

has been fairly represented, others who stand in the same interest are not entitled to renew it. Now what is the interest here? The interest is the interest of the public in this right of way. That is the question. And what is the conclusion sought by the action? To have it declared, that there is a public right of way. The question at issue is—a public right of way or no? What right had the pursuers in this action to try the question? They represented the interest of the public; therefore, I am clearly of opinion, that the judgment was right upon the first point.

But then comes the second point; that was considered in the Court below as a question of great difficulty. Every one of the Judges expressed his opinion upon that question with hesitation. We have now heard the cases argued again. I myself, in the Court below, expressed my opinion upon that point. I by no means entertained a confident opinion upon it, though I was not disposed to alter the judgment of the Lord Ordinary. But there is an element in the case which I am bound to say I think may be founded upon to sustain the judgment which has been proposed by your Lordships. I mean, that there was something given for the settlement of the case; it was to a certain extent purchased. Now that is a point, which I think may be founded upon as disturbing the ordinary course of procedure. Had another course been followed by the defenders' action, they might have followed out their notice of trial by a special jury, and if they had obtained a verdict, or the other party had failed to maintain his action, the case might have stood in a different position. But when the defenders in the action, the heritors, gave something to the other party for obtaining the judgment, that introduces an element as to which I cannot say, that it does not entirely sustain your Lordships' decision.

The *Attorney General*.—Will your Lordships pardon me for making a suggestion as to the form of your Lordships' order. Your Lordships would reverse the second finding of the interlocutor which has sustained the second plea in law, that is, the plea of *res judicata*. Then there comes the question which might be prejudiced by that form of order, unless your Lordships add some words. I take the words of LORD CURRIEHILL'S judgment, and I would suggest, that it would be right to add, that it is without prejudice to the question, whether the respondents are entitled to prove, (I do not ask for liberty to prove, but that that question should be left open to us to prove,) that the pursuers in the present action are identified in the manner he refers to with the pursuers in the former action.

LORD CHANCELLOR.—My Lords, I do not think your Lordships can be called upon to take the course suggested by the Attorney General. The question is, whether these interlocutors ought to be reversed or not? I apprehend, that your Lordships are of opinion, that they ought to be reversed, and that the case must be remitted to the Court of Session to be proceeded with.

LORD COLONSAY.—If the case is remitted to the Court of Session to be proceeded with, it will start from the point at which it was when the Lord Ordinary pronounced his interlocutor, which has been brought under review, and which was affirmed by the Inner House. The other inquiry is left open.

Mr. Scott.—I have to ask your Lordships for the costs.

LORD CHANCELLOR.—Costs are never given when there is a reversal.

Interlocutors reversed.

Appellant's Agents, D. Crawford, S.S.C.; Holmes and Co., Westminster.—*Respondents' Agents*, Gibson Craig, Dalziel; and Brodies, W.S.; Martin and Leslie, Westminster.

APRIL 11, 1867.

The Rev. GEORGE HAY FORBES, Burntisland, *Appellant*, v. The Right Rev. ROBERT EDEN, D.D., Primus of the Episcopal Church, and Others, *Respondents*.

Church—Jurisdiction—Voluntary Association—Episcopal Church—Altering Canons—*There is no direct power in courts of law to decide whether A or B holds a particular status according to the rules of a voluntary association. But if a fund held in trust has to be paid over to the person who, according to the rules of the society, fills that character, then the Court must make itself master of the questions arising out of the rules of the society, which are necessary to enable it to decide whether A or B is the party entitled. There is no jurisdiction in the Court of Session to reduce the rules of a voluntary society, or, indeed, to inquire into them at all, except so*

far as may be necessary for some collateral purpose, such as the enjoyment of any pecuniary benefit in connection with such rules.

There is nothing to prevent a synod or assembly of a voluntary church altering its canons.¹

The pursuer (the appellant) was minister of the Scotch Episcopal congregation at Burntisland, and the action was directed against Bishop Eden, then Primus of the Episcopal Church in Scotland, and against the other bishops, deans, and ministers of that church, who were members of a General Synod of that church, held at Edinburgh on 8th July 1862, and continued by various prorogations and adjournments until 13th February 1863, as such members, and as individuals. The summons concluded for reduction of "the Code of Canons of the Episcopal Church in Scotland," enacted by that General Synod, so far as it contained the enactments comprised in article 20, § 4; article 28, § 20; article 29; article 30, §§ 2 and 4; and article 38, § 3. The declaratory conclusions were—"That it was and is *ultra vires* of the defenders, or of any general synods of the said church, to alter, amend, or abrogate any of the canons contained in the code which was 'revised, amended, and enacted by an ecclesiastical synod holden for that purpose at Edinburgh on the 29th day of August, and continued by adjournment till the 6th of September inclusive, in the year of our Lord 1838,' or to make new canons for the said church, except in so far as such alterations, amendments, abrogations, and new canons may be in conformity with the constitution which was recognized and the practice which was acknowledged in the said church at the time of the pursuer's ordination as a minister thereof, and set forth in the Code of Canons of 1838, which was then subscribed by him: And it ought and should be found and declared, that the pursuer is entitled to celebrate Divine worship, and all the other services, and to administer the sacraments and all other rites of the said church, in conformity with the said canons enacted in the year 1838, and is entitled to the free exercise and enjoyment of all the privileges conferred on him under said canons, or under the deed of institution in his favour aftermentioned."

The pursuer further concluded for payment of £120, being the amount paid by him, or for which he was liable, to the Rev. John Wilkinson, for his services as curate to the pursuer, in terms of an agreement between them, of which services the pursuer was deprived through the wrongous refusal of a license to the said Rev. John Wilkinson; and also of the sum of £200 as damages.

The pursuer stated, that he was ordained as a clergyman of the Episcopal Church in Scotland in 1848; and in the following year was instituted by Bishop Torry to the pastoral charge of the Episcopal congregation in Burntisland. Under his deed of institution, the pursuer held his office for life, and could only be removed for an offence against the canons of his church. Prior to his ordination, the pursuer subscribed the Thirty nine articles of the Church of England, and the canons of the Episcopal Church in Scotland, enacted in a synod held in 1838. Since his institution, the pursuer had expended a considerable sum in promoting the interests of the Scotch Episcopal Church in Burntisland. In particular, he had purchased ground and erected on it a clergyman's house, a school, and part of a chapel. In virtue of his office, he was in receipt of an income amounting to about £40 a year. He also received from the Scotch Episcopal Church Society an annual grant of £10 towards the expenses of the school which he maintained in connexion with said church. The pursuer was a member of the Scotch Episcopal Friendly Society, which was confined to the clergy of the Scotch Episcopal Church, and had for its object to make provision for their widows and children. The pursuer was married; and if he were deprived of his status of a clergyman of the Episcopal Church in Scotland, the provision for his widow would be lost.

The pursuer objected in this action to the enactments comprised in the portions of the canons of 1863, of which he sought reduction, as inconsistent with the canons of 1838, which were the canons of the church in force at the date of his ordination and institution, and as involving an alteration of these canons, which was *ultra vires* of the General Synod.

With regard to the power of a General Synod to alter the canons, the 33d article of the Code of Canons of 1838 provided—"A general synod of the church, duly and regularly summoned, has the undoubted power to alter, amend, and abrogate the canons in force, and to make new canons; and the said alterations, amendments, abrogations, and new canons, being in conformity with the recognized constitution and acknowledged practice of this church, shall not only oblige the minority in the said synod, but all the absent members of the church."

The enactments sought to be reduced as containing alterations in the canons of 1838, *ultra vires* of the synod, were—

(1.) ARTICLE 20, § 4. "Under special circumstances, a bishop shall not be precluded from opening a mission in any part of his diocese, when to him it may seem desirable."

This article was alleged to be contrary to the rules of the church at the date of the pursuer's

¹ See previous report 4 Macph. 143; 38 Sc. Jur. 98. S. C. L. R. 1 Sc. Ap. 568; 5 Macph. H. L. 36: 39 Sc. Jur. 411.

institution, and subversion of his exclusive right to the pastoral charge of the congregation at Burntisland conferred on him by the deed of institution.

(2.) ARTICLE 28, § 20. "The General Synod shall have power to alter, amend, and abrogate the canons in force, and to enact new canons, provided that such alterations, amendments, abrogations, and new canons be in conformity with the recognized constitution of this church, and such enactments shall oblige as well the minority in the said synod as all members of the church."

This article differed from Article 33 of the canons of 1838, quoted *supra*, inasmuch as it did not provide, (as the Article 33 of the canons of 1838 did,) that the alterations of the canons were to be in conformity with the acknowledged practice of the Church.

(3.) ARTICLE 29. "Whereas, in the preface to the first Reformed Prayer Book of the Church of England (1549) it was provided, in order to remove the inconveniences arising from 'diversity' in the celebration of Divine worship, that 'henceforth all the whole realm shall have but one use;' and whereas, in consequence of the communion and intercourse that exist between the United Church of England and Ireland and the Episcopal Church in Scotland, it is expedient to have as little diversity as may be between the practice of this church and that of the sister churches of the United Kingdom in the use of divine offices; and whereas the English Book of Common Prayer is and has been for many years past in general use among us, not only for the performance of morning and evening service, but for the administration of the sacraments and other rites and ceremonies of the church: it is hereby enacted, that the said Book of Common Prayer, as now authorized according to the sealed book, is, and shall be held to be, the service book of this church for all the purposes to which it is applicable, and that no clergyman shall be at liberty to depart from it in public prayer, and administration of the sacraments, or in the performance of other divine offices, except so far as the circumstances of this church require, and as specified in the canons of this church."

(4.) ARTICLE 30, of which the pursuer sought reduction in §§ 2 and 4, provides—"1. Whereas the Episcopal Church in Scotland, under the guidance of divers learned and orthodox bishops, has long adopted and extensively used a form for the celebration of the Holy Communion, known by the name of the 'Scotch Communion Office,' it is hereby enacted, that the adoption of the Book of Common Prayer, as the service book of the church, shall not affect the practice of the congregations of this church which now use the said 'Scotch Communion Office.' In such congregations the use of the said 'Scotch Communion Office' shall be continued, unless the incumbent and a majority of the communicants concur in disusing it. 2. The office of the Book of Common Prayer shall be used in all new congregations, unless the majority of the applicants mentioned in Canon 20, § 1, shall declare to the bishop, at the time of sending their resolutions to him, that they desire the use of the Scotch Office in the new congregation, in which case the bishop shall sanction such use. The use of the said office shall be continued in such congregation, unless the clergyman and a majority of the communicants shall concur in disusing it. . . . 4. At all consecrations, ordinations, and synods, the Communion Office of the Book of Common Prayer shall be used."

(5.) ARTICLE 38, § 3.—"At the burial of the dead, the rubrical directions of the Book of Common Prayer shall be complied with, so far as the circumstances of this church will permit."

The pursuer's main ground of objection to the enactments above quoted, in Articles 29, 30, and 38, was in substance, that the English Book of Common Prayer was thereby declared to be the "service book of the Episcopal Church in Scotland."

The alteration of most importance, and most insisted in by the pursuer, was, that, by the new canons, the Communion Office of the Book of Common Prayer was directed to be the office used in the Church, unless in the exceptional cases specified in Article 30. This was said in particular to be in violation of Article 21 of the code of 1838, by which the Scotch Communion Office was declared to be of primary authority, and which provided—"Whereas it is acknowledged by the 20th and 34th of the Thirty nine Articles, that 'not only the church in general, but every particular or national church, hath authority to ordain, change, and abolish ceremonies or rites of the Church, ordained only by man's authority, so that all things be done to edifying,' the Episcopal Church in Scotland, availing herself of this inherent right, hath long adopted and very generally used a form for the celebration of the Holy Communion, known by the name of the Scotch Communion Office, which form hath been justly considered, and is hereby considered, as the authorized service of the Episcopal Church in the administration of that sacrament. And as, in order to promote a union among all those who profess to be of the Episcopal persuasion in Scotland, permission was formerly granted by the bishops to retain the use of the English office in all congregations where the said office had been previously in use, the same permission is now ratified and confirmed. And it is also enacted, that in the use of either the Scotch or English office no amalgamation, alteration, or interpolation whatever shall take place, nor shall any substitution of the one for the other be admitted, unless it be approved by the bishop. From respect, however, for the authority which originally sanctioned the Scotch Liturgy, and for other sufficient reasons, *it is hereby enacted, that the Scotch Communion Office continue to be held of*

primary authority in this church, and that it shall be used not only in all consecrations of bishops, but also at the opening of all general synods."

With regard to the Scotch Communion Office mentioned in the canons, the pursuer averred—"The said 'Scotch Communion Office' was compiled for the use of the Episcopal Church in Scotland in or about the year 1637. Since that time the 'Scotch Communion Office' has been frequently published separately, as well as in editions of the Scotch Prayer Book, and other publications of the said office. In the separate form, fifty four or more different editions of this office have been published, in all of which it is styled, 'The Communion Office' of said church. And no other document except itself has ever borne this title, down to the passing of the canons now complained of."

In answering this statement, the defenders admitted, "That at and long prior to the date of the canons of 1838, the office called the Scotch Communion Office existed, and had been printed and published, and that there is no question about the identity of the office referred to in said canons and in the canons of 1863 as the Scotch Communion Office."

With regard to the Order for the burial of the dead, the Administration of baptism of infants, and the Order for the visitation of the sick, the pursuer stated, that there were certain passages in these services which were opposed to his belief; and which, by the new canons, he was bound to read at burials, baptism, and visitation of the sick; whereas, under § 23 of the canons of 1838, it was optional to him to use the English services for visitation of the sick and burial of the dead or not, as he thought proper; and § 17 of the canons of 1838 provided differently from the canons of 1863 for the administration of baptism.

The pursuer further stated, that being in bad health he had procured the assistance of the Rev. John Wilkinson as his curate, and had agreed to pay him £120; but that the bishop of the diocese had refused to receive him unless he should subscribe and conform to the new canons. The pursuer further stated, that under the new canons he was subject to deposition of his pastoral charge and degradation from his office for nonconformance to the new canons.

The defenders stated, *inter alia*, that the canons of 1863 were duly adopted, enacted, and sanctioned by a General Synod, of which the defenders were the members; it was dissolved on 13th February 1863, and the said General Synod thereafter ceased to exist. In adopting, enacting, and sanctioning the canons, the said General Synod acted within their proper province. The canons were such as they were entitled to enact, and they did not thereby do the pursuer any wrong, and, in particular, no civil wrong. The defenders made no claim to the ground, house, school, and part of a chapel referred to in the condescence. With respect to the pursuer's objections to passages or expressions in services in the Book of Common Prayer, and to his objection to use burial and baptismal services, and the order for the visitation of the sick, the defenders stated, that these services had, from a remote period, and long before the pursuer's ordination, been generally used in the Episcopal Church in Scotland, and the use of them was enjoined by the canons of 1838. The defenders desired to explain, that while they maintained, that the canons are not liable to be reduced by the Court, they did not seek to defend themselves from legal liability by pleading, that the canons have not been reduced, and that they undertook not to state any such defence.

The pursuer pleaded—1. The said new Code of Canons, in so far as regards Article 20, § 4; Article 28, § 20; Article 29; Article 30, §§ 2 and 4; and Article 38, § 3 thereof, having been enacted in gross violation of the contract or constitution of the said Episcopal Church in Scotland, and being *ultra vires* of the defenders, the pursuer is entitled to have them reduced; or, at least, in so far as they can be founded on as a bar to his obtaining reparation and damages. 2. By virtue of the contract entered into by the said Episcopal Church in Scotland with the pursuer, when he subscribed the said canons enacted in 1838, and was ordained as a minister of said church, and by virtue of the said deed of institution in his favour, he is entitled to decree in terms of the declaratory conclusions. 3. The pursuer having, by the wrongous refusal of license set forth in the condescence, been deprived of the services of a curate, is entitled to payment of £120, paid by him to said curate, or for which he is ultimately liable in payment. 4. The pursuer having, through and in consequence of the said wrongous refusal of license, been deprived of all assistance in his ministerial duties, and having been thereby injured in his health, feelings, and patrimonial interests, he is entitled to damages and *solatium* as concluded for.

The defender pleaded—1. The grounds of reduction libelled are insufficient in law. 2. Reduction of the canons called for and complained of is unnecessary to entitle the pursuer to maintain any remedy or legal liability competent to him against the defenders, as members of the General Synod, by which the canons complained of were enacted, and the action ought therefore to be dismissed, or the defenders assoilzied, in so far as regards the reductive conclusions. 3. The declaratory conclusions of the summons are unfounded in law and are unsupported by any relevant and sufficient statement. 4. The petitory conclusions are not founded on any statement sufficient in law to support them.

The Court of Session held, that the alterations in the canons complained of were not *ultra vires* of the synod, and that the pursuer's averments were irrelevant; and the defenders were assoilzied.

The appellant gave the following reasons in his *printed case* for reversing the interlocutors:—1. Because the new code of canons, in so far as complained of in the present action, has been enacted in gross violation of the contract or constitution of the said Episcopal Church in Scotland, and is *ultra vires* of the respondents. 2. Because the said violation of the contract or constitution of the said Episcopal Church in Scotland has inflicted, and is calculated to inflict, loss, injury, and damage on the appellant, and his rights as a member of the said church or association have been, and may be, interfered with. 3. Because the facts averred by the appellant are relevant and sufficient to entitle him to obtain redress in the various modes concluded for in the summons.

The *appellant* argued in person.

The *Attorney General* (Rolt), and *Mundell Q.C.*, for the respondents.

The authorities referred to were *Macmillan v. Free Church*, 23 D. 1314; 24 D. 1282; *Presbytery of Strathbogie*, 2 D. 258; 4 D. 1298; *Middleton v. Anderson*, 4 D. 957; *Ferguson v. Malcolm*, 12 D. 732; *Dunbar v. Skinner*, 11 D. 945; *Craigie v. Marshall*, 12 D. 552; *per L. Moncreiff*; *Couper v. Burn*, 22 D. 120; *Att. Gen. v. Pearson*, 7 Sim. 290.

LORD CHANCELLOR CHELMSFORD (after stating the facts and pleadings).—I will only add one word as to the petitory conclusion for damages for the refusal of a license to Mr. Wilkinson. If the bishop had authority to grant or refuse a license at his discretion, of course no valid cause of complaint arises, but if he wrongfully refused, he would be personally answerable for his own act, and the General Synod cannot be liable for it in any way; and if a license was improperly withheld, it would be Mr. Wilkinson who had a right to complain, and not the appellant, for the remote consequences of suffering in health and mental anxiety resulting from his not obtaining a curate.

I therefore submit to your Lordships, that the interlocutor must be affirmed, and the appeal dismissed, and I regret to add it must be dismissed with costs.

LORD CRANWORTH.—My Lords, the decision of this case depends on certain well established principles of law.

There is no authority in the courts either of England or Scotland to take cognizance of the rules of a voluntary society, entered into merely for the regulation of its own affairs, save only so far as it may be necessary, that they should do so for the due disposal or administration of property. If funds are settled to be disposed of amongst members of a voluntary association according to their rules and regulations, then the Court must necessarily take cognizance of these rules and regulations for the purpose of satisfying itself who is entitled to the funds; so if the rules of a religious association prescribe who shall be entitled to occupy a house, or to have the use of a chapel or other building. This is the principle on which the courts have administered funds held in trust for dissenting bodies. There is no direct power in the courts to decide whether A or B holds a particular status according to the rules of a voluntary association.

But if a fund held in trust has to be paid over to the person who, according to the rules of the society, fills that character, then the Court must make itself master of the questions necessary to enable it to decide whether A or B is the party so entitled.

These considerations go to the root of the present case. The appellant contends, that he was ordained under the canons of 1838, and, so ordained, was entitled to exercise the functions of a clergyman of the Episcopal Church of Scotland, according to the doctrine and practice established by those canons; and he complains, that the effect of the canons of 1863 has been to impose on him the maintenance of doctrines and the adoption of a practice different from those to which he bound himself on his ordination under the prior canons.

But assuming that to be so—assuming that the General Synod of 1863 had no power, according to the constitution of 1838, to make the alteration of which the appellant complains—that of itself gives no jurisdiction to the superior courts. There is no jurisdiction in the Court of Session to reduce the rules of a voluntary society, or, indeed, to inquire into them at all, except so far as may be necessary for some collateral purpose.

The only remedy which the member of a voluntary association has, when he is dissatisfied with the proceedings of the body with which he is connected, is to withdraw from it. If, connected with any office in a voluntary association, there is the right to the enjoyment of any pecuniary benefit, including under that term the right to the use of a house, or land, or a chapel, or a school, then incidentally the Court may have imposed on it the duty of inquiring as to the regularity of the proceedings affecting the status in the society of any individual member of it. But there is no question of that sort.

This seems to me to dispose of the whole case, for I cannot think that the statement in the condescendence alleged the violation of any legal right which enables the Court of Session to inquire into the power of the general synod to frame the canons of 1863. In the 4th condescendence the appellant states, that, as minister at Burntisland, he is in receipt of an income of £40 per annum, besides an annual grant of £10 from the Church Society towards the maintenance of a school. This may all be true, but there is no allegation that he is entitled, as of right, to this income, or that there is any intention on the part of those from whom it is

derived to deprive him of it under the provisions of the new canons. In the 5th condescendence he states, that he is a member of a friendly society, to which none but clergy of the Scotch Episcopal Church can belong; and he complains, that if he is deprived of his status as a clergyman of the Scotch Episcopal Church he will lose all benefits from the premiums which he has paid since his ordination in 1848. But here, again, there is no allegation of an intention to deprive him of his status as a clergyman, and, if there were, it is not that status which entitles him to that benefit of a friendly society, but a contract into which he has voluntarily entered with that body. If any rights which he or his representatives may have acquired or may acquire under that contract should be violated or withheld, he will seek, and, no doubt, will obtain, proper redress. But until such a question arises, there is no power to pass any judgment on the validity of the canons of which the appellant complains. They are the mere rules which a voluntary association has prescribed for itself.

In the view I have taken of this question, I do not feel myself in strictness called on to go any further, but the appellant has argued this case with so much earnestness and ability, that I have felt it due to him, that I should shortly examine the case from his own point of view, that is, I should consider whether, assuming that there is any power in the Court to reduce the canons of 1863, he has shewn any ground for such reduction. I am of opinion that he has not.

The appellant rests his own case on the analogy which he supposes to exist between the body associated as the Scotch Episcopal Church and an ordinary commercial partnership. He contends truly, that unless, so far as the articles of partnership authorize it, no change can be made in its provisions by the mere will of a majority of the partners, nor, indeed, without the concurrence of every individual of which the partnership is composed; and he contends that, on the same principle, the synod or general assembly of persons associated as a church of a religious body can have no power to alter the canons or rules of that church or religious body without the consent of every member of it, except so far as they are expressly authorized to do so by the terms of their constitution. But the synod of the church seems to me to resemble rather the Legislature of a state than the articles of association of a partnership.

A religious body, whether connected with the state or not, forms an *imperium in imperio* of which the synod is the supreme body, when there is not, as there is in the Church of England, a temporal head. If this is so, I feel it impossible to say, that any canons which they establish can be treated as being *ultra vires*. The authority of the synod is supreme. It may, indeed, be, that a synod or a general assembly of a religious body has no power to affect civil rights already acquired under existing canons or rules. But that is very different from saying, that the canons or rules themselves have no force among those who have no such complaint to make.

This is my view of the principles involved in this case, but I think it right to add that, even on the narrower ground on which the appellant has proceeded, I think he fails to establish any ground of complaint against the new canons.

The most material complaint relates to articles 2 and 4 of the 30th canon of the new code. The appellant complains, that these two articles of this canon effect very generally a substitution of the English for the Scotch communion service. I will assume that they do so. But I cannot think that this affords any ground of complaint to the appellant.

The language of the 21st of the old canons, when fairly interpreted, treats the whole communion service as merely a form ordained by man's authority, and recognizes in the fullest way the right of the synod to vary the form as may be desirable. The language of that canon seems to admit of no other construction. It begins by reciting, that "every particular church hath authority to ordain, change, and abolish ceremonies or rites of the church ordained only by man's authority," and then proceeds to say, that the Episcopal Church, availing herself of this inherent right, "hath long adopted, and very generally used, a form for the celebration of the holy communion, known by the name of the Scotch communion office, which form hath been justly considered, and is hereby considered, as the authorized service of the Episcopal Church in the administration of that sacrament." But it then goes on to say, that the English office might be retained where it had heretofore been in use, and that no substitution of the one for the other shall be admitted unless approved by the bishop, and it declared, that the Scotch communion office shall be held of primary authority, and that it shall be used in all consecrations of bishops, and at the opening of general synods. I find it impossible not to deduce from the terms of this canon, that the framers of the canons of 1838 treated the Scotch communion office as a ceremony or rite of the church ordained by man's authority and liable to be changed by the same authority. The language appears to me to admit of no other construction, and if this be so, how can the appellant complain, that a subsequent synod has, by the 30th canon, reversed as it were the position of the two offices, and made the English the office of primary authority, instead of the Scotch? It is to be observed, if that be important, that the canon has no direct effect on the appellant. He is left at liberty to use the Scotch office as he has hitherto done, and so may any new congregation on its formation if the majority desires.

I cannot conceive anything more fairly to be treated within the competence of the General Synod than such a change of what the 21st canon of 1838 describes as a ceremony or rite of the

church ordained by man's authority, and the power to make which change the canon itself treats as the inherent right of the Episcopal Church in Scotland.

The next canon in point of importance, of which complaint is made, is the 29th, which makes the Book of Common Prayer the service book of the Scotch Episcopal Church for all purposes. Under the whole canons (canon 28 as in the new canon 29) the Book of Common Prayer was alone to be used in the celebration of morning and evening services, and also in the occasional services, particularly in the baptismal and burial services, and in the visitation of the sick, and this he complains of as a grievance. But I can discover none. As to baptism, the 17th old canon prescribes the form to be adopted in baptism, and evidently intended, that the Book of Common Prayer should be generally used. When any applicant for baptism expresses a doubt as to the validity of baptism previously obtained from some other sect, this canon directs the form prescribed by the Book of Common Prayer in a nearly similar case to be used, and this is said to have been provided for in consequence of the unhappy multiplicity of religious sects prevailing in Scotland. This however cannot be treated as a substantial deviation from the form in the Book of Common Prayer. It was certainly in the power of the synod to prescribe the use generally of that which was already in common if not in universal use.

As to the burial service, the applicant's objection is plainly unfounded. By the old canon 23 he was bound to read the church service for the burial of the dead when called on to do so. The applicant says, that this left him at liberty to use any service which he might prefer when not so called on. I desire not to be taken as at once assenting to this construction of the old canon, but even if that be its true interpretation, the appellant cannot complain of the change introduced by the new canon. It only obliges him to use the church form on all occasions instead of leaving him at liberty to use a different form, when not required to follow the form found in the Book of Common Prayer. Under the old canons he was bound sometimes to use the church burial service; now he is bound always to use it. This change was certainly within the competency of the synod. In both the old and new canon exceptions are made, when and so far as the circumstances of the Scotch church make a change of form necessary. As to the form of the visitation of the sick, there is no pretence for any complaint. It is true, that the general introduction, by the 29th canon, of the Book of Common Prayer would introduce, as part of the services to which the appellant must adhere, the order for the visitation of the sick. But this is expressly qualified afterwards by the 38th canon, which authorized the clergyman to give comfort and instruction either according to the order for the visitation of the sick, or in any other way which he may think most needful and convenient. This differs in no respect from the previous regulations contained in the 23d canon of 1838. The complaint as to the 3d article of the 38th canon relates to the necessity of attending to the rubrical direction of the Book of Common Prayer at the burial of the dead. This head of complaint I have already dealt with. A fourth head of complaint is founded on the 4th article of the 20th new canon, which enables a bishop under special circumstances to open a mission in any part of his diocese when it may be seen to him desirable. To this I can only say, that such a provision may be highly convenient for a church in the position of the Episcopal Church of Scotland. It is vain to say, that no such course could be taken in the Established Church of England. The circumstances of the two churches are entirely different, and I cannot imagine any reason why the synod should not be at liberty to make this arrangement if it appeared to them desirable.

The only other part of the new canon of which the appellant seeks reduction is the 20th article of the 28th canon, which declares, that the general synod shall have power to alter, amend, and abrogate canons in force, and to enact new canons, provided that such alterations, amendments, abrogations, and new canons be in conformity with the recognized constitution of this, that is, the Scotch Episcopal Church. The same power is found in the 33d canon of 1838, except that there the alterations, amendments, abrogations, and new canons are required to be in conformity with the recognized constitutions and acknowledged "practice" of the Scotch church. The appellant argues, that the omission of these words "acknowledged practice" vitiates the new canon, as giving to it a force which the old canon did not possess. I do not feel any force in this objection. The remarks which I have already made on what I conceive to be the general powers inherent in a synod, are sufficient to shew my doubt whether one synod can validly control the power of another, which is in the nature of an independent Legislature. But even supposing this could be done, and supposing further, that these words amounted, which they, however, do not, to a prohibition on the synod against altering, by virtue of its inherent power, the acknowledged practice of the church, and not merely to a restriction by the power conferred by the 33d canon, still I think the subsequent synod was entitled to say, that these words were necessarily included in the other words "recognized constitution," and so to reject them as inconvenient surplusage. Nothing can be described or imagined as constituting the acknowledged practice of the church, which would not also be properly described as part of its recognized constitution. This exhausts all the parts of the new canons of which the appellant seeks reduction. To state shortly, therefore, my view of the whole case, I am of opinion, (i.) that canons made from time to time by the synod of the Episcopal Church of Scotland are to be treated merely as

the rules of a voluntary society over which the Court of Session has no jurisdiction, except in cases where the interpretation of them is necessary for a collateral purpose, as for determining the rights to trust property depending on their construction; (2.) that no such questions of right are raised on this record; and (3.) that, even if the validity of the new canons had been properly before the Court, the appellant has not shewn any valid ground of complaint. I concur, therefore, with my noble and learned friends in thinking, that the appeal ought to be dismissed.

LORD COLONSAY.—My Lords, I so entirely concur in the views which have been stated, that I have scarcely anything to add. A court of law will not interfere with the rules of a voluntary association, unless it be necessary to do so, in order to protect some civil right or interest which is said to be infringed by their operation. Least of all will it enter into questions of disputed doctrine, when it is not necessary to do so in reference to civil interests.

In the present case no objection is taken to the jurisdiction of the Court, for this plain reason, that the appellant has, by the shape of his action, coupled with his allegations against the proceedings of the synod as affecting his civil rights and interest, entitled himself to have the judgment of the Court on those civil rights and interest, and the conclusion for reduction which this summons contains was not an inept conclusion in reference to such demand, because it might have been pleaded against a mere petitory action, that those rules stood in the way, and until they were set aside it was incompetent to the Court to go into the question which would have been raised by a petitory action. The meaning of that part of the summons which seeks for reduction, therefore, is, that in so far as those rules can be pleaded against the demand for redress in reference to his civil interest, they are complained of and assailed by the summons. But if the appellant has not made out a case which the Court can maintain in the way he asks it to do in reference to the civil rights and interests said to be involved, then I apprehend that his case must fail.

Now, with regard to that demand, it is a demand which rests entirely on the allegation, that he is exposed to pecuniary consequences in respect to the position he is placed in, with reference to the refusal of a license to his curate. This is a question which may yet have to be tried between him and his curate, if either of them fails to fulfil the contract which has been entered into between them. But at present we cannot go into that question. It is not a matter which is properly raised here, and therefore, I apprehend there is no relevancy in this action as regards that demand, and there being no relevancy in this action as regards that demand, I apprehend that we cannot go into those further questions of reduction and declarator which are made, as it were, the prelude to dealing with that petitory conclusion.

If we were to go into those questions, I think that the conclusion which has been arrived at by my noble and learned friends, who have already addressed the House, is irresistible.

The whole case of the appellant rests upon this, that the synod had no power to do what they have done, and that they had no power to do so, because by the 33d canon of the code of 1838 there was a prohibition against the alteration of anything which was according to the recognized or established practice. That is the whole case set up by the appellant, that the canons of 1863 were *ultra vires* of the synod, because the synod was restrained by that clause in the canons of 1838.

Now the canons of this church are, according to the recital in the canons of 1838, matters applicable to the discipline of the church which it is declared the church has power to alter from time to time; the recital of the canons of 1838 bears, that the church has from time to time altered and repealed some of those canons. There must be some supreme authority, and looking at the power of the synod in the mode in which my noble and learned friend who last addressed the House put it, I think the synod which is the supreme authority of the church, had the power to regulate and change those matters ordained (as the canon expresses it) by man's authority, which the recital of the canon of 1838 declares, that every church has power to regulate and change. I cannot therefore hold, that it was *ultra vires* of the synod of 1863 to make that alteration.

If we were to go into the particulars of the alterations that have been made, I cannot say, that I differ from the observations that have been made by your Lordships. It does not appear to me that there is any infringement made upon any position which the present appellant occupies by the new canons of 1863. The use of the English communion service does not appear to me to be a matter of novelty in this church. On the contrary, the canons of 1838 recognize it. They allow the two modes, the two services, but although they allow two services it is not to be inferred, that these are two things which are incompatible in the estimation of the church. On the contrary, it is repugnant to reason to hold, that these two services are incompatible, or that the doctrines discovered now to be contained in them are things that were regarded by the church as incompatible with each other. It could not have been a united church or union of churches if it were so. Such a thing would be a contradiction in terms. You might as well have an united Christian and Mahomedan church. I therefore hold, that it is quite plain that there was not that repugnance between the two services, and that these canons which are now complained of do nothing more than substitute the more comprehensive communion service of the English Church, for the communion service of the Episcopal Church of Scotland, a thing which, as it

appears to me from the recital of the canons of 1838, it was perfectly in their power to do. Therefore, I entirely concur in the proposition which has been made, that this judgment should be affirmed.

Interlocutors affirmed, with costs.

Appellant's Agents, W. Peacock, S.S.C.; W. Robertson, Westminster.—Respondents' Agents, Ronald and Ritchie, S.S.C.; Connell and Hope, Westminster.

MAY 6, 1867.

JAMES PRINGLE, *Appellant*, v. JAMES FLEMING BREMNER and Another, *Respondents*.

Wrongous imprisonment—Issues—Warrant of search—Averment of malice in Constables—*P., in an action of damages against constables, alleged that they came to his house, saying they had a warrant, and entered and searched the house, and read and seized his papers, and conveyed him to prison and detained him there; whereas they had no warrant, and acted illegally and wrongously. Defendants in answer alleged they had a warrant, and pursuer replied, "reference is made to the warrant for its terms."*

HELD (reversing judgment), *That by this pleading the pursuer did not admit that a warrant existed, and having stated relevant matter, he was entitled to issues and a trial by a jury.*¹

This was an appeal from interlocutors finding, that there was not on the record matter sufficient to support any of the issues proposed, and assoilzieing the defenders, with expenses.

The action was raised by the appellant, a millwright at Barley Mill, near Newburgh, in the county of Fife, and the respondents and defenders were the chief constable of the county of Fife and an officer of the constabulary force. On 31st October 1864 there was placed near to a window of the manse of Dunbog, the residence of Mr. Edgar, the iron bush of a cart wheel filled with explosive powder, plugged with plugs which had apparently been made and fitted for the purpose, and to this a long fusee was attached, which being set on fire caused an explosion of the machine, and shattered the windows of the house. Ultimately the defenders, on 24th December 1864, went and searched the pursuer's house, books, and papers in the circumstances set forth in the pleadings and in the judgment. The pursuer then raised this action of damages for the defenders' illegal, wrongous, and unwarrantable proceedings. The first plea in law for the defenders was, that "the pursuer's averments are irrelevant and insufficient in law." The record was closed, and the appellant lodged the following issues:—"1. Whether, on or about 24th December 1864, the defenders wrongfully and illegally searched the house at Barley Mill, occupied by the pursuer, or part thereof, and his repositories, and read or examined writings belonging to him or in his possession, and took possession of and carried away several writings belonging to the pursuer, to his loss, injury, and damage? 2. Whether, on or about 24th December 1864, the defenders wrongfully and illegally apprehended the pursuer and detained him in the police office at Cupar till the morning of the 25th December 1864, to the loss, injury, and damage of the pursuer? Damages laid at £500 sterling."

The Lord Ordinary reported these issues to the First Division; and the parties were allowed to amend the condescence and answers, and amendments were made. On 30th January 1866 the First Division found, "that there is not on record matter sufficient to support any of the issues proposed, assoilzie the defenders from the conclusions of the action as laid, and decern; find the pursuer liable in the expenses of process."

The pursuer now appealed against this interlocutor, and in his *printed case* stated the following reasons for reversing the interlocutors:—"1. Because the appellant's case was relevantly laid, set forth good grounds of action, and contained issuable matter. 2. Because the appellant should have been allowed the issues proposed by him, or such others as would have been suitable for the trial of the cause. 3. Because the judgments of the Court of Session, appealed against, proceeded on the footing, that the respondents' statements were true, although they were denied by the appellant, and had not been proved. 4. Because although the respondents' statements were true, they did not in law afford a justification of their actings, nor warrant a judgment of absolvitor in their favour. 5. Because the said judgments were erroneous and contrary to law and the justice of the case.

¹ S. C. 5 Macph. H. L. 55; 39 Sc. Jur. 414.