting of the General Assembly in May 1899 the 'Union Committee' submitted a report embodying a 'Plan of Union.' The Assembly approved of the report, and adopted an overture enacting and ordaining that the Plan of Union 'is authorised and accepted by this Church with the view to an incorporating union with the United Presbyterian Church as a plan to come into operation as soon as a uniting Act shall have been passed by the General Assembly with consent of a majority of Presbyteries of the Church.' That overture was transmitted to the Presbyteries of the Church for their opinion, and it was approved by them by a very large majority, and in the following May (1900) the General Assembly passed an Act in terms of the overture. The same Assembly sent another overture to the Presbyteries embodying an Act authorising a union. That overture also obtained the approval of a large majority of the Presbyteries, and at a meeting of the General Assembly held in October 1900 the Act was passed by a majority of 643 to 27. The procedure which I have narrated was taken in terms of what is called the Barrier Act. That was an Act which was originally passed by the Church of Scotland in 1697, and which was adopted by the Free Church. It provided that the General Assembly before passing any Act making an alteration or innovation either 'in doctrine or worship or discipline or government' of the Church, should first lay before the Assembly an overture (that is, a proposal embodying the terms of the Act), which if adopted by the Assembly should be remitted to the consideration of the Presbyteries, and if the result of the remit to the Presbyteries was to shew that the proposed Act was in accordance with 'the more general opinion of the Church,' then and not sooner the Assembly was authorised to pass it into law.

"The Union therefore was effected in the most formal way, and it cannot be challenged unless it was a transaction which it was not in the power of the Church, acting by its General Assembly, to effect contrary to the wishes of a minority.

"The case of the pursuers is that the Union was incompetent, 1st, because it involved a sacrifice of principles which formed a fundamental and essential part of the constitution of the Free Church; and 2ndly, because the Free Church could not unite with any other Church except with the consent of all her members.

"The defenders on the other hand maintain that no fundamental or essential principle was violated by the Union, and that, that being so, it was competent for the General Assembly to carry out the Union, acting by a majority of its members, after the sense of the Church had been taken in the manner provided by the Barrier Act. The defenders, however, further propounded a view which, if sound, would admit of a very easy determination of the question at issue. They argued that the constitution of the Church—its principles and doctrine—were whatever the General Assembly might declare them to be.

"I am not prepared to assent to the latter argument. Large as the powers of the General Assembly of the Free Church in my opinion were, I do not think that they were unlimited. In the case of the Free Church (as in the case of every Church), there were certain doctrines and principles so essential that without them the Church would cease to exist. I do not think that the General Assembly could repudiate or materially alter such doctrines and principles. For example, the General Assembly could not in my opinion have competently passed an Act declaring that the Westminster Confession of Faith was no longer accepted by the Church, and enacting that the government of the Church should in the future be Episcopalian and not Presbyterian, because that would have been to change the Church from being a Reformed Presbyterian Church into something very different.

"On the other hand, in regard to matters which were not of the essential nature to which I have referred, I am of opinion that the General Assembly of the Free Church was supreme. The Free Church was framed as regards its judicatories—their powers, functions, and forms of procedure—upon the model of the Established Church of Scotland, and the General Assembly of the Established Church is a body which has not only judicial and executive but legislative powers. To go no further than the Barrier Act, which I have mentioned, its terms are instructive as showing the scope of the power of the General Assembly in the way of legislation. That Act speaks of Acts of Assemblies making 'alterations or innovations . . . in either doctrine or worship or discipline or government,' not for the purpose of restricting the powers of the General Assembly, but to secure by the procedure enacted that such alterations and innovations should not be sudden or to the prejudice of the Church. And indeed it was necessary that the Supreme Court and Council of the Church should have large powers of a legislative nature even in regard

to matters of faith and doctrine. For example, the Established Church accepted the Westminster Confession as containing the sum and substance of the doctrine of the Reformed Churches. That Confession is a document which is open to interpretation, and which has been interpreted in different senses, with equal confidence, by different sects. Accordingly it was necessary that the Supreme Council of the Church should have the power, not only of deciding questions of doctrine which came before it judicially, but of declaring and enacting, as occasion required for the peace or welfare of the Church, what was the sense in which the Church interpreted particular passages in the Confession of Faith, or in other words, what the doctrine of the Church was. I am accordingly of opinion that the Declaratory Act of 1892, in regard to which there was a great deal of argument, passed as it was after a reference to the Presbyteries under the Barrier Act, was a legitimate exercise of the power belonging to the General Assembly of the Free Church, and that the pursuers' case is not well founded in so far as it is rested on the averment that that Act was *ultra vires* of the Assembly.

"The serious question seems to me to be, whether it was not (to use the phraseology of the Claim, Declaration, and Protest of 1842) 'an essential doctrine and fundamental principle in the constitution' of the Free Church, that it was (I now quote from the Protest of 1843) 'the right and duty of the Civil Magistrate' (the State) 'to maintain and support an establishment of religion in accordance with God's Word;' and whether the Union with the United Presbyterian Church did not necessarily involve an abandonment of that principle?

"There is no doubt that the founders of the Free Church when they left the Established Church in 1843 did so declaring that they adhered to the principle of an Established Church, and that they seceded only because as the law then stood the Church did not possess that independence in what they regarded as matters spiritual which in their view was essential in order to give effect to the cardinal doctrine of the Headship of Christ.

"On the other hand it seems to me to be equally certain that the United Presbyterian Church never read the Confession of Faith as laying down that it is the right and duty of the Civil Magistrate to maintain and support an Established Church. There does not appear to be any material difference between the two Churches upon the point so far as their standards are concerned, but the view of the United Presbyterian Church as a whole has always been that it is not within the province of the Civil Magistrate to endow the Church out of public funds, and that the Church ought not to accept State aid, but ought to be maintained by the freewill offerings of its members.

"I therefore think that it must be conceded that the original Free Church could not consistently with its avowed opinions have joined the United Presbyterian Church. The establishment principle (to use a convenient short phrase) was one which was regarded as of great importance by the Free Church at the commencement of its history, and naturally so, because in the first place it justified the action of those who had seceded by proclaiming that they were not schismatics, and in the second place the founders of the Church hoped that a change in the law might be effected which would enable them to return to the Establishment. But seven-and-fifty years elapsed between the Disruption and the Union of 1900, and in the meantime the Free Church had grown and prospered as a voluntary church in fact. There was no longer any need to justify the position of the Church, because that was assured, and long prior to the Union, I take it, all hope or intention or desire of returning to the Established Church had passed away. The establishment principle therefore had ceased to have the practical importance which it had in 1843, and the sense of the Church as exhibited by large majorities in successive General Assemblies was that the principle might be regarded as an open question upon which the individual members of the Church might be guided by their own consciences.

"It is therefore necessary to examine the place which the establishment principle held in the constitution of the Free Church to see whether it was so essential that the majority of the Church, acting through the General Assembly and the Presbyteries, having taken a step which involved that the principle was no longer regarded as essential, but as a matter of opinion, the dissentient minority are entitled to have it declared that they are truly the Free Church, and are entitled to the civil rights belonging to the Free Church.

"The leading document is the Claim, Declaration, and Protest which was adopted by the General Assembly of the Church of Scotland in 1842, setting forth the objections of the Church to the law as then existing, and as declared by the civil courts. An address was also presented by the ministers and elders of the General Assembly to the Queen, submitting the Claim, Declaration, and Protest for her 'favourable consideration,' and expressing the hope 'that such measures may be directed by your Majesty as will preserve to us the peaceable possession of those rights and privileges secured to us by statute and solemn treaty.'

"The Claim, Declaration, and Protest not having led to any change or the prospect of any change in the law, certain ministers and elders drew up a Protest, which they laid upon the table of the General Assembly in May 1843, and in terms thereof separated themselves from the Established Church and founded the Free Church. In the Protest they declared that the Claim, Declaration, and Protest of 1842 should be 'holden as setting forth the true constitution of the Church.' It is therefore to the Claim, Declaration, and Protest that we must turn to ascertain what is the constitution of the Free Church.

"That document commences with the statement that it is an 'essential doctrine of this Church and a fundamental principle in its constitution . . . that there is no other Head of the Church but the Lord Jesus Christ,' and that 'the Lord Jesus as King and Head of His Church hath therein appointed a government in the hand of Church officers distinct from the civil magistrate.' It is then set forth that 'the above-mentioned essential doctrine and fundamental principle' had been recognised, ratified, and confirmed by repeated Acts of Parliament, but that the Patronage Act of Queen Anne, the interpretation put upon that Act by the courts of law, and the powers asserted by these courts, chiefly in regard to the settlement of ministers, amounted to a denial of the said doctrine and principle by interposing the civil power between the Church and her Divine Head in matters which were truly spiritual and ecclesiastical. The document then claimed 'as of right' that the Church should possess 'her liberties, government, discipline, rights, and privileges according to law, especially for the defence of the spiritual liberties of her people,' and protested that all Acts of Parliament and sentences of courts in contravention of the liberties and privileges of the Church were null and void. Finally, there was a prayer to Almighty God 'that He would be pleased to turn the hearts of the rulers of this kingdom to keep unbroken the faith pledged to this Church . . . or otherwise that He would give strength to the Church—office-bearers and people—to endure resignedly the loss of the temporal benefits of an establishment and the personal sufferings and sacrifices to which they may be called, and would inspire them with zeal and energy to promote the advancement of His Son's Kingdom in whatever condition it may be His will to place them.'

"The Claim, therefore, does not refer to the establishment principle as an essential principle of the Church, but the principle is nevertheless affirmed, although in a parenthetical way, in the clause in which the essential doctrine and fundamental principle of the Headship of Christ is stated.

"The parenthesis is in these terms:—'While "God, the supreme Lord and King of all the world, hath ordained civil magistrates to be under Him over the people for His own glory and the public good, and to this end hath armed them with the power of the sword" (ch. xxiii. sec. i.); and while "it is the duty of people to pray for magistrates, to honour their persons, to pay them tribute and other dues, to obey their lawful commands, and to be subject to their authority for conscience' sake," "from which ecclesiastical persons are not exempted" (ch. xxiii. sec. 4); and while the magistrate hath authority, and it is his duty in the exercise of that power which alone is committed to him, namely, "the power of the sword," or civil rule, as distinct from the "power of the keys," or spiritual authority, expressly denied to him, to take order for the preservation of purity, peace, and unity in the Church.'

"I shall have something to say presently in regard to the terms in which the principle is there stated, but in the first place I desire to say that the subordinate position which it holds in the Claim is not, in my judgment, to be taken as measuring the importance which the Church attached to it. The principle relates to the duty of the civil magistrate—the State—and not to the duty (at all events the direct duty) of the Church. If the civil magistrate refuses to recognise and support the Church the fault is his, but the Church is free from blame. If, upon the other hand, the Church were to accept the recognition and support of the civil magistrate subject to conditions which violated essential doctrines of the Protestant religion, she would be unfaithful, and under such circumstances her duty would be to separate her connection with the State. It was the latter view which it was the object of the Claim to enforce, and hence the parenthetical form in which the principle of the duty of the State or civil magistrate was referred to.

"Nevertheless, it must be taken that the statement of the principle in the Claim is a correct summary of the doctrine held by the Church in regard to the duty of the civil magistrate, and I shall now consider the terms in which it is framed.

"The principle is stated in the form of three propositions, the first two being quotations from the Confession of Faith, and the third an adaptation of the language of the Confession.

"The first proposition is, that civil magistrates are ordained by God for His own glory and the public good, and the second is, that it is the duty of people to pray for the magistrates, to pay them tribute, and to obey their lawful commands.

"I do not suppose that any Protestant Church which accepts the Confession of Faith would take objection to these propositions.

"The third proposition, however, is in a different position, and as it is an adaptation of Article 3 of Chapter xxiii. of the Confession, I shall take the exact words which I find there, a course to which the pursuers cannot object, as their view is that the Confession is unalterable. The article first declares that 'the civil magistrate may not assume to himself administration of the word and sacraments, or the power of the keys of the kingdom of heaven.' It then proceeds (and this is the part referred to in the third proposition in the Claim): 'yet he hath authority, and it is his duty, to take order that unity and peace be preserved in the Church, that the truth of God be kept pure and entire, that all blasphemies and heresies be suppressed, all corruptions and abuses in worship and discipline prevented and reformed, and all the ordinances of God duly settled, administered, and observed.'

"It is plain that that passage is open to construction, because many different views might be taken as to the method by which the civil magistrate ought to perform the duties ascribed to him. Let me take one example. It is laid down that the civil

magistrate is 'to take order . . . that the truth of God be kept pure and entire.' To 'take order' means, I apprehend, to use the magisterial power, or (as the Claim puts it) 'the power of the sword.' Then to keep 'the truth of God pure and entire' seems to me to be equivalent to saying 'to maintain sound doctrine.' Is it then the right and duty of the magistrate to intervene with the power of the sword to maintain sound doctrine in the Church? The Free Church could not hold that view, because she left the Establishment on the ground that the civil magistrate had no right to interfere at all in spiritual matters. How the Free Church interpreted the third article of the chapter I do not know, nor do I know how the Established Church interpreted it prior to the Disruption, because I am not aware of any Act of Parliament, or Act of Assembly, or other constitutional document, which defines the duty of the State to the Church, except the Westminster Confession.

"I pass on now from the Claim to the Protest of 1843 and other authoritative documents of the Free Church, to see if we find in them any more precise statement of the principle than that which is contained in the Confession of Faith.

"In the Protest the seceding ministers and elders protested that the Legislature having rejected the Claim, it was lawful for them to separate from the Establishment, 'while firmly maintaining the right and duty of the civil magistrate to maintain and support an establishment of religion in accordance with God's Word.'

"That is the most precise statement of the principle which I find anywhere, and it must be taken as representing the sense in which the founders of the Free Church at that time interpreted the Confession of Faith. It does not however follow that that view was fixed and unchangeable, and could not be modified or reviewed by the Church so as to meet changed circumstances.

"The next document to which I shall refer is an Act passed by the Assembly of the Free Church in 1846, in regard to the questions and formula to be put to office-bearers before ordination, and to candidates for the ministry. The Act proceeded upon the narrative that the change in the outward condition of the Church rendered it necessary to amend the questions and formula. It then approved of the questions annexed to the Act, and then proceeded: 'And the General Assembly, in passing this Act, think it right to declare that while the Church firmly maintains the same scriptural principles as to the duties of nations and their rulers in reference to true religion and the Church of Christ for which she has hitherto contended, she disclaims intolerant or persecuting principles, and does not regard her Confession of Faith, or any portion thereof, when fairly interpreted, as favouring intolerance or persecution, or consider that her office-bearers by subscribing it profess any principles inconsistent with liberty of conscience and the right of private judgment.'

"It will be observed that in the Act (as in the Claim and Protest) the principle in regard to the duty of the civil magistrate is stated parenthetically, and that what is emphasised is the disclaimer of any interpretation of the Confession of Faith which would involve intolerant or persecuting principles, and the declaration that the office-bearers of the Church shall not be held, by subscribing the Confession, to profess (as regards the doctrine of the duty of the civil magistrate) any principles 'inconsistent with the right of private judgment.'

"It seems to me that in face of that Act (providing as it does for so vital a matter as the profession of their faith to be made by entrants to the ministry) it is impossible to say that the Free Church regarded any particular method for the fulfilment by the civil magistrate of his duty to the Church as an essential and fundamental doctrine of the Church.

"Finally I shall refer to an Act and Declaration which was issued by the General Assembly of the Free Church in 1851. It is in the form of a historical narrative, which was compiled by a committee of the General Assembly, and published for the information and instruction of the members of the Church. I find that it contains four passages which may be regarded as referring to the doctrine of the duty of the civil magistrate.

"In the first place, it is stated that the Reformed Church of Scotland has ever held 'that nations and their rulers are bound to own the truth of God and to advance the kingdom of His Son.' I see no reason to suppose that the United Presbyterian Church would not all along have been ready to affirm that proposition.

"In the second place, the Revolution Settlement is said to have 'recognised as an unalienable part of the constitution of this country the establishment of the Presbyterian Church.' That is a statement in regard to the effect of an Act of Parliament upon the constitution of the country, and not in regard to an article of faith on the part of the Church.

"In the third place—referring to the Disruption—it is stated that the members of the Free Church seceded 'under protest that it is her being Free and not her being Established that constitutes the real historical and hereditary identity of the Reformed National Church of Scotland.' There (as in the Claim of 1842) spiritual independence is put forward as essential, while recognition of the State is regarded as a matter which (however important) does not affect the 'identity' of the Church. That is not very consistent with the view now urged by the pursuers.

"Finally it is said that the Church 'holds still, and through God's grace will ever hold, that it is the duty of civil rulers to recognise the truth of God, according to His Word, and to promote and support the Kingdom of Christ without assuming any jurisdiction in it or power over it.' That again, I imagine, is a proposition to which the United Presbyterian Church would have assented, although they would pro-

bably have taken a different view from that generally held in the Free Church as to the way in which civil rulers should recognise the truth of God.

"It therefore appears to me that as a matter of creed the Free Church simply accepted the statement of the Westminster Confession in regard to the duty of the civil magistrate, although as matter of opinion the founders of the Church gave their adhesion to the particular application of the duty to which effect had been given in Scotland. I have already pointed out that the Confession states the duty of the magistrate in very general terms, which may be interpreted in different ways. I take it that the doctrine was so stated designedly, because the question how best the civil magistrate may perform his duty to the Church is necessarily one of circumstances. Now, in Scotland the State had recognised as the State Church, and had endowed, the Reformed Presbyterian Church, and the founders of the Free Church accepted at the time of the Disruption that recognition and endowment as being (so long as the State did not intervene in matters spiritual) a proper and sufficient carrying out by the State of the doctrine of the Confession. Until the Disruption, although there had been various secessions, the Established Church included a very large majority of those in the country who professed the Reformed Presbyterian faith. With the Disruption, however, there arose a Church—the Free Church—whose adherents were numerous and which was not in connection with the State. Then in 1847 two bodies, the Secession Church and the Relief Church, joined together and formed the United Presbyterian Church, which also came to be an important Church with numerous adherents. Thus in the latter part of the nineteenth century there were three large and important Presbyterian Churches in Scotland, one of which alone was recognised and supported by the State. That was an entirely different position of matters from that which had been in the contemplation of the founders of the Free Church when they declared their adherence to the form in which the State had discharged its duty to the Church in Scotland. There had come to be three Churches instead of practically only one Church, and it seems to me that it was competent for the Free Church, without sacrificing anything which was essential in her faith, doctrine, or constitution, to take the view that in the changed circumstances it was expedient that each Church should be maintained by the liberality of its members, rather than that the State should select one alone to be supported out of public funds.

"And that was all that the Free Church required to do in order to bring her into line with the United Presbyterian Church. Apart from the establishment principle there was no difference in doctrine or worship between the two Churches, and even as regarded that principle there does not seem to have been any practical difference so far as the standards of the Churches were concerned, although there was undoubtedly at one time a difference in the views which were in general held by the members of the two Churches. Like the Free Church, the United Presbyterian Church accepted the Confession of Faith, including the xxiii. chapter, and, like the Free Church, she regarded the doctrine of the Headship of Christ as of supreme importance; and she also, in 1879, passed a Declaratory Act in regard to formula, in which the view of the Church upon the 'doctrine of the civil magistrate' is stated in terms almost identical with the Declaratory Act of the Free Church of 1846, which I have already quoted.

"I am therefore of opinion that the Union did not involve the giving up by the Free Church of any doctrine or principle which formed an essential or fundamental part of her creed or her constitution, but only involved the modification of views which the Church had held under different circumstances in regard to the application of the doctrine of the Confession as to the duty of the State—a modification which, it appears to me, it was entirely within the power of the General Assembly to make.

"I have but one more remark to make upon this branch of the case, and that is, that the history of the Free Church since the Disruption shows that the particular form of the duty of the State to the Church for which the pursuers contend was not regarded as an essential matter. If the establishment principle was an essential and fundamental doctrine of the Church, then it must be conceded that until that principle received practical effect the Church was an imperfect and incomplete Church. As therefore the Free Church was from the beginning a Church of great zeal and possessed of considerable power and influence, one would have expected to find it straining every nerve to bring about such an alteration in the law that it might without sacrifice of principle resume its connection with the State. But not a single act of that nature is averred, nor is any such act disclosed by the voluminous documents produced. On the contrary, the documents seem to me to show that the tendency of the Church was towards a permanent and avowed separation from the State; and further, I imagine it to be a matter of common knowledge, that if the views and efforts of the majority of the Free Church had been successful an Established Church would have ceased to exist in Scotland long prior to the Union.

"For these reasons I am of opinion that the first ground upon which the pursuers claim the property held in trust for the Free Church fails.

"The next question is, whether assuming that there was no obstacle in the way of difference in doctrine, the Union was incompetent so long as there was a dissentient minority?

"Now the position of matters was this. There were two Churches identical in doctrine, worship, and form of government, and they were working together in the same field, so that their agencies overlapped

and their efforts were to some extent wasted. It therefore seemed to both Churches that by uniting the common work in which they were both engaged would be greatly advanced. In such circumstances could it be said that a Union could not take place if a single member of the Free Church dissented? I do not think so. I think that the power to effect such a Union could be maintained upon the general ground of the duty of unity among Christians, but it seems to me that it is sufficient to say that the Free Church from a very early period recognised and asserted that it had the power to unite with any other body of Christians holding the same faith. Thus immediately after the Disruption it became necessary to settle the terms under which the places of worship of the Free Church should be held, and in 1844 a Model Trust Deed was prepared and approved of by the General Assembly. That Trust Deed has been in use ever since, and the titles of nearly all the places of worship belonging to the Church are framed according to its terms. Under it the place of worship is vested in trustees 'to be used as and for a place of religious worship by a congregation of the said body of Christians called the Free Church of Scotland, or of any united body of Christians composed of them and of such other body or bodies of Christians as the said Free Church of Scotland may at any time hereafter associate with themselves under the foresaid name of the Free Church of Scotland, or under whatever name or designation they may assume.' These words contemplate the very case which has now occurred, and make it plain that the Church all along asserted that she had power to make such a Union; and if she had that power, it seems to me to be absurd to say that she could only exercise it if there was absolute unanimity among her members.

"I am therefore unable to give effect to the second ground upon which the pursuers claim the property held for the Free Church.

"The pursuers claim alternatively that they have right to participate in the funds and property of the Free Church. Now it seems to me that either the pursuers are the Free Church of Scotland, and are therefore entitled to the whole funds and property held in trust for that Church, or they have entirely separated themselves from the Free Church, and have therefore no right to any part of its property. As my opinion is that the pursuers are not the Free Church of Scotland, it follows that I cannot hold them to be entitled to participate in the property of the Church.

"I shall therefore dismiss the action."

The pursuers reclaimed.

In the Inner House the parties renounced probation, and the case was heard as on a concluded proof.

Argued for the reclaimers—(1) The establishment principle was a fundamental principle of the Church of Scotland, and when the Free Church abjured the establishment as existing in 1843, she did not abjure the establishment principle; her standards were defined in the Protest of 1843 as the standards of the Church of Scotland "as heretofore understood." The sole *causa causans* of the Disruption being the spiritual independence for which the Free Church sacrificed the advantage of connection with the State, it was unnecessary that the Protest should emphasise the establishment principle beyond expressing parenthetically an acknowledgment of the importance of that principle. The sole reason why the Free Church was not a party to the Union of 1847 constituting the United Presbyterian Church was her attitude towards voluntaries and her adherence to the establishment principle, and there was nothing in the constitution of the Church or in the circumstances of the times which made that principle less important now than it was in 1847 or in 1843. The documentary evidence was sufficient to satisfy the Court that it was a fundamental principle of the Free Church. In *Smith* v. *Galbraith*, February 21, 1843, 5 D. 665, the ground of judgment was that the pursuer had failed in the proof. (2) The Free Church Assembly had no power to modify any of the Church's fundamental principles. The Church was based upon a definite constitution which could not be altered by a mere majority. The contrary view would attribute to the Free Church legislative powers which the constituting documents had been held not to confer—*Cruikshank* v. *Gordon*, March 10, 1843, 5 D. 909, Lord Cuninghame, at p. 919. Neither the Church of Scotland nor the Free Church could legislate, and the Lord Ordinary had erred in attributing legislative powers to Assemblies. It would be inconsistent with the commission granted to representatives of general assemblies to support any proposal to alter the Confession of Faith—Moncreiff's Practice of the Free Church, Edinburgh, 1898, p. 316. Accordingly, in voting for the union the Free Church Commissioners acted *ultra vires*. Observance of the procedure prescribed by the Barrier Act did not help the majority. That Act was merely an Act of Assembly, and conferred no right upon the Church to alter her constitution. Patrimonial interests being involved, the Court would look at the conditions under which the pursuers had joined the Church. The parties to a contract having agreed when it was entered into to interpret it in a particular way, one of the parties could not afterwards, against the will of another party, seek to interpret it in a different way. (3) The majority, by entering into a union with professed voluntaries, had abandoned the establishment principle, and so had seceded from the Free Church which was now represented by the reclaimers, and the majority could not take the Free Church property with them into the Union. The United Presbyterian Church entered the Union declaring herself anti-establishment, and resolved to petition Parliament for disestablishment; therefore if the majority were allowed to take the Free

Church property into the United Church, that property would be diverted from Free Church purposes, and employed to promote opposition to the establishment principle. By the contract which was the basis of union the whole doctrines of the Church were thrown loose, and an elastic constitution was substituted for the fixed constitution of the Free Church, which comprised the maintenance of the establishment principle and the Westminster Confession of Faith in its entirety. The majority had departed from the position of strict adherence to the Confession of Faith, and adopted a position of mere regard for it, with power to the United Church to modify it to any extent. The basis of union of the United Presbyterian Church in 1847 embodied a qualification of the Westminster Confession, and that qualification was perpetuated in the Declarations adopted in October 1900. There was no difference in principle between the abandonment of a part of the Confession of Faith and the abandonment of the whole, and though the Church might interpret she could not cut out any dogma from the Confession. The Lord Ordinary was mistaken in his view of the meaning of "take order;" it meant that the magistrate was to take means to identify himself with the Church by taking part in her proceedings, but the United Presbyterian Church denied that he had any such duty. The majority might unite with the United Presbyterian Church if they chose to leave the Free Church, but while there was a dissentient minority in the Free Church there could be no incorporating union of the two Churches which involved a beneficial interest in each Church in the other Church's property. In the Free Church preaching of voluntary principles would expose a minister to immediate dismissal from his charge, but according to the views of the defenders a Free Church pulpit might be filled one day by a minister preaching the establishment principle, and another day by a minister preaching the principle of voluntaryism; that was a result which the Court would not countenance—*Dill* v. *Watson*, 1836, 2 Jones' Irish Exch. Cas. 48. If a majority of a Church abandoned a distinctive principle of the Church, it forfeited all the patrimonial benefits which the Church had acquired to a minority who adhered to her principles—*Craigdallie, &c.* v. *Aikman*, July 21, 1820, 3 Scots Rev. Rep. (H.L.) 607, 6 Pat. App. 618; *Dunn, &c.* v. *Brunton*, 1801, M. No. 3 App., Society; *Couper* v. *Burn*, December 2, 1859, 22 D. 120; *Forbes* v. *Eden*, December 8, 1865, 4 Macph. 143, 1 S.L.R. 58, April 11, 1867, 5 Macph. (H.L) 36, 4 S.L.R. 6; *Craigie* v. *Marshall*, January 25, 1850, 12 D. 523. (4) Even if the majority were at liberty to retain in the United Church their former opinions on the establishment principle, they had departed from the principles of the Free Church by adopting the formula of the United Church, which applied a totally different test to candidates for ordination from that applied by the Free Church, as it involved recognition of doctrines which might be "approven by general Synods." That was not a fixed test, and at anyrate it included the doctrines of the United Presbyterian Church, which professed the principles of voluntaryism. (5) At least by declining to enter the Union the pursuers had not ceased to be members of the Free Church. Assuming that the majority had not changed any essential principle, or that they were entitled to do so, it did not follow that the minority who refused to do the same had forfeited their patrimonial rights. It was not fair or necessary to hold, as the Lord Ordinary had done, that congregations who as a whole belonged to the minority and adhered to Free Church principles had thereby committed a wrong, and were to be deprived of the enjoyment of Church buildings. The minority had not ceased to be beneficiaries under the Model Trust-Deed, because they had done nothing to violate the conditions of the trust, and they were entitled to the trust property, unless the Court should hold that the majority had not departed from any essential principle, in which case the minority were entitled to share the trust property with the majority — *Ferguson Bequest Fund* case, January 16, 1879, 6 R. 486, 16 S.L.R. 300. While the defenders held that property, they held it in trust for the reclaimers—*Long* v. *Bishop of Capetown*, 1863, 1 Moore, P.C.C. (N.S.) 411, Lord Kingsdown, p. 466.

Argued for the respondents—(1) In considering whether the establishment principle was fundamental it was necessary to bear in mind what "fundamental" meant; it meant necessary to continued existence. What was necessary for the continued existence of a Church was something different from what the Church or members of it might think important at a particular period. They might hold an opinion which no one else did, and which in that sense was distinctive, but which was not necessarily fundamental. The documents relied on did not support the view that the establishment principle was fundamental. In 1843 the view was that, establishment or no establishment, spiritual independence was the essential principle. The establishment principle concerned only the conduct of the State, not the conduct of the Church. It was a mere opinion as to what a third party ought to do, and that could not be called a fundamental principle of a Church. The reclaimers' contention was inconsistent with the conduct of the Free Church in cutting herself off from the establishment. The Westminster Confession did not lay down the principle that one Church was to be recognised and endowed by the State, but that was the establishment principle contended for. The Claim, Declaration, and Protest did not so represent it; it merely referred to the duty of the magistrate to "take order," which was a different thing. On the other hand, spiritual independence was carefully referred to as a fundamental principle, and establishment was referred to merely as something which was "highly valued,"

and it was referred to in the Protest of 1843 merely parenthetically. The language of the Protest showed that having an opportunity of declaring what was considered fundamental, the Free Church took it and distinguished the establishment principle from the principles which were considered fundamental. The Act of 31st May 1851 expressly declared that it was "her being free and not her being established" that constituted the real identity of the Reformed National Church of Scotland. This was borne out by the Mutual Eligibility Act of 1873, which was passed by the Free Church Assembly without a vote. To ascertain what were the fundamental principles referred to in that Act it was necessary to refer ultimately to the Claim, Declaration, and Protest, which contained no reference to the "establishment principle," and yet it was said that that principle was fundamental. The cases cited by the reclaimers did not support their contention, as appeared from an examination of the Judges' opinion in those cases. It was matter of decision that in the case of a Church founding on the Westminster Confession the establishment principle was not fundamental—*Smith* v. *Galbraith*, *cit. sup.* The majority of the Free Church had not altered their principles at all, but assuming that by entering the Union they had altered their position with reference to the establishment principle, that alteration had been carried out constitutionally and in strict compliance with the Barrier Act. Though that was an Established Church Act, the defenders were entitled to rely on it as conferring wider powers upon the Free Church than on the Established Church, because the latter Church, while the connection with the State lasted, had to reckon with the State, and could not do by a majority what the Free Church might so do, so that the Free Church and the Established Church were not in the same position with regard to legislative power. The distinction was illustrated by the freedom of thought with regard to the establishment principle which was allowed to members of the United Free Church, a freedom which could not exist in the Established Church. In *Cruikshank* v. *Gordon*, *cit. sup.*, the view of the Church's spiritual independence which was rejected by Lord Cunninghame in the passage relied on by the reclaimers was the view of the Free Church, and the decision in that case proceeded not on the Church's own documents but on the fact that there was another contracting party, viz., the State. It could not be maintained that the Free Church had left the Establishment and severed her connection with the State without affecting her constitution so far as based upon Established Church documents—*Smith* v. *Galbraith*, 5 D., *cit. sup.*, Lord Justice-Clerk, p. 679. (3) The majority had abandoned none of their opinions, but remained members of the Free Church, and entered the Union carrying their identity with them. Apart from the terms of the Union, the United Presbyterian principles did not compel any repudiation of the establishment principle but recognised the right of private judgment. The reclaimers had themselves departed from the principles of the Free Church if they held that no one could be a member of that Church who did not affirm the right and duty of the magistrate, or if they held that the Free Church Assembly could not alter or interpret the Confession of Faith, or that without forfeiture of Church property the Free Church could not unite with any other Church if there was a dissentient minority. They were defying the constituting documents of the Free Church, and their present position deprived them of their status as members of that Church, and of the accompanying right to enjoy her property, to which the majority alone were entitled. (4) The formula of the United Free Church involved no departure from Free Church principles. The formulæ of the Free Church and the United Presbyterian Church did not conflict. The Act prescribing the Free Church formula had admittedly to be read along with the formula, and it expressly reserved in the passage quoted by the Lord Ordinary the right of private judgment, so that a minister or office-bearer signing the formula was free to hold what opinion he liked as to the establishment principle. The formula of the United Free Church did not introduce any element of elasticity by referring to what was "approven by Acts of General Synods and Assemblies," because that could only refer to past Acts, General Synods having ceased to exist in 1900. (5) With regard to the property held under the Model Trust Deed, that deed and the Act of 1844 anent the same provided for a division of opinion, and gave certain rights to a minority of required dimensions, but the minority constituted by the reclaimers did not satisfy the given requirements, and therefore the Model Trust Deed conferred no rights upon them. If the Court held that the United Free Church represented the Free Church, then the reclaimers had no right to any share in the trust property. None of the principles upon which the decision proceeded in the *Ferguson Bequest* case, *cit. sup.*, were applicable in the present case.

At advising—

LORD JUSTICE-CLERK—[*After the historical narrative quoted above his Lordship proceeded*]—These historical details have been gone into for the purpose of bringing into view the attitude taken up from time to time by the Free Church on the question of State establishment of religion. It cannot be doubted on a perusal of the documents that often, and sometimes with emphasis, such establishment was put forward as a prominent article of doctrine accepted by the general body of those who left the Established Church at the Disruption. They desired to declare that they were not voluntaries in principle, and that they left the Church only because the civil power, as they held, was obtruding itself into the spiritual domain, and assert-

ing a right to control the Church in the exercise of its spiritual functions, in which they held that the Church was directly under the Headship of Christ, and therefore could not acknowledge any earthly authority as having power to interfere. Now, the pursuers maintain, first, that the Free Church has abandoned the principle, and second, that in doing so it has lost its character as the Free Church, and thereby lost the right to all property which belonged to the Free Church, and must be ordained to deliver up that property to the minority who have refused to join in the union with the United Presbyterian Church. They maintain that they are now the Free Church, from whom the large majority by their action have cut themselves off, and thereby "amitted, lost, and forfeited all right and title to and beneficial interest" in the lands, property, and funds belonging to the Free Church, and declarator is asked that they may not be applied by the trustees who hold them for behoof of the new community; that the pursuers lawfully represent the Free Church, and "are entitled to have the whole lands, property, and funds applied . . . for behoof of themselves" and those who may adhere to them, "as constituting the true Free Church of Scotland," and that the trustees are bound "to denude themselves of the lands, property, and funds in favour of trustees to be nominated by the pursuers." There is an alternative conclusion that the pursuers by separating from those who have formed the new community have not forfeited their right, title, or interests in the lands, property, and funds, but are entitled to the use and enjoyment of them proportionately. The reasoning upon which these claims proceed is, first, that State establishment was an "essential principle" of the Free Church; second, that the Free Church had no power to modify or abandon that principle; third, that by uniting with the United Presbyterians the majority did abandon that principle, and therefore have no right to the title of the Free Church, and must denude in favour of those who have adhered to the principle.

Upon the question whether it was an essential principle, without which the Free Church as constituted could not subsist, it is important to notice that it never was maintained that the Church could not fulfil all her functions without the aid of a State Establishment. This is self-evident, for the Christian Church in its early days had no king or government in any place in which its work was carried on that accepted Christianity. And it was plainly a question depending upon the circumstances and conditions whether, when any State became Christian in faith, its support should be accepted officially by the Church. It had to be considered necessarily with regard to the circumstances and the conditions coupled with it. Indeed, as regards the Church of Scotland itself, it affords historical illustration on this point. For it originally was a seceding Church, renouncing the Episcopal authority to which up to the Reformation the whole Christian community had been submissive.

Again, when later the State endeavoured to reimpose Episcopacy, the Church of Scotland carried on its organisation and work, not only without connection with the State, but in active and determined opposition to it. The principle was throughout strenuously maintained that where there was an establishment, if the State took up any position which was contrary to the conditions on which alone the Church could accept its aid, the Church could withdraw from its association with the State, and if it did so it would not the less continue to be the Church as it was before. This was indeed the very ground taken up in the case under consideration by those who objected to the action of the State before the Disruption, and which was expressed by those who formed the Free Church on the very day when they left the building in which the General Assembly was sitting in presence of the Lord High Commissioner of the Queen, and took upon themselves to assemble elsewhere. They declared it to be part of what they had had to consider in taking the step they did that in the circumstances "a free Assembly of the Church of Scotland, by law established, cannot at this time be holden, and that an Assembly, in accordance with the fundamental principles of the Church, cannot be constituted in connection with the State without violating the conditions which must now, since the rejection by the Legislature of the Church's Claim of Right, be held to be the conditions of the Establishment." This was followed up by an Act and Declaration of the Free Church in 1851 as to what had been done in 1843—viz., that the action had been one of "publicly renouncing the benefits of the National Establishment, under protest that it is her being Free and not her being Established that constitutes the real historical and hereditary identity of the Reformed National Church of Scotland." And in that document it was pointed out that the "whole work" of the setting up of the Scottish Reformed Church, and its relief by severe struggles from Episcopacy, which "it repudiated," was "begun and carried on without warrant of the civil power," and that the Church had done it "by the exercise of her own inherent jurisdiction." In another passage it is said, "Thus by God's grace, in this second Reformation, wrought out by our fathers amid many trials and persecutions, this Church was honoured of God to vindicate and carry out the great fundamental principles of her constitution—the government of the Church by presbyteries alone; her inherent spiritual jurisdiction, derived from her great and only Head, and the right of congregations to call their own pastors."

In more than one of the passages referred to the expressions "fundamental principle" and "great fundamental principle" are used. An examination of the documents shows that the expression "fundamental principle" was not one which was employed indiscriminately and

applied to numerous doctrines, but was specially used for emphasis in regard to such things only which those using it held were essential to the Church's existence as a Church, and which, if they gave up, she would cease to be a Church of Christ at all. Thus in the Claim, Declaration, and Protest of 1842 it is described as "an essential doctrine of this Church and a fundamental principle of its constitution . . . that 'there is no other Head of the Church but the Lord Jesus Christ." In the same document it is narrated historically that the Act of James the Sixth "recognised and established as a fundamental principle of the constitution of the kingdom that the jurisdiction of the Church in these" (certain spiritual matters named) . . . "was exclusive and free from coercion by any tribunals holding power or authority from the State or supreme civil magistrate." They declared this to be "an unalterable and fundamental condition" of the Treaty of Union, and that they could not put the "public advantages of an establishment" in competition with the "inalienable liberties of a Church of Christ." I find in the documents only two declarations in which the expression "fundamental principles" is used in connection with a statement as to the relation of the State to the Church. The Free Assembly in 1871 formulated the following declarations:—"Having respect to the past history, the present position, and the future prospects of this great Union question, the Assembly think it fitting at this juncture to declare their unalterable adherence, in common, as they believe, with that of all their people, to the great fundamental and characteristic principles of this Church regarding—

"(1) The sole and supreme authority of the Lord Jesus Christ, and His exclusive right to rule in and over His Church, and the consequent obligation of His Church to be regulated in all her proceedings by His Word alone. For which end she claims in all spiritual matters complete independence and immunity from all coercion and control from without. And regarding—

"2. The prerogative of the same Lord Jesus Christ as Head over all things to His Church, and supreme over nations and their rulers, who are consequently bound, collectively and officially, as well as individually and personally, to own and honour His authority, to further the interests of His holy religion, and to accept the guidance of His word as making known His mind and will.

"And the Assembly in the circumstances foresaid think it fitting also to declare that this Church can never consistently or conscientiously enter into any union that would imply the abandoning or compromising of either of these essential principles which are divine and unalterable truths."

The other declaration is in the Act relating to mutual eligibility of ministers passed by the Free Church Assembly in 1873. I agree with the Lord Ordinary in thinking that these declarations are not such as affirm anything which could not be affirmed by those who are opposed to a State Establishment or endowment. They seem only to emphasise what it must be the duty of the Church in the exercise of its spiritual functions to preach and teach to the State as a matter of duty, and only repudiate the idea that in a Christian community the civil ruler can consistently with his duty fulfil his functions regardless of the Divine authority and principles as expressed in the Holy Scriptures. And accordingly it was with these declarations standing that the Union was ultimately effected. They show that the negotiations which led up to the Union were conducted by the great majority of the Free Church, who were favourable to it, on the footing that "there was no objection in principle to the formation of an incorporating union" (resolution of the General Assembly of the Free Church in 1871), while they acknowledge that "much consideration is due to the difficulties which still appear to an important minority of esteemed and honoured brethren to stand in the way."

It thus appears that while in the early days of the Free Church's existence very great importance was attached to the principle of a civil establishment of religion, it was treated as subordinate, in the sense that it was in no way vital to the existence of the Church and must be repudiated and its benefits rejected if the terms upon which the State might insist should be contrary to the spiritual liberty and authority of the Church in its own region. This view of the matter is very forcibly put by the Judges in the case of *Smith* v. *Galbraith*, and the views there expressed seem to me in their essential particulars to bear upon this case. I abstain from quotation, but the opinions are well worthy of study, and it is not easy to see how a judgment in favour of the pursuers in this case could be reconciled with that decision, which is, I think, substantially in point as regards the opinion expressed by the Judges, although the case may not rule the present.

This view might, I think, be sufficient for the disposal of the case, but even if it were not so, there is another element which cannot be overlooked. The Free Church at its inception, taking up the ground that it was the Church of Scotland quitting the establishment, adopted and continued as part of its constitution the Barrier Act, by which the Church of Scotland in 1697, on the narrative that as regards innovations it would "mightily conduce to the exact obedience of the Acts of Assemblies, that general Assemblies be very deliberate in making the same, and that the whole Church have a previous knowledge thereof, and their opinion be had therein," enacted that "before any General Assembly of this Church shall pass any Acts, which are to be binding rules and constitutions of this Church, the same Acts be first proposed as overtures to the Assembly, and being by them passed as such, be remitted to the consideration of the several presbyteries of this Church, and their opinions and consent reported by their commissioners to

the next General Assembly following, who may then pass the same in Acts if the more general opinion of the Church thus had agree thereunto." Now, this Barrier Act was passed, as its terms indicate, to prevent rash and inconsiderate innovation. Its purpose was to fence round important changes with a certain amount of deliberative and cautious procedure before change should be finally sanctioned and take effect. But it necessarily proceeds upon the assumption of the existence of the power, the exercise of which it was desired to guard from the evils of undue haste, or of the enforcement by a chance predominance in the supreme Assembly of the Church of a particular view. It very plainly recognises that certain things may be done effectively, and only prescribes detail procedure to ensure that they shall not be done inconsiderately. The Free Church having adopted this Act as governing its procedure, carried out the order prescribed in it in their proceedings preliminary to the union with the United Presbyterian Church, and it is not disputed that the condition that "the more general opinion," as expressed by the Presbyteries when consulted, agreed to the step being taken. The procedure was thus entirely orderly, and it only remains to be seen whether the thing done falls within the description of innovation under the Act, as being lawful if there be the "more general opinion" in its favour. What, then, are the matters to which this Barrier Act is to be applied? They are four—doctrine, worship, discipline, and government—and certainly they are very comprehensive, and there is no restriction or limitation, but absolute generality. It might be a question whether under the head of doctrine an unlimited power existed — whether, for example, doctrines which go to the foundations of Christianity, such as the doctrine of the Incarnation, or of the Resurrection, could be declared no longer to be the doctrines of the Church. It would be difficult to say that a majority, however great, could under a power to innovate, so subvert the very foundations of the faith, and shut out a minority who held fast by these doctrines and refused to become anti-Christian. But can it be said that, given a power to change declaration of doctrine, that power cannot be exercised on such a question as that involved in the present case, which touches only the relations of the State to the Church, not as fundamental to the Church's existence, nor as regards either the Free Church or the United Presbyterian Church having ever formed a test of membership, or of admission to communion? I cannot answer that question affirmatively. However strongly the doctrine of State Establishment of religion may have been held at the time of the Disruption, I cannot hold that if the "general opinion" of the Free Church agreed to an innovation under which that doctrine, either in whole or in part, ceased to be officially held by the Church through its Assembly, after the proper and regular procedure, that the minority who dissented were entitled to a declarator and interdict in a court of law such as the pursuers here demand.

It is worthy of notice, in conclusion, that the matter in dispute in this case relates really to the question whether it is the majority which has united with the United Presbyterian Church or the minority who repudiate the Union that is carrying out the objects of the great Protest of 1842 and 1843 "more faithfully" the one than the other. Now, such a case is expressly provided for in the Model Trust-Deed of the Free Church, which has a strong bearing upon the cases in which office-bearers and persons connected with individual congregations have raised actions against the United Free Church in regard to the right to churches occupied by these congregations. These churches are all held by trustees under this Model Trust-Deed, and are therefore to be administered by the trustees, under the authority and direction of the Church through its courts. That deed gives a power of secession, carrying the property with it, to a minority in certain circumstances. Had it been the case here that one-third, or more than one-third, of the ordained ministers of the Free Church separated from the Free Church on this question, then a majority of a congregation, who agreed with the minority dissenting, would have been entitled to keep the church in which they worshipped, or to have it made over by the trustees of the Free Church to trustees to be nominated. But this very right conferred on a minority of a certain strength is a negative to the claims of a small minority of persons to claim the property belonging to the Free Church as a whole, unless some act has been done by the great majority which they had no right to do under the constitution which the Free Church had established for itself. Holding, as I do, that the Free Church had the right, by its Assembly, to do what has been done, and that the regularity of the procedure in doing it cannot be impugned, I would move your Lordships to adhere to the judgments of the Lord Ordinary in the different cases before us, with this difference, that in the principal case, as it has been heard before us, as on a concluded proof, the interlocutor should be one of absolvitor as in a concluded cause.

LORD YOUNG—The pursuers of this action, which was raised in December 1900, ask the Court to annul by reduction the union of two dissenting Churches (the Free Church and the United Presbyterian Church), effected, or contended to have been so, in the preceding October. The Lord Ordinary states—I think accurately and with sufficient fulness—how it was effected on the part of the Free Church, and expresses the opinion, in which I concur, that it was effected in the most formal way, "and cannot be challenged unless it was a transaction which it was not in the power of the Church, acting by its General Assembly, to effect contrary to the wishes of a minority" —that is to say, otherwise than unanimously. The majority was large—643 to 27—but I do not think that affects the legal

question, assenting, as I do, to the argument of the pursuers' counsel, that if the law required unanimity the dissent of one would be fatal. The Lord Ordinary does not, I think, specially notice the procedure of the United Presbyterian Church in effecting the union; but the case was argued to us, as it no doubt was to his Lordship, on the footing that the procedure of the United Presbyterian Church courts, including the chief of them—the General Synod—was in all respects regular and valid, and without manifestation of any difference of opinion. Postponing for the present any reference to the fact that at the date of the union the Free Church was the owner of property (both land and money), and any question regarding it, I confine my attention to the grounds on which we are asked to decide that its union with the United Presbyterian Church was illegal by the civil or municipal law, which alone we administer. Such union means this, and so far as I know only this, that the Christian Churches and their worshippers who agree to it think, after, presumably, due consideration, that their religious opinions, aims, and objects are identical, or so substantially similar, that they desire to be free to associate together in worship, prayer, and praise under—to use a familiar term—pastors admitted by the same spiritual authorities in whom they have a common confidence, and to unite in the furtherance of their common aims in religious matters.

What, then, are the legal grounds on which the union in question is challenged? The first is, that the assent of the Free Church Assembly was not unanimous, which is, I think, too obviously untenable to call for an answer. The second is stated by the Lord Ordinary as presenting what seem to his Lordship to be the serious questions in the case, viz., whether it was "an essential doctrine and fundamental principle in the constitution of the Free Church that it is the right and duty of the civil magistrate (the State) to maintain and support an establishment of religion in accordance with God's Word, and whether the union with the United Presbyterian Church necessarily involved an abandonment of that principle" by the Free Church. The pursuers ask for an affirmative answer to both questions. Neither of them is a question of law—at least I know of no statutes or rules of the common law, and we were referred to none, which inform us what is or is not an essential doctrine and fundamental principle of the Free Church or of the United Presbyterian Church, or whether they are in conflict or agreement on any specified doctrine and principle. Regarded as questions of fact, supposing we had jurisdiction to dispose of them, we could not possibly do so without allowing a proof at large or sending them for trial by jury. Of course, if it be the law that no two dissenting churches can lawfully unite if either differ from the other upon any religious doctrine or fundamental principle, and that the question whether they do or not must be determined by a court of law, on being appealed to by a member of either who dissents from the union, I say, if the law be so, we must encounter and deal with the difficulties, whether of fact or law, which such appeal, when made to us, may present.

I think, however, that the law is not so, my opinion being that any two or more dissenting churches may lawfully unite so as to form themselves into one Church, and that nothing more is necessary to the union than their own consent, which they are respectively free to give or withhold, and that this Court has no jurisdiction to annul a union so made on the ground that the Churches who made it proceeded on views of their respective doctrines and religious principles which we think erroneous. Before proceeding to questions regarding the property referred to in the summons and claimed by the pursuers, I desire to say that there is, in my opinion, no rule of law to prevent a dissenting church from abandoning a religious doctrine or principle, however essential and fundamental, or from returning to it again with or without qualification or modification.

Whether or not a property title is such that a forfeiture of property will follow such abandonment or return is another matter. The property claimed by the pursuers is thus specified in the first declaratory conclusion of the summons: "The whole lands, property, sums of money, and others which stood vested as at 30th October 1900," in the persons named in the conclusion, and there designated "as general trustees of the Free Church of Scotland." These persons were appointed by the Church to hold its property and use it as ordered. The words of the conclusion taken literally might (seem to) import that these "general trustees of the Free Church" held the property "under various trusts" for various purposes specified in various deeds. But as was explained to us by counsel this was not meant, and is not according to fact, the truth being that the whole property, land, and money which at the date of the union stood vested in the general trustees of the Free Church was the absolute property of that Church. No special or limited title has been produced or referred to as existing. But this is a topic which I need not dwell upon, for taken either way the result as regards the point I am about to deal with is the same. That point is, that dissenting Churches who unite together, as the Free Church and the United Presbyterian Church did here, and assuming the validity of the union, may lawfully take their respective properties with them into the Union, and indeed always do so, the United Church having the title thereto (absolute or limited) which the several Churches respectively had before the union. It follows that no person or class of persons who before the union had a legal right to require the Free Church to use in a certain manner specified property vested in its trustees, or to refrain from using it in a certain manner, can be prejudiced by the union, the same legal right existing against the United Church which existed against

the Free Church. The United Church is, indeed, the Free Church with an increased membership. I do not think it is reasonably arguable that dissenting Churches with property possessed on titles, whether absolute or limited by qualifications favourable to others cannot unite without clearing themselves of it so as to enter the Union landless and penniless. When the two Churches united, they, as matter of course, took into the Union their respective churches and manses to be used as churches and manses of the United Church, and exactly as they had been, with only this change (hardly, if at all, appreciable, considered as a use of property) that members of the United Church might become seatholders in any of them, and pastors of the United Church, if regularly chosen and elected, become incumbents of any of them and occupiers of their manses. The only objection to this which the pursuers' argument suggests is that members of the Free Church are (as they say), by the terms of the titles on which its churches are held, protected against being associated therein with seatholders and worshippers who do not hold it an essential doctrine and fundamental principle of religious belief that it is the duty of the State to maintain and support an Established Church. It is, I think, enough to say, although I have already perhaps sufficiently expressed my views on the subject, that no church or manse of the Free Church is held on a different title now than it was before 30th October 1900, and that any of his Majesty's subjects who can relevantly aver and establish that any such church or manse is being used to his prejudice in violation of the title, or otherwise than the title warrants, will have remedy and protection in a court of law. No such case is presented by the pursuers, who found on no special title to any property, and allege no use by the United Church or by any of the defenders of the property in question other than was lawfully made of it before 30th October 1900.

If the Union in question is a valid Union, which we cannot annul, the whole case presented by the pursuers necessarily fails, for the property in question belongs to the Free Church, which is in the Union, which the pursuers admittedly are not. Their case, indeed, is that the Act of the General Assembly of 30th October 1900 was not a consent to or enactment of union with the United Presbyterian Church, but an exodus of 643 individuals from the Church, and resignation by each of them of his membership of its Assembly, leaving in it a residue of 27, who thereupon constituted the Assembly, which, with this remnant of members, was entitled to immediately proceed to business, as it did, passing Acts, appointing trustees to receive and hold the property of the Church, and within six weeks, I think, raising this action. I have already noticed that the argument for the pursuers went the length of contending that a remnant of only one man who, with sound views on the subject of Church Establishment, voted against the proposed union, would have been equally fatal to it, and entitled him to have vested in himself, or trustees nominated by him, the whole property of the Church from which all but himself had fled.

I have, I hope, sufficiently expressed and explained the grounds of my opinion that we can in this action take no account of or adjudicate upon the religious views and opinions of either the Free or the U.P. Church, or the propriety and expediency (or the reverse) of their union. We can, and indeed must, decide any dispute which may be brought before us regarding the disposal or use of property vested in either or in both united, but we can and must do so upon the law which governs the rights and obligations of the disputants, having regard to the titles on which the property is held and contracts affecting it. A question of creed and form of worship may thus possibly come before a court of law in a dispute regarding the use of a church or manse held on a title which specifies and limits the use. Money vested in the trustees of a beneficent donor to a church or association of worshippers to be used in promoting a specified or otherwise clearly indicated religious creed may in like manner be the subject of question in a court of law—the question, of course, being whether or not the money is being used according to the trust on which it is held. But when land is conveyed or money is bequeathed in *ex facie* absolute property to a church or association of religious worshippers, I cannot assent to the proposition that a court of law must or may regard the title as limited and qualified by reference, not expressed but assumed to be implied to "the essential doctrines and fundamental principles in the Constitution of the Church" or association, the questions (for they may be numerous) what these are being in case of dispute decided by the Court as questions of law or fact. In this case we have been desired to read and consider over ninety pre-Disruption, post-Disruption, and Free Church documents, all produced as showing "the essential doctrines and fundamental principles" of the Free Church, and to read and consider them with the aid of much argument as to their import and meaning, about which the parties differ. I am clearly of opinion that an *ex facie* absolute property title, whether in land or money, in a Church or association cannot be thus limited and qualified, or the Church or association thereby hindered from exercising its otherwise undoubted right of modifying or even renouncing any doctrine or principle however fundamental. I am not to be understood as indicating an impression created by anything which the pursuers have brought under our notice, or anyhow, that the defenders by the union in question renounced or modified any doctrine or principle whatever of their Church. I mean only that it was for them, and the Church with which they united, and not for this Court, to judge of the matter, and that no good ground has been presented for our interference with their decision.

Upon these grounds and for these reasons the pursuers must fail and the defenders must succeed. But I do not think the decision is properly expressed in the Lord Ordinary's interlocutor which dismisses the action. I am prepared, and I think the Court ought, to disallow the whole grounds of action, sustain the defences, and assoilzie the defenders with expenses.

LORD TRAYNER—The propositions for which the pursuers contend are mainly these—(1) That they as representing the Free Church are entitled to the whole property held in trust for behoof of that Church; and (2) that the defenders having departed from the essential and fundamental principles of the Free Church, and violated its constitution, have forfeited all right in and to such property. If these propositions are established in fact there is probably no doubt that the pursuers are entitled to our judgment. The Free Church of Scotland as constituted in 1843 was simply a voluntary association, and it is the law applicable to the rights of members of such associations which must be applied here. Now, I take it to be clear that if certain members of a voluntary association (and that whether they form a majority or minority in number) depart from the essential and fundamental principles of the association, and violate the conditions and terms of its constitution, they thereby cease to be members of the association, and forfeit right to any benefit they had as members in the funds or property held in trust therefor; the remanent members form the association and retain all its rights. The parties, in their arguments before us, did not appear to be at variance as to the law which would rule our decision—the law as I have stated it—but differed as to the facts on which the pursuers' claim is based. Accordingly, the question to be now determined is, whether the pursuers' averments in point of fact have been established.

The grounds of complaint alleged by the pursuers against the defenders are, as far as I could discover, two—First, it is said that whereas the Free Church held as essential and fundamental, and as part of its constitution, the doctrine of Church Establishment, the defenders had departed from that by uniting themselves with another association which repudiated that doctrine and professed the contrary doctrine of Voluntaryism. Second, that whereas the Free Church had required from its ministers and elders subscription to a formula, by which they acknowledged the Westminster Confession of Faith "approven by former General Assemblies" to be the confession of their faith, the formula now adopted by the Free Church (in conjunction with the other Church it had joined) requires ministers and elders to profess their belief in the Westminster Confession "approven by Acts of General Synods and Assemblies." It was said that the difference in the formulæ introduced a fluctuating standard for a fixed and unchangeable standard of belief.

I think it convenient to deal first with this second ground of complaint. I have been unable to discover any real or tangible ground upon which it can rest. The formulæ appear to me to be essentially the same. The introduction of the words "*General Synods and* Assemblies" became appropriate, if not necessary, in the formula of the United Church, because it requires candidates for orders to recognise the construction put upon the Westminster Confession, by the chief judicatory of each of the Churches—now united—when they were separate bodies, that is, the General Assemblies of the Free Church and the General Synods of the United Presbyterian Church. It would have been important if it could have been shown that the interpretation or construction put by these bodies respectively on the Westminster Confession was inconsistent or contradictory. But this the pursuers have failed to show. So far as appears, the Churches which now form the United Church are, and have always been, agreed on the meaning and construction of the Westminster Confession in so far as any matter of faith or religious doctrine is concerned, and it is with matter of faith and religious doctrine that the formulæ are alone concerned. That the Free Church and United Presbyterian Church differed as to the 3rd section of the 23rd chapter of the Westminster Confession to some extent is true. The difference, however, was not concerning a matter of faith, but of polity. Nor do I see anything in the new formula to suggest that the standard which has now to be acknowledged and professed is less rigid than it was before. If any change is introduced it must be one "approven" by the principal judicatory of the Church, and in regard to this the formulæ do not differ.

But the serious question in the case, and to which the parties chiefly addressed themselves in debate, is that which I have mentioned as the pursuers' first ground of complaint against the defenders. In dealing with this question we start with two matters of fact that are not open to doubt —(1) that the Free Church from its constitution in 1843 down (at least) to its union with the United Presbyterian Church professed the establishment principle; and (2) that the United Presbyterian Church throughout the whole period of its existence has repudiated that principle, and professed instead the principle of Voluntaryism.

In this state of the facts two questions arise—(1) Have the defenders abandoned the principle of establishment? and (2) Was it a principle so fundamental or essential to the constitution of the Free Church that the abandonment of it involved the consequences attributed to it by the pursuers?

1. The first of these questions, I think, must be answered in the affirmative. It is quite true that the principle of establishment was declared at the time of the union with the United Presbyterian Church to be left an open question, and accordingly in

the Declarations adopted by the United Assembly of the same date as the Uniting Act, it is set forth that members of both Churches "shall have full right, as they see cause, to assert and maintain the views of truth and duty which they had liberty to maintain in the said Churches." It is therefore still open to any member of the Original Free Church to maintain (although a member of the United Church) the principle of Church Establishment, and to do his best to bring others to his view. But it does not seem to me to meet the question whether the Free Church, as a Church, has not abandoned the principle of Church Establishment, to say that it is left open to any individual member to hold it. It was the feature of the Free Church (prior to the Union), which distinguished it from all other Presbyterian Churches in Scotland, that it was the only Presbyterian Church not connected with the State which professed to hold the establishment principle. And one of the results of the Union is, that moneys bequeathed and subscribed for behoof of the Free Church, at a time when it professed that principle, may now be devoted to the purposes of a Church many of whose ministers and congregations repudiate that principle. I cannot come to any other conclusion, therefore, than that the defenders (that is, the original Free Church as a body) have abandoned the principle of Church Establishment. They can no longer give effect to it by renewing their connection with the State, or returning to the Church as by law established.

2. Was the establishment principle an essential or fundamental principle of the Free Church? or did its abandonment violate the terms of its constitution? I answer both of these questions in the negative. The principle in question was never regarded or put forward as *de fide;* at the most it was a principle of polity, of government, of management. The essential principles of the Free Church, as they were in the earlier years of its history, repeated again and again, were the Headship of Christ, and the consequent independence of His Church (independence, that is, of the civil ruler) in matters religious or ecclesiastical. The establishment principle is never once referred to as essential or fundamental, nor presented as a principle on the same platform with those I have named. That it was frequently referred to in the Protest and other documents at the time of the Disruption as a principle which, notwithstanding their separation from the State, they still professed, is true, and the Lord Ordinary has shown how natural it was that it should be so. But, I repeat, it was never set forth as an essential principle of the constitution of the Free Church. What after all is this principle to which the Free Church at the Disruption declared its adherence? It is that contained in the 3rd section of the 23rd chapter of the Westminster Confession, which sets forth the view or opinion which the Reformed Church held regarding the duty of the civil magistrate. Now it appears to me difficult to hold that a mere opinion as to what some third person was bound to do, which he might neglect or refuse to do, and which the Church could not compel him to do, could in any way be an essential part of the constitution of the Church which held that opinion. The Church existed whether the civil magistrate did his duty or not. Indeed, the establishment principle could scarcely be regarded as an essential or fundamental principle which all the members of the Free Church were bound to hold and maintain, because that principle as laid down in the Westminster Confession was so vague, both as to the character of the civil magistrate's duty and the manner of performing it, that a great variety of opinion might exist (and doubtless did exist) in regard to it. It was not a well-defined principle like spiritual independence in matters sacred or ecclesiastical, or the non-intrusion of ministers.

Besides what I have said, it is not without importance to keep in mind that the history of the Free Church shows that as a Church, and apart from the opinions held by some individual members of it, it did not regard the establishment principle as one of its fundamental or essential principles. It was from the commencement of its existence down to the date of its union a Church conducted and maintained, in point of fact, according to the voluntary principle. If in theory it was something else the theory did not square with the fact. But even the theory that it was based upon the establishment principle can scarcely be maintained in face of this other fact, that the Free Church not only did nothing to give effect to the establishment principle so as to make it of any practical avail, but on the contrary devoted much of its time and energy to bring about (if it could) the disestablishment of the Church of Scotland. In a word, the principle of establishment was from an early period in the history of the Free Church treated as a dead letter.

Lastly, on this branch of the case, while I cannot say (as was urged by the defenders) that the decision in the case of *Smith* v. *Galbraith* is a decision of the question here at issue, yet it appears to me that the opinions delivered by the Judges who decided that case are in principle adverse to the pursuers' contention here.

But *esto* that the establishment principle had been explicitly declared in 1843 to be an essential principle of the Free Church, I think the Church had the power to abandon that principle and to that extent alter the original constitution.

In the first place, if that principle had no bearing upon the constitution of the Free Church except as affecting its polity or management, I am disposed to think that it could be modified, altered, or abandoned by the voice of the majority duly or deliberately taken. But, in the second place, I think the Free Church (before the Union) had the power under its constitution to alter its principles, if in order to do so it observed certain well-defined procedure.

In the Act of Separation and Deed of Demission, by which at the Disruption in May 1843 the ministers and elders abdicated

and renounced their status as ministers and elders of the Established Church, it was declared that they did not abandon their right "to perform freely and fully the functions of their offices towards their respective congregations;" and further, "that they are and shall be free to exercise government and discipline in their several judicatories separate from the Establishment, according to God's Word, and the constitution and standards of the Church of Scotland as heretofore understood." The effect of that declaration was just this, that the Free Church should, as regards its judicatories and their jurisdiction, be as they had hitherto been in the Established Church, the only difference between the two Churches (as was indeed much emphasised) being that the Free Church declined to recognise that exercise of its powers by the civil court in which the Established Church had acquiesced. Now, at the time when that declaration was made, one of the Acts of Assembly of the Established Church in full force and observance was the Barrier Act. By that Act it was provided that to prevent sudden alteration or innovation or other prejudice to the Church in either doctrine or worship or discipline or government the General Assembly should not pass any Acts "to be binding rules and constitutions to the Church" until the same had been submitted to the several presbyteries, after which the Assembly might "pass the same in Acts, if the more general opinion of the Church thus had agree thereunto." That Act became part of the law of the Free Church by adoption, and they certainly acted upon it before the Union. In connection with this Act the Lord Ordinary points out that it conferred on the Assembly of the Established Church a certain legislative power, and I agree with him. But the State was no party to the Barrier Act, and therefore the exercise of any power under it by the Established Church would be liable to be called in question by the State. No one, however, in the Free Church could call in question the exercise of powers (conferred by the Barrier Act) by the Free Church, because no one was concerned in its adoption except the members of the Free Church themselves. It was among them part of the contract—the constitution—by which and under which they were united. Each member of the Free Church in 1843 was a party to the adoption of the Barrier Act, and everyone who subsequently became a member did so on the condition that that Act formed part of the law of the Association. It may be that under the Barrier Act the Free Church had not absolutely unrestricted power of legislation, or that it did not authorise any or every change in matter of doctrine, worship, discipline, or government, although it conferred large powers in that direction. For example, it may be thought that the Barrier Act would not be held to authorise an Act declaring that the Church no longer held the doctrine of the divinity of Christ, because then it would have ceased to be a Christian Church; nor to authorise the declaration that the Church was thereafter to be governed by bishops, because then it would have ceased to be a Presbyterian Church. I am not prepared to say that even these extreme cases would not have been covered by the wide terms of the Barrier Act, for that Act contains no limitation of the power to make alterations regarding the doctrine, worship, discipline, or government of the Church. But changes less radical than these which I have supposed, or changes which did not materially alter the character and religious tenets of the Church or its peculiar form of government, were, in my opinion, authorised by the Barrier Act. I am of opinion, therefore, that, assuming the principle of Establishment to have been a distinctive doctrine of the Free Church, it was quite competent for the General Assembly to alter or abandon it if it was found—on adopting the procedure appointed to be observed by the Barrier Act (which was done)—that "the more general opinion of the Church agreed thereunto."

On the whole matter I am of opinion that the judgment of the Lord Ordinary should be affirmed. The form of his interlocutor, however, will require to be altered. His Lordship having heard and disposed of the case as on relevancy, dismissed the action; but we have heard the case as on a concluded proof, and the proper interlocutor therefore will be one of absolvitor.

It follows from what I have said that the judgments pronounced by the Lord Ordinary in each of the cases, called the Aultbea, Kyleakin, Culter, and Buccleuch Greyfriars cases, should be affirmed.

The Court pronounced this interlocutor:—

"Recal the said interlocutor reclaimed against in so far as it dismisses the action, and in lieu thereof assoilzie the defenders from the conclusions of the action, and decern; Find the pursuers liable in additional expenses, and remit," &c.

The decision in this case governed four other cases, viz., the *Aultbea* case, the *Kyleakin* case, the *Buccleuch Greyfriars* case, and the *Culter* case, which were actions at the instance of the United Free Church.

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